SUPREME COURT OF QUEENSLAND

CITATION:	*Onecard Australia P/L v Clift* [2006] QSC 224
PARTIES:	**ONECARD AUSTRALIA PTY LTD (ACN 102 366 692) (applicant)** **and** **JOHN LAWRENCE CLIFT (respondent)**
FILE NO:	BS4741 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	21 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2006
JUDGE:	Mackenzie J
ORDER:	**1. That the application, in so far as it relies on clause 1.1 as a basis for summary judgment, is refused.** **2. That the respondent commence proceedings for relief under s 87 of the *Trade Practices Act* or s 12GM of the *Australian Securities and Investment Commission Act* and such other relief as he may be advised, within one month of the delivery of these reasons.** **3. That Order 2 shall not apply if, and only if, an order is made under r 14 UCPR with respect to the present proceedings or, before the expiry of the one month, the applicant commences proceedings by claim with respect to the alleged debts under the subscription agreement and/or the deed, (without any obligation on the applicant to seek such order or commence such proceedings).** **4. That except to the extent that the application has been refused, the application be adjourned to a date to be fixed.** **5. That there be liberty to apply.** **6. That costs be reserved.**
CATCHWORDS:	GUARANTEE AND INDEMNITY – ACTIONS AGAINST SURETY – GENERALLY – OTHER CASES – Right of debtor to set-off – Where deed unconditionally and

irrevocably acknowledges indebtedness "free from all set-offs, counterclaims and deductions" – Whether right to set-off or counterclaim can be excluded by agreement - Whether deed related to validity of debt or existing indebtedness

Trade Practices Act 1974 (Cth) s 87
Australian Securities and Investment Commission Act 2001 (Cth) s 12GM

Capital Finance Australia Ltd v Airstar Aviation Pty Ltd [2004] 1 QdR 122, followed
Coca-Cola Financial Corporation v Finsat Internation Ltd (1998) QB 43, considered
Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd [2000] QSC 050, considered
The Fedora (1986) 2 LILR 441, considered
The Society of Lloyds v Leighs & Ors (1997) CLC 1398, considered

COUNSEL: P A Freeburn SC for the applicant

P H Morrison QC and M Burns for the respondent

SOLICITORS: Phillips Fox Solicitors for the applicant

Deacons Lawyers for the respondent

[1] **MACKENZIE J:** The applicant seeks a declaration that the respondent is indebted to the applicant in the sum of $1,000,000 pursuant to:

(a) a subscription agreement entered into between the applicant and the respondent and/or

(b) a deed entered into between the applicant and the respondent on 17 November 2005.

Judgment in the sum of $1,000,000 against the respondent is also sought. Further or alternatively an order for specific performance of the subscription agreement and/or the deed is sought. It is common ground that the debt is now $900,000 because of payments made.

[2] According to the respondent's affidavit, he discussed financial involvement in the applicant with Mr O'Kelly, who appears to be a director of the applicant, from mid 2003 onwards. By 1 June 2005 matters had progressed to the point where Mr O'Kelly offered to sell to the respondent 10% of the applicant, by allotment of shares, for $250,000. On 17 June 2005 a memorandum of understanding was signed and payment of $250,000 for 1,000,000 shares was made on 27 July 2005. These transactions occurred without the respondent having legal representation. Without going into detail, his affidavit is at pains to stress his reliance on what he was told by Mr O'Kelly. Attempts by him to obtain independent timely verification of anything he was told seem to have been minimal.

[3] On 3 October 2005, the respondent signed a subscription agreement under which shares in the applicant were to be taken up at a cost of $3,000,000 to be paid in three tranches. $500,000 was to be paid on signing the subscription agreement, a further $1,500,000 by 7 October 2005 and the remaining $1,000,000 by 7 November 2005. The first payment was made in accordance with the agreement. With respect to the second tranche, the respondent arranged with Westpac, prior to signing the subscription agreement, for Westpac to make available the $1.5m by banker's undertaking under which the applicant could draw upon it to a maximum of $1.5m. He says he signed the agreement with Westpac only after obtaining a promise from Mr O'Kelly to the effect that the funds from the subscription agreement would be used to pay for the national expansion of the applicant's business and that they would only be drawn as and when required.

[4] The respondent had also been in contact prior to signing the subscription agreement with another man ("the interested party") who wished to buy shares in the applicant. On about 6 October 2005 the respondent agreed to sell him shares for $1.5m with settlement being no later than 30 November 2005. He made Westpac aware of this by way of comfort.

[5] Soon after the payment of the $1.5m to the applicant on 7 October 2005, the respondent received advice from Westpac that the whole $1.5m under the banker's guarantee had been drawn down almost immediately. At that time, the respondent did not have funds to pay for the third tranche in accordance with the subscription agreement. However, he deposes that he expected he would either be able to on-sell all or part of the shares he had subscribed for before payment was due, or persuade Westpac, on the basis of his understanding of the applicant's projected earnings and his own previous good record, to lend him sufficient to pay for the third tranche.

[6] At this point the chronology of events described in the affidavit becomes a little obscure. The respondent says he told Mr O'Kelly of the settlement date of the proposed share sale to the interested party. Mr O'Kelly offered to extend the date if security was given. Accordingly the respondent offered a mortgage over his unit at Surfers Paradise in favour of the applicant on the basis that the mortgage would not be registered by Mr O'Kelly. It was executed on or about 7 October 2005. The affidavit then continues that the third tranche of shares was due to be paid for on 7 November 2005. As he was unable to make that payment, he requested from Mr O'Kelly an extension of time until 7 December 2005 so that he could complete the sale of shares to the interested party. He says that Mr O'Kelly told him that that would be acceptable. Then on about 15 November 2005, Westpac informed him that the applicant had registered the mortgage on 10 November 2005 without warning to the respondent.

[7] That resulted in Westpac freezing all the respondent's accounts. The proposed sale of shares to the interested party did not proceed and as he had not been able to otherwise on-sell any of the shares, he was unable to borrow to pay the $1m required for the third tranche of shares.

[8] That resulted in a meeting being held on 16 November 2005 between Mr and Mrs O'Kelly and the applicant at which he told the O'Kellys that their actions in drawing down the whole $1.5m in one hit and registering the mortgage without notice would ruin him because all of his sources of funds had been locked up. He asked them to withdraw the mortgage and give him additional time to pay for the third tranche. He says he believed there was an agreement at the end of the lengthy meeting that the mortgage would be withdrawn and he would be given more time to pay and that that would be documented by the solicitors for the applicant.

[9] The next day, 17 November 2005, he learned that the mortgage had not been released and was told by the applicant's solicitor that it was not considered there had been an agreement. The respondent then spoke to Mrs O'Kelly who advised, after discussion, that the applicant would release the mortgage on terms which included immediate cash payments of about $90,000, which the respondent could raise, and a strict time payment schedule for the balance. He says he agreed to that demand because he had no economic alternative. He says he was able to extract a promise that the mortgage would not be re-registered until 31 March 2006.

[10] On 17 November 2005 the deed which is the direct focus of this application was executed. As a result, the mortgage was released and Westpac unfroze his accounts.

[11] According to the applicant, subsequently he tried repeatedly to obtain updated financial information and details of the applicant's merchants and customers but it was never supplied. In early January 2006 he gave notice to the applicant that he intended to exercise his rights as a director to inspect the books of the company, on 11 January 2006 at 11am, to the best of his recollection. At that time he attended the applicant's office with his accountant and the chief financial officer of his own companies. However, the receptionist advised him that the O'Kellys had left the premises 1 ½ hours before and there was no-one available to show them the books. The following day the respondent received a letter from Mr O'Kelly explaining his absence and expressing concerns about release of information that was considered commercially confidential and which should not be made available in the market place.

[12] On 17 January 2006 the respondent tendered his resignation effective at midday that day as a director. Subsequently, when it appeared that that had not been registered with ASIC he had his solicitors lodge the necessary forms. On 17 January 2006 the respondent's solicitors wrote a letter putting the applicant on notice that the respondent did not consider himself bound by the agreements because of representations by Mr O'Kelly which, it was alleged, were false to his knowledge and made with the intention of inducing the respondent to enter into them. The issue of denial of information which should have been available to the respondent as a director was also raised.

[13] According to the respondent's affidavit, throughout December 2005 and January 2006 he became increasingly concerned about the applicant's refusal to provide him with financial information. He deposes that in that period he asked Barbara Atwood, then personal assistant to one of the O'Kellys, about the financial

information and the company's position. He deposes that she gave him information tending to contradict many of the matters that had been the subject of representations allegedly made to him. He deposes that since he resigned as a director, he made further inquiries as a result of which he received advice that a charity nominated by the respondent as a beneficiary of the applicant's activities had not been registered as a charity; it was actually a company of which Mrs O'Kelly was a director. He was also told that there were numerous legal disputes including one relating to ownership of the technology and software used to operate the system, and other matters casting doubt on the extent of the claimed operations of the applicant.

[14] The respondent says that the representations led him to enter into the various transactions described earlier in these reasons and that he would not have entered into them had he known of their falsity. He deposed that he had considered taking legal proceedings against the applicant and the O'Kellys to recover his losses. However, he was concerned about whether it would be throwing good money after bad. He was concerned about the solvency of the applicant, from information he had received. That, in my view, is not a critical issue; it should not, in any event, be looked at only from the respondent's perspective.

[15] The respondent's allegations are untested, and probably because of the focus of this application, not responded to. As they stand, unless the issue yet to be discussed is resolved in the applicant's favour, there is a clear basis for not granting summary judgment.

[16] On 17 January 2006 the applicant had served notice of demand relating to default under the deed of 17 November 2005. The sum claimed, $900,000, was to be paid by 24 January 2006. The present proceedings were commenced by an originating application filed on 7 June 2006, subsequently amended and filed on 24 July 2006. One of the issues raised in correspondence relating to the application was obtaining evidence from the people who gave information to the respondent, in the context of alleged confidentiality and the consequences of that evidence being given by the parties. As it turned out, before me, there was no attempt to call evidence from the informants. The extent to which what it is alleged that they know of the applicant's financial and other circumstances will be backed by admissible evidence remains unknown. Before me the focus of the application was whether, irrespective of any claim in respect of misrepresentations, the terms of the deed obliged the respondent to pay the $900,000 owing.

[17] Clause 1.1 of the deed is as follows:

> "The Investor unconditionally and irrevocably acknowledges that at the date of this document he is indebted to the Company in the amount of the Debt free from all set-offs, counterclaims and deductions."

The applicant's short point is that the effect of that clause is to oust any right or ability of the respondent to raise any form of counterclaim or set-off against the applicant.

[18] It was submitted that the terms of the deed itself were an acknowledgment that the respondent was indebted to the applicant for $1,000,000 because he had failed to subscribe for the third tranche. The respondent gained benefits by entering into the deed. He avoided enforcement of the mortgage and was given time to pay by instalments. To obtain them he unconditionally and irrevocably acknowledged that he was indebted to the applicant free from all set-offs, counterclaims and demands.

[19] The respondent's original outline concentrated on the fact of and extent of the issues in dispute between the parties as a basis for arguing that summary judgment was inappropriate. In the supplementary outline, the starting point was that clause 1.1 may be effective to prevent a cross-claim for damages but did not prevent a matter of defence, especially one going to the validity of instruments, from being raised. The words "free from all set-offs, counterclaims and deductions" excluded any reduction of the amount of the debt but did not preclude an attack on the debt itself. In other words the focus of the phrase was on what may be set against an existing indebtedness, not validity of the debt itself. It was also submitted that where the question is whether the deed is capable of rescission for fraud or liable to be declared void or the subject of an order refusing to enforce its provisions, as under s 87 of the *Trade Practices Act*, or s 12GM (7) of the *Australian Securities and Investment Commission Act 2001* it would be illogical to allow it to be upheld or enforced by reliance on a provision in the deed itself.

[20] There was then discussion of authority on clauses of the same general kind with the underlying conclusion being urged that there was nothing in them that compelled a conclusion adverse to the respondent's argument where invalidity of the instrument was the issue.

[21] As against this, the applicant submitted that the decision perhaps most favourable to the respondent, *Capital Finance Australia Ltd v Airstar Aviation Pty Ltd* [2004] 1 QdR 122 was distinguishable. It is therefore necessary to analyse this authority and other arguments addressed by the parties in support of their respective positions.

[22] The authorities relied on are concerned with clauses that are not all identical but usually refer to rights of set-offs or counterclaim not being available in various ways. In *Coca-Cola Financial Corporation v Finsat International Ltd* (1998) QB 43, 53 Neill LJ rejected the argument that the right of set-off cannot be excluded by agreement. In that case and *The Fedora* (1986) 2 LlLR 441 the purpose of clauses of this kind was said to be to ensure immediate payment of a debt in the circumstances contemplated in the particular case. It was said that where the parties had specifically provided, both in the loan agreement and the guarantees, that payment should be made free of any set-off or counterclaim, it would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the creditor waiting for a payment which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaim were litigated.

[23] White J applied that notion in *Daewoo Australia Pty Ltd v Porter Crane Imports Pty Ltd* [2000] QSC 050. *Daewoo* discussed an issue relied on in this case, relief

pursuant to s 87 of the *Trade Practices Act*, which was raised by counsel for Porter Crane, White J noted that no relief had been sought pursuant to s 87 prior to the hearing. As the matter was at that time pleaded, and as the supporting material demonstrated, there was no basis for anticipating an order declaring the agreement between Porter Crane and Daewoo void. White J observed it was a typical case of damages being an adequate remedy if Porter Crane was successful in its allegations.

[24] It is also established by the authorities that persons bound by such a clause may still prosecute their claims; the clause merely prevents them from holding out payments admittedly due while disputed cross-claims are litigated (*The Fedora* at 444).

[25] To the extent that reliance is placed on the English Court of Appeal decision in the *Lloyds Names* cases (*The Society of Lloyds v Leighs and Others* ((1997) CLC 1398), the particular statutory framework, and the kind of dealings and nature of the relationship between the parties were influential in the outcome. The general words capable of supporting the applicant's position must be read in that context.

[26] The present case is, in my view, closer in its essential nature to *Capital Finance*. In that case Holmes J, after a careful review of the authorities, said the following at 126-127:

> "[17] The clause here is equally unambiguous. Its effect is to preclude the defendants here from setting off any claim for damages against their liability for the monies guaranteed. Those claims must be dealt with independently of this proceeding. However, there are matters raised in the counter-claim which are, as Ms Skennar submitted, more properly matters of defence: allegations of misrepresentation or misleading conduct, and breaches of conditions which may lead to vitiation of the guarantees or discharge of the guarantors' liability under them. The counter-claim should be struck out, because insofar as it constitutes a true counter-claim, the respondent defendants have contracted not to bring it, and the balance contains pleading not properly the subject of counter-claim. But the latter, going to invalidity or complete discharge of the guarantees, could properly be repleaded in the defence.
>
> [18] Mr O'Neill pointed to cl. 2 of the guarantee, which contains the guarantor's acknowledgement that:
>
> > "(b) Guarantor has made its own enquiries, and satisfied itself, as to the financial condition of Customer and Customer's ability to perform its obligations under the Agreement and not relied in any way on any information rovided [sic] by Capital on customer or on any other matter;
> >
> > (c) Capital has no duty at any time to give Guarantor any information relating to the financial condition or other affairs of Customer (including notice of any default) or anyone else."
>
> That clause, he said, prevented the defendants from relying on alleged representations by the plaintiff. But it is debateable whether it could shield positive misrepresentation as is alleged here; it may

> not preclude relief by way of discharge under s. 87 of the *Trade Practices Act*, and it is no answer to the allegation that an implied condition as to the maintenance of a security has not been performed. I cannot be satisfied in terms of r. 292(2) that the defendants have no real prospect of successfully defending the plaintiff's claim or that there is no need for a trial of it. In those circumstances it is inappropriate for me to canvass any further the plaintiff's submissions as to the merits of particular contentions in the defence."

[27] In my view I should follow the same approach. The remedies in s 87 and s 12GM are statutory in nature which adds an extra dimension to the problem of interpreting clause 1.1 which was, but for the belated reliance on alleged deliberate misrepresentation, calculated to provide the applicant with a commercial solution to the difficulty caused by the respondent's lack of liquidity. As the matter stands, it is of some concern that the material in support of the s 87 or s 12GM relief is to a substantial degree hearsay based. Because of its nature it is yet to be seen whether it will come up to proof in admissible form in a way which would entitle the respondent to such relief. However I could not exclude reliance on it in a proceeding of the present kind on the basis that it is so shadowy as to be insufficient. The issue is also complicated by reason of payments having been made under the subscription agreement and the deed. However there may still be some utility in seeking to have both of the documents voided because there is a substantial sum still owing. Having said that, it is in my view not directly relevant to the issue of the interpretation of clause 1.1. It is merely mentioned in this context for a different reason.

[28] The point is that in my conclusion the relief sought by the applicant by way of summary judgment must be refused because I am not persuaded that clause 1.1 would preclude reliance on a defence enlivening relief under s 87 or s 12GM. Because the matter has been commenced by originating application, not a claim, it is necessary to ensure that the nature of the respondent's case is exposed in the form of pleadings promptly to ensure expeditious disposal of the matter since it is a commercial matter involving a relatively significant sum. For that reason I intend to make orders designed to ensure that the matter simply does not linger if there proves to be no substance to the respondent's claims.

[29] Accordingly the following are the orders:

1. That the application, in so far as it relies on clause 1.1 as a basis for summary judgment, is refused.
2. That the respondent commence proceedings for relief under s 87 of the *Trade Practices Act* or s 12GM of the *Australian Securities and Investment Commission Act* and such other relief as he may be advised, within one month of the delivery of these reasons.
3. That Order 2 shall not apply if, and only if, an order is made under r 14 *UCPR* with respect to the present proceedings or, before the expiry of the one month, the applicant commences proceedings by claim with respect to the alleged debts under the subscription agreement and/or the deed, (without any obligation on the applicant to seek such order or commence such proceedings).

4. That except to the extent that the application has been refused, the application be adjourned to a date to be fixed.
5. That there be liberty to apply.
6. That costs be reserved.