# SUPREME COURT OF QUEENSLAND

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| CITATION: | *AVS Property P/L v QLD-1 P/L & Ors* [2007] QSC 365 |
| PARTIES: | **AVS PROPERTY PTY LTD** ACN 094 311 645<br>(plaintiff/respondent)<br>**v**<br>**QLD-1 PTY LTD** ACN 112 570 617<br>(first defendant/applicant)<br>**GEORGE CHEIHK**<br>(second defendant)<br>**ZOE CHEIHK**<br>(third defendant/applicant)<br>**QLD DEVELOPMENTS PTY LTD** ACN 103 914 709<br>(fourth defendant/applicant) |
| FILE NO/S: | BS 7609 of 2006 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 5 December 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 10 October 2007 |
| JUDGE: | Martin J |
| ORDER: | **The default judgment dated 16 May 2007 obtained by the plaintiff be set aside** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – DEFAULT JUDGMENT – where judgment entered in default of defendants filing a Notice of Intention to Defend – whether default judgment should be set aside<br><br>*Uniform Civil Procedure Rules 1999* (Qld), r 290<br><br>*Ampol Petroleum (Qld) Pty Ltd v Easton* [1955] QWN 79, cited<br>*Evans v Bartlam* [1937] AC 473, cited<br>*GE Capital Australia v Davis* [2002] NSWSC 1146, cited<br>*National Mutual Life Ass'n of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, applied<br>*Owenlaw Mortgage Managers Ltd v NK River Pty Ltd* [2005] VSC 464, cited<br>*Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Ass'n of Australasia Ltd* [1984] Qd R |

447, cited
*Troiani v Alfost* [2002] QCA 281, applied

COUNSEL: M M Stewart SC, with D J Pyle, for the plaintiff
P J Dunning SC, with S R Lumb, for first, third and fourth defendants

SOLICITORS: B2B Lawyers, Melbourne, for the plaintiff
Bain Gasteen for the first, third and fourth defendants

[1] **MARTIN J:** This is an application by the first, third and fourth defendants to set aside a judgment entered in default of filing a Notice of Intention to Defend.

[2] The judgment entered was that the defendants pay to the plaintiff the sum of $1,462,059.34, which sum included interest and costs.

**Background**

[3] In December 2005 a series of agreements were entered into involving the parties to this action. They were:

(a) a deed entitled "Deed of Loan and Guarantee" ("the $1.2 million loan agreement") between the plaintiff ("AVS") and the third defendant ("Zoe Cheihk")(as borrower and as guarantor) and the first ("Qld-1"), second ("George Cheihk") and fourth defendants ("Qld Developments") (as guarantors), pursuant to which AVS agreed to advance the sum of $1.2 million to Zoe Cheihk;

(b) a second deed entitled "Deed of Loan and Guarantee" ("the $4 million loan agreement") between AVS and Zoe Cheihk (as borrower and as guarantor) and Qld-1, George Cheihk and Qld Developments (as guarantors), pursuant to which AVS agreed to advance the sum of $4,000,000 to Zoe Cheihk;

(c) a written agreement entitled "Share Sale and Subscription Agreement" ("the SSS Agreement") between Zoe Cheihk, Opdicom Holding Pty Ltd ("Opdicom Holdings"), Opdicom Pty Ltd ("Opdicom") and Mario Salvo pursuant to which, among other things, Opdicom Holdings agreed to transfer 1,450,000 fully paid shares held by it in Opdicom to Zoe Cheihk in consideration of the payment of $2,000,000; and Opdicom agreed to issue a further 1,400,000 fully paid shares in Opdicom (in three tranches) to Zoe Cheihk in consideration of a payment of $2,000,000 (that payment to be made in three tranches);

(d) Qld Developments (as mortgagor) and AVS (as mortgagee) entered into a mortgage ("the mortgage") pursuant to which Qld Developments charged land described as "the Whylie Gibbs land" as security for the payment of the "secured money" as defined in the mortgage.

[4] Opdicom was a distributor of a product known as a "Disk Stakka" which was described as a product that stored CDs in a central unit allowing access by PC users on a network, thus obviating the need for those users to insert and eject single CDs as and when they used them.

[5] Under the $1.2 million loan agreement the moneys advanced were obliged to be repaid four months after what was defined as the "commencing date". It is not disputed that

that payment date was no later than 30 April 2006. No repayment was made under the $1.2 million loan agreement as required.

[6] In November 2006 the Claim and Statement of Claim in this matter were served on each of the defendants. None of them filed a Notice of Intention to Defend and Defence.

[7] The borrowers defaulted under both loans and in December 2006 AVS sold the Whylie Gibbs land. After the payment of the costs of sale, the paying out of prior mortgages and so on, the net proceeds were $4,111,690. AVS applied that sum in reduction of the indebtedness under the $4 million loan agreement. That left, at 4 May 2007, $375,116.32 remaining owing under the $4 million loan agreement and $1,457,067.35 remaining owing under the $1.2 million loan agreement.

**Chronology**

[8]

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| 11.04.06 | Notice of demand sent to the defendants. |
| 09.05.06 | Originating Application for sale of Whylie Gibbs land filed. |
| 23.05.06 | Consent Order that Qld Developments pay AVS $1,250,498 plus costs by 6 June 2006 failing which AVS can recover possession of the Whylie Gibbs land. |
| 06.06.06 | No payment made. |
| 25.08.06 | Form 4 (*Property Law Act 1974* (Qld)) notice sent to Qld Developments. AVS will sell the Whylie Gibbs land failing payment of moneys under both loans, namely, $1,355,733 and $4,272,870. |
| 07.09.06 | Claim and Statement of Claim filed. |
| 11.09.06 | First and Fourth Defendants served. |
| 01.11.06 | Second and Third Defendants served. |
| 07.12.06 | Settlement of sale of Whylie Gibbs land for $16,500,000. |
| 04.05.07 | AVS's solicitors write to defendants' solicitors requiring payment of $1,457,065.37 by 10 May 2007. No response. |
| 16.05.07 | Default judgment entered. |
| 24.07.07 | Zoe Cheihk served with a bankruptcy notice. |
| 19.09.07 | Application to set aside the default judgment filed. |

**Principles to be applied**

[9] Rule 290 of the *UCPR* provides:

> "The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."

[10] Where a judgment has been entered regularly the court's discretion is completely unfettered on an application under r 290. *Evans v Bartlam* [1937] AC 473. On such an application, an affidavit as to the merits of the Claim will generally be required except where there is an obvious technical defence. Such an affidavit should deal with following:

- the reason/s for not having filed a Notice of Intention to Defend,
- if there has been a delay in making the application, the reason/s for the delay, and
- the merits of the defendant's case.

See *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Ass'n of Australasia Ltd* [1984] Qd R 447, *Evans v Bartlam* at 482, *Ampol Petroleum (Qld) Pty Ltd v Easton* [1955] QWN 79.

[11] In dealing with the merits of the case, an applicant does not have to show that the plaintiff would fail at trial. The extent to which an applicant must go was considered by McPherson J in *National Mutual Life Ass'n of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441 where, at 449-450, he said:

> "In *Aboyne Pty. Ltd. v. Dixon Homes Pty. Ltd.* [1980] Qd.R. 142, Kelly J. regarded an application to set aside such a judgment, when regularly entered, as requiring the court to consider whether the defendant had given a satisfactory explanation of its failure to appear, any delay in making the application; and whether the applicant defendant had a *prima facie* defence on the merits. Speaking generally, it may be said that it is the last of these considerations that it is the most cogent. It is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the plaintiff: *Attwood v. Chichester* (1878) 3 Q.B.D. 722; *Rosing v. Ben Shemesh* [1960] V.R. 173. …
>
> …But in any event the tenants are required to show by affidavit a defence on the merits; that is, what is described in *Evans v. Bartlam* [1937] A.C. 473, 480, as a '**prima facie defence'**, and in *Saunders v. Hammond* [1965] Q.W.N. 39 as '**a substantial ground of defence'**." (emphasis added)

[12] Even if the explanation for the failure to defend can be described as "dubious", it is not often that the Court will refuse the opportunity of defending to a defendant who has an apparently good ground of defence and where no irreparable prejudice would be thereby done to the plaintiff. *National Australia Bank Ltd v Singh* [1995] 1 Qd R 377 at 380. As was said by McPherson JA in *Troiani v Alfost* [2002] QCA 281:

> "It should always be borne in mind in matters of this kind that a refusal to set aside a judgment has the consequence that a plaintiff succeeds in obtaining and retaining a judgment, sometimes for a substantial sum of money, in an action in which the defendants may, as in this case, have been found to have a plausible defence on the merits which is never tried. That is an unusually heavy sanction for delay and one that, in the context of the finding here that there is a defence on the merits, should not be imposed in the present case."

**Failure to file a Notice of Intention to Defend**

[13] Zoe Cheihk claims that she was unaware of the Claim and Statement of Claim in this matter and, similarly, unaware of the default judgment until she received a bankruptcy notice.

[14] In her affidavit she says:

> "28. Over the years I have received, taken delivery of, and been served with court and other documents. It is my practice to always call George to let him know that I have been served with a document, and if he is available, to provide the documents to him. He will then either take it to the QLD Group offices or have me send it to the office. I understand that those documents are then passed to my lawyers.
>
> 29. I cannot recall being served with the Claim in this proceeding however, if I was served with it, I would have passed it onto George as I do with all Court documents that are served on me. I had no reason to think that the Claim would not be dealt with by George on my behalf.

[15] The "George" to whom Zoe Cheihk refers is George Cheihk, the second defendant and her husband. In paragraph 39 of her affidavit, Zoe Cheihk says:

> "I had always believed that since AVS had recovered possession of the Whylie Gibbs land that any debt I, as Trustee, owed in relation to the $1.2 million loan, had been paid on sale of the land by AVS."

[16] In George Cheihk's affidavit, he says:

> "84. In November 2006, although on what date I cannot recall, I was personally served with the Claim by AVS Property in this proceeding. I did not think too much about the Claim as I knew that AVS had already taken possession of the Whylie Gibbs land and was in the process of marketing and selling the land. In my discussions with the Second Mortgagee's representative, John Tyquin in or around October 2006, he had told me that Whylie Gibbs was being sold for approximately $16 million.
>
> 85. I knew as a Director of QLD Developments that the debt over the Whylie Gibbs property was about $11,500,000 to the First and Second Mortgagees and that AVS would therefore be able to obtain the money that it claimed of around $1.2 million upon settlement of the sale.
>
> 86. From discussions with John Tyquin, I understood that the sale of Whylie Gibbs was completed in December 2006. I assumed that AVS would therefore have been paid any debt owing to it pursuant to the $1.2 million loan at that time."

[17] George Cheihk goes on to say that, in his opinion, the $4 million loan is still in dispute. He says that:

> "91. At that time [which I assume to be May 2007] I accepted that the $1.2 million loan plus interest was payable by Zoe pursuant to the $1.2 million loan agreement. I had always assumed that the sale of Whylie Gibbs land would pay out that debt.

> 92. That is why I did not defend this proceeding or cause QLD-1 or QLD Developments to defend the proceeding or recommend to Zoe that she defend the proceeding."

[18] He goes on to say that it was in or around mid-May 2007 that he first appreciated that he and Zoe Cheihk had a defence to the claim.

[19] In May 2007, the plaintiff's solicitors wrote two letters to the defendants. In the first the defendants were reminded that they were indebted to the plaintiff under the $4 million loan agreement, that the sale of the property known as Whylie Gibbs netted proceeds of $4,111,690, and that that amount had been applied in reduction of the amount owing such that, as at 4 May 2007, $375,116.32 was owing.

[20] The second letter referred to the $1.2 million loan agreement. It made no reference to the application of any funds from the sale of the Whylie Gibbs land for the obvious reason that the net proceeds had been exhausted in the reduction of the debt under the other agreement. The letter put the defendants on notice that the amount of $1,457,065.37 was owing, and that in the absence of payment or the filing of a Notice of Intention to Defend that the plaintiff would proceed to enter judgment.

[21] George Cheihk's simple reaction to those letters (paragraph 89 of his first affidavit) was that he "was most concerned as to AVS's application of funds from the sale of the Whylie Gibbs [land] against the $4 million loan". In other parts of his affidavit material he refers to the pressure he was under at various times arising from other litigation and bankruptcy proceedings.

[22] George Cheihk's behaviour on this point demonstrates a degree of foolhardiness which is difficult to understand. It is as consistent with an acceptance by him that there was no defence to the claim as it is with the explanation he gives for not responding to the claim or the correspondence. Indeed, one could be forgiven for describing his account of his reasoning as "dubious". Nevertheless, consistent with McPherson JA's remarks in *Troiani*, I will consider whether the applicants have demonstrated a prima facie or substantial ground of defence.

**The grounds of defence**

[23] The applicants raise two grounds of defence:

(a) that, of the $1.2 million loan, $600,000 was not advanced by AVS and, of the other $600,000, there is a triable issue as to whether it was paid,

(b) that any money owing pursuant to the $1.2 million loan agreement was discharged upon receipt by AVS of the net proceeds of the sale of the Whylie Gibbs land.

*Was the money advanced?*

[24] George Cheihk deposes, in his first affidavit, to being a director of a number of separate development companies which form the QLD Group of companies which he refers to as the QLD Group elsewhere in his affidavit. On each of 21 and 23 December 2006 a company named Distinctive FX Pty Ltd paid $300,000 to Queensland Group Pty Ltd.

[25] Woodrow Wunsch ("Wunsch") is the group secretary for First Delta Group. AVS, Distinctive FX Pty Ltd, Opdicom and Opdicom Holdings are all parts of that group. Wunsch, at paragraph 20 of his affidavit, says:

> "On 21 December 2005, I also provided a cheque to Mr Cheihk on behalf of Mrs Cheihk which I had brought with me from Melbourne in the sum of $300,000 drawn upon a bank account of Distinctive FX. I cannot recollect who the payee of the cheque was but it was a Cheihk related entity which had been nominated by Mr Cheihk on behalf of Mrs Cheihk for the purposes of receiving the first instalment of loan funds by AVS under the $1.2 million loan deed."

[26] That evidence is unchallenged.

[27] In paragraph 22 of his affidavit, Wunsch says:

> "On 23 December 2005, I received, probably by facsimile, a handwritten direction from Mrs Cheihk for the payment of the remaining loan funds under the 1.2 M loan deed as follows:
>
> (a) $300,000 to a bank account 'Qld Group' with the BSB and account details given;
>
> (b) $600,000 to Miltons, being a law firm in Queensland."

[28] Wunsch goes on to say that he procured payment of those amounts. There is no evidence challenging those statements by Wunsch. Wunsch explains that the payment by Distinctive FX to the Cheihk related entity was made at the direction of the plaintiff, that is, it represented a loan from Distinctive FX to the plaintiff which was then on-lent to the Cheihk related entity pursuant to the $1.2 million loan agreement. That unchallenged evidence, the absence of any evidence from the applicants explaining why an amount of $600,000 should otherwise have been paid into accounts associated with them, George Cheihk's admission that he accepted that the $1.2 million was payable by Zoe Cheihk (see [17] above), and the provisions of cl. 2.1 of the $1.2 million loan agreement[1], lead me to the conclusion that there is no merit in this point raised by the applicants.

*Was the money owing under the $1.2 million loan agreement discharged upon receipt of the net proceeds of the sale of the land?*

[29] The applicants advance this argument in two steps. First, they say that due to a provision of the $4 million loan agreement, AVS was not entitled to apply the net proceeds of the sale of the land against that agreement. Secondly, they say that as a result of the first step the proceeds of the sale of the land should be taken to have discharged any indebtedness under the $1.2 million loan agreement.

*Clause 13 of the $4 million loan agreement*

[30] When the $4 million loan agreement was executed, a handwritten amendment was made by the insertion of cl. 13. It provides:

> **"Lender's acknowledgement**
>
> Notwithstanding any other clauses of this Deed, the lender irrevocably acknowledges that in the event that the Buyer under the

[1] Which provides: "The borrower agree [sic] with the lenders that subject to the terms of this deed the borrower has at the commencing date received from the lenders up to an amount equal to the facility limit and the borrower is indebted to the lenders for an amount equal to the facility limit."

> SSSA has a dispute of any nature with any other party to the SSSA which arises prior to 15 March 2006 than the payment or repayment of any sums owing to the lender (to the max sum of $4 million) pursuant to the terms of this Deed are stayed absolutely until the resolution of such dispute, or in the event that the Buyer under the SSSA is successful in claiming a breach of the SSSA or any warranties contained therein, then the total sum owing to the Lender shall be reduced absolutely by the amount of such claim (with the claim capped in the sum of $4 million)."

[31] George Cheihk says that he, on behalf of Zoe Cheihk, raised a dispute about three separate matters prior to 15 March 2006, that those disputes have not been resolved, and that, because of cl. 13, the repayment of the loan was stayed until resolution of those disputes. Those matters were:

- that there had been a representation (which was untrue) that Mario Salvo had invested $16 million in Opdicom;
- that there had been a representation (which was untrue) that it would be possible for George Cheihk to get exclusive distributorship in Australia and New Zealand of a product like the Disk Stakka; and
- that there had been a representation (which was untrue) that Opdicom was selling 10,000 units a month and had the ability to sell 100,000 units a month.

[32] AVS points to an e-mail from Wunsch which deals with the each of those matters and which adequately resolves any dispute. That e-mail also forms part of the SSS Agreement as the Schedule 3 Disclosed Material. Two of those issues were raised again by George Cheihk in early 2006 and were dealt with in an e-mail from Wunsch of 7 February 2006.

[33] On 8 February 2006, George Cheihk e-mailed Wunsch and said (in part):

> "We are of the belief that certain aspects of the company's performance and activities have been overstated and some in fact misrepresented. These aspects relate to the true financial position and strength of the company. We are also concerned with its position to go forward in the market place without spending significant additional monies on further R&D to replace current obsolete software."

[34] On 13 February 2006, Wunsch replied. He pointed out that the comments were very general and incapable of being answered in detail. Wunsch asked him to retract his e-mail.

[35] In a letter of 15 February 2006 the plaintiff's solicitors wrote to the defendants' solicitors about completion of the SSS Agreement. The letter contained the following:

> "We are instructed that your clients have indicated in general terms, some concerns in relation to the Agreement. Although we are instructed that your clients have since withdrawn any suggestion that they are dissatisfied, we are instructed to request that any specific concerns or issues in relation to the Agreement be communicated in writing and addressed to us."

[36] That letter was answered by the defendants' solicitors on the same day and, relevantly, it contained the following:

> "We have sought our client's instructions with respect to the matters raised in your correspondence."

[37] The defendants' solicitors wrote to the plaintiff's solicitors on 1 March 2006 referring to the previous correspondence of 15 February 2006 but raised no concerns about any disputes; rather, they requested that the documents relating to the transfer of shares be promptly forwarded to them.

[38] On 9 March 2006, the plaintiff's solicitors wrote to the defendants' solicitors referring to the $1.2 million loan agreement and the requirement in it for Qld Developments to procure the execution of a Deed of Priority. The letter also contains requests for information about the actions taken by Qld Developments and, in particular, it is noted that the first repayment of $2,000,000 was due to be paid by 15 March 2006. The letter concludes:

> "Could you please confirm that payment will be made on that date, and whether you require our client's bank account details in order to facilitate the making of the payment."

[39] By a further letter of 17 March 2006, the plaintiff's solicitors note that the date for repayment of the first instalment of $2,000,000 had passed and that they had not received any response to the letter of 9 March. The letter concludes:

> "Our client would prefer not to have to exercise its formal rights under the Deed of Loan and Guarantee, and accordingly we would appreciate your prompt response."

[40] On 20 March 2006 the defendants' solicitors wrote to the plaintiff's solicitors and informed them that they held instructions to request extensions for the payment of the amounts required under the agreement.

[41] On 22 March 2006 the plaintiff's solicitors rejected the request for extension of time for payment and required immediate payment.

[42] On 24 March 2006 the defendants' solicitors wrote and gave notice pursuant to cl. 9.6(d) of the SSS Agreement that the defendants alleged the plaintiff was in breach of the SSS Agreement in a number of respects. None of those matters were the matters now relied upon as constituting the disputes which trigger cl. 13.

[43] I have noted above that the plaintiff in this matter issued proceedings against Qld Developments whereby it sought an order for possession of the Whylie Gibbs property. In that proceeding an affidavit was filed on behalf of Qld Developments in which the question of the existence of a dispute was raised. The only disputes which were put forward in the submission made on behalf of Qld Developments were with respect to matters which have no bearing on the alleged "disputes" relied upon in this case.

[44] Finally, when the plaintiff's solicitors wrote to the defendants on 4 May 2007 advising them that there were amounts owing under both loan agreements the letter which responded to those from the defendants' solicitor of 16 May 2007 did not raise any issue about clause 13 of the $4 million loan agreement or any disputes which were said to exist which would fall within that clause.

[45] This sequence of letters, together with the submissions made on behalf of Qld Developments at the earlier proceedings, demonstrates that, on the material before me, it is quite possible that the disputes sought to be raised now did not exist, or had been resolved, prior to 15 March 2006 and, thus, the provisions of cl. 13 of the $4 million loan agreement were not activated.

[46] Mr Dunning SC, for the applicants, says that the absence of a response to the respondent's correspondence and the other matters I have referred to above should not be taken as conclusive proof against his clients. He argues that such activity or inactivity is not so compelling as to prevent the applicants from agitating their case.

**Other matters**

[47] Mr Stewart SC, for the respondents, relied, to a substantial extent, on the provisions of cl. 10.7 of the Deed of Loan and Guarantee. That clause provides:

> "As long as the Guaranteed Money or other money payable under this clause 10 remains unpaid, the Guarantors may not without the consent of the Lenders –
>
> 10.7.1 in reduction of its liability under this clause 10 raise a defence, set-off or counter claim available to itself or the Borrower against the Lenders or claim is set off or make a counterclaim against the Lenders; or
>
> 10.7.2 prove in competition with the Lenders if a liquidator, provisional liquidator, trustee in bankruptcy or administrator is appointed in respect of the Borrower or the Borrower is otherwise unable to pay its debts when they fall due; or
>
> 10.7.3 claim to be entitled by way of contribution, indemnity, subrogation, marshalling or otherwise to the benefit of a Loan Security held in whole or in part in respect of the Guaranteed Money."

[48] The argument based on that clause was that it completely prevented the applicants from taking any steps in this action to defend or counterclaim etc. until full payment of the debt had been made. It was put to me that cl. 10.7 does not bar the guarantors from making any claims or enforcing any rights against either the respondent or the debtor; it merely suspends those rights so long as the guaranteed money remains unpaid. The suspension can be ended at once if the guarantors meet their contractual obligation and pay the amount of the guaranteed money. Particular reliance was placed upon the decision in *GE Capital Australia v Davis* [2002] NSWSC 1146 at [93]. It was argued that the court should not interfere since the parties have provided that the payment under this document should be made free of any set off or counterclaim. That argument might well be compelling in a circumstance where there was no clause such as cl. 13. It commences with the words: "Notwithstanding any other clauses of this Deed …". It follows, then, that cl. 10.7 must be read subject to cl. 13. That is one of the points which is to be raised in the proceedings I refer to below.

[49] Unusually, for an application of this kind, the applicants did not exhibit a Defence which, if successful, they would file. That may be because on 28 September 2007 the applicants filed a Writ and Statement of Claim in the Supreme Court of Victoria in which AVS, Opdicom, Opdicom Holdings and Mario Salvo are named as defendants.

[50] In that Statement of Claim the plaintiff seeks against all the defendants:

"(a) a declaration that a dispute within the meaning of clause 13 of the $4 million loan agreement arose between Zoe Cheihk and Opdicom Holdings and/or Opdicom prior to 15 March 2006.

(b) an order pursuant to s 87 of the TPA:

(i) declaring the $4 million loan agreement to be void ab initio;

(ii) declaring the SSS Agreement to be void ab initio;

(iii) that Zoe Cheihk do all things necessary to transfer:

(A) to Opdicom Holdings, 1,450,000 shares in Opdicom held by her; and

(B) to Opdicom, 1,400,000 shares in Opdicom held by her;

(iv) declaring that Zoe Cheihk is not obliged to pay to AVS any part of the $4 million loan;

(v) varying the Mortgage so that 'the security money' is limited to such amount as is owing under the $1.2 million dollar loan agreement ;

(vi) that AVS pay to Qld Developments the sum of $3,511,690;

(c) alternatively to (b):

(i) Zoe Cheihk recover damages in the sum of $4 million pursuant to s 82 of the TPA;

(ii) Qld Developments recover damages in the sum of $3,511,690 pursuant to s 82 of the TPA."

[51] The Statement of Claim deals with all the matters raised in this application before me and also, as is obvious from the relief sought, makes allegations with respect to breaches of the *Trade Practices Act*.

[52] It is on the basis of this action in the Supreme Court of Victoria that Mr Dunning SC advances the submission that the refusal of their application could result in the existence of inconsistent judgments. The issues sought to be agitated in the Victorian Supreme Court proceedings are, putting to one side the *Trade Practices Act* matter, the same issues as were agitated in this application. The only difference in the parties is that Mario Salvo is a defendant.

[53] Mr Stewart SC argues that the Victorian proceedings will afford the applicants an opportunity to have a trial of all the issues raised by them in this application. However, such a trial could result in a judgment in favour of the applicants which would, in part, be directly inconsistent with the default judgment currently in place. The courts have always strived to avoid the possibility of inconsistent judgments or verdicts, most usually within the same court structure but also where it might arise where two different courts are properly seised of the same matter. The prospect of inconsistent judgments has always been sought to be avoided because of: the obvious inconvenience and costs to which the parties will be subjected, the uncertainties that can arise with respect to the state of the relevant law, and the potential of damage to the integrity of the legal system. The risk of inconsistent verdicts in two proceedings was found to be sufficient by Williams J in *Owenlaw Mortgage Managers Ltd v NK River Pty Ltd* [2005] VSC 464 to set aside a default judgment.

[54] The circumstances in this case are such that I am persuaded that the action in the Victorian Supreme Court will allow a complete resolution of the issues between the

parties and not result in inconsistent verdicts if this judgment is set aside. The case for the applicants, while by no means compelling, is sufficient to come within the principles in *National Mutual Life Ass'n of Australasia Ltd v Oasis Developments Pty Ltd* and *Troiani*.

[55] I grant the application that the default judgment dated 16 May 2007 obtained by the plaintiff be set aside. I will hear the parties on directions and costs.