SUPREME COURT OF QUEENSLAND

CITATION:	*Aviation Services of Australia Pty Ltd v Byrt* [2009] QSC 387
PARTIES:	**AVIATION SERVICES OF AUSTRALIA PTY LTD ACN 121 365 482** (plaintiff) **v** **TERRENCE JOHN BYRT** (defendant)
FILE NO/S:	2159 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	21 August 2009
JUDGE:	Martin J
ORDER:	**THAT THE JUDGMENT BE SET ASIDE.**
CATCHWORDS:	Where the plaintiff and others and the defendant and others entered into a deed of settlement, requiring the defendant and others to pay the plaintiff and others a certain sum – Where settlement sum was not paid – Where plaintiff and others purported to enter an agreement, assigning the debt to the plaintiff – Where deed of assignment unsigned - Where plaintiff brought action against defendant for the settlement sum – Where no defence was filed – Where judgment was entered against the plaintiff – Where defendant seeks to set aside the judgment on the basis of irregularity – Whether there was an assignment of rights at common law – Whether there was an equitable assignment of rights – Whether all the creditors should have been included as parties to the plaintiff's action – Whether the judgment was irregularly entered – Whether the judgment should be set aside. *Uniform Civil Procedure Rules*, r 290 *Cusack v De Angelis* [2008] 1 Qd R 344 *Norman v FCT* (1963) 109 CLR 9 *NT Power Generation Pty Ltd v Trevor* [2000] WASC 254
COUNSEL:	C McIvor for the plaintiff

J Davies for the defendant

SOLICITORS: John Neive O'Donoghue Solicitor for the plaintiff
Rodgers Barnes & Green for the defendant

[1] On 26 February 2009 the plaintiff ("**ASOA**") filed a claim seeking payment of the sum of $2,339,104.50, together with interest and costs. The basis of the action was that ASOA and others and the defendant and others had entered into a deed of settlement on 24 August 2008. Under that deed the defendant and others were obliged to pay the plaintiff and others the sum of US$1,488,750.01. ASOA alleges in the statement of claim that it holds the "full right and title to recover the amount owing under the deed" of settlement. It alleges that the defendant and others have defaulted under the deed and, as a consequence, ASOA gave notice of default and called in the whole of the principal debt as due and owing. ASOA also pleads that, as at 24 February 2009, the sum of US$1,488,750.01, when an exchange rate of AU$1 = US$0.64 is used, amounts to AU$2,326,171.80.

[2] A process server deposed in an affidavit that, on 31 March 2009, he served the defendant at a solicitors' office in Perth.

[3] No notice of intention to defend was filed and on 30 April 2009 default judgment was entered against the defendant in the sum of $2,383,285.17, including $42,296.16 in interest and costs.

[4] On 16 July 2009 the defendant filed the application presently before the court to set aside the default judgment. The defendant filed an affidavit in which he states:

> "I cannot recall being served with the claim and statement of claim issued in these proceedings. I have been shown the affidavit of service filed herein which asserts they were served on 31 March 2009 with those documents at the office of McKenzie Moncrieff lawyers in Perth. I do not recall that. However, at about that time, I was embroiled in the collapse of Macair Airlines (of which I was a director) and the dealings with numerous creditors of that group and the administration and liquidation of the Macair Group of Companies was distracting me. I was under immense pressure."

[5] One might be forgiven for thinking that, notwithstanding the pressure brought about by the administration and liquidation of the Macair Group of Companies, one might recall being served with a claim for over $2,000,000. That, though, was not the subject of submissions before me and no challenge was made to the defendant's affidavit.

[6] The defendant contends that the judgment was irregularly entered and should be set aside as of course. In the alternative, it is submitted that if the judgment was regularly entered then there are grounds upon which it should be set aside.

Was the judgment irregularly entered?

[7] The basis of the original debt is to be found in a deed of settlement of 24 August 2008. The deed was executed by nine parties. It related to lease, hire and hire purchase agreements concerning four aircraft. The parties seeking damages under

the agreements were Aviation Services of America, CRI Leasing Inc, CRI International Inc, Aviation Services of Australia Pty Ltd, Emery Lee Delavan and D.A. "Chip" Cipolla. They were described in the deed as "the creditors". The parties who agreed to pay the money were Macair Airlines Pty Limited and Transtate Leasing Pty Ltd. They were referred to in the deed as "the debtors". The defendant was also a party to the deed. He agreed to "personally guarantee the payments and obligations by the debtors so that if the debtors failed to make any payments for any reason, [the defendant] is liable for those payments".

[8] In the statement of claim ASOA alleges that it holds the full right and title to recover the amount owing under the deed and to institute proceedings for that purpose.

[9] Mr Cipolla, Mr Delavan and Mr Nieve O'Donoghue (a director of ASOA) each swore an affidavit in which reference is made to an agreement, in January 2009, among them by which all the creditors assigned the liability of the debtors and the defendant under the deed of settlement to ASOA. Each of them agrees that the document which was created to evidence that assignment was not executed. Each of them also swears in identical terms: "Nevertheless I have always considered the assignment binding on the plaintiff."

[10] The unexecuted deed of assignment is dated 18 February 2009. In the recitals it sets out: the fact of the deed of settlement, the default by the debtors, and that the parties to the "deed of assignment" have called on the defendant to honour the guarantee.

[11] The body of the deed contains the following: "4. This assignment is effective from the date of execution hereof."

[12] In his submissions, the defendant argues that the unsigned deed of assignment does not even constitute an equitable assignment of the debt, but, if it did, ASOA's claim would still be irregular as the purported assignors would still be necessary parties to a proceeding to enforce the interest assigned.

[13] ASOA, acknowledging that there was no formal assignment as allowed for by s 199 of the *Property Law Act* 1974, responds with a submission that it has the benefit of an equitable assignment of the right to sue the defendant on any breach of the guarantee. No formality is required for the assignment of equitable property, merely "a clear expression of an intention to make an immediate disposition". See *Norman v FCT* (1963) 109 CLR 9 at 30.

[14] The expression in *Norman v FCT* that such an assignment requires an immediate disposition of rights was the subject of two references by Windeyer J. The first, at p 30, I have already referred to; the second is at p 26 of the report where his Honour says:

> "Assignment means the *immediate* transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee." (emphasis added)

[15] Although Windeyer J was in the minority, his discussion of the subject was referred to by Dixon CJ in the following way:

> "As to the question of the alleged assignment of the interest, I have had the advantage of reading the discussion contained in the

> judgment of Windeyer J. of the whole subject of voluntary equitable assignments and I do not know that there is anything contained in it with which I am disposed to disagree."

[16] The important factor for this case is the repeated reference in *Norman v FCT* to the requirement that such an assignment be immediate, that is, that it takes effect straight away. Although the three natural persons who were parties to the "deed of assignment" deposed as to their belief of the effect of their agreement, the "deed of assignment" which they all agree represents their intentions contains the clause referred to above providing that the assignment is not to take effect until the deed is executed. In other words, the three individuals agreed that there would not be an assignment until the deed was executed. Thus, any oral agreement did not have effect at all.

[17] A similar conclusion was reached by Ipp J in *NT Power Generation Pty Ltd v Trevor* [2000] WASC 254.

[18] In that case, Ipp J considered a deed in which it was provided by the assignor as follows:

> "In consideration of the YMI payment, I agree on demand sent to my address shown in this document to assign to MXC the whole of my GGO claim."

[19] It was contended that that clause reflected an intention that no assignment should take place until the demand which was contemplated was sent. His Honour said:

> "[25] It seems to me that in these circumstances the test whether an equitable assignment has effected is whether, in signing the Release upon payment of the amounts owing to them, there was an intention on the part of the employees to impart an interest in the debts to Multiplex: *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 (at 623 to 624). In this regard, the further remarks of Windeyer J in *Norman v Federal Commissioner of Taxation (Cth)* (at 28-29) are enlightening:
>
> > 'But the weight of authority is, I think in favour of the view that in equity there is a valid gift of property transferable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that on his part is necessary to give effect to his intention and arms the donee with the means of completing the gift according to the requirements of the law.'
>
> The issue is whether the employee intended, by signing the acknowledgment, release and assignment, to make then and there a 'complete disposition and transfer' to Multiplex.
>
> [26] In my opinion, it is apparent from cl 3 that the employees intended that the actual disposition of the debts would only occur upon the demand being made. Therefore, although the employees have done everything necessary on their part to give effect to that intention, an equitable assignment can not take place until the demand is made. That being the paramount intention of the parties, equity would not give effect to any different result. I therefore uphold Ms McLure's submissions in this respect."

[20] The provision of the unsigned deed of assignment with respect to when the assignment was to take place is to similar effect. The clear intention of the parties was that there would be no assignment until the deed had been executed. The deed has not yet been executed, therefore there has been no assignment. It follows then, that ASOA did not have a cause of action of the type claimed against the defendant.

[21] Had there been an effective assignment, then the "creditors" would have had to have been parties to the action. Where there is an equitable assignment of a legal chose in action, the assignors must be a party to an action to recover the debt whether as plaintiffs or defendants. *McIntyre v Gye* (1994) 51 FCR 472; *Deputy Commissioner of Taxation v Bluebottle UK Ltd* (2006) 68 NSWLR 558.

[22] I find, therefore, that the judgment was entered irregularly in that there was no assignment of the chose in action to ASOA and, even if there had been an assignment, the necessary parties were not engaged in the litigation. There is a power under r 290 of the *UCPR* to vary a default judgment but it should not be exercised in circumstances where there was no capacity in the plaintiff to obtain judgment for itself.

[23] There was another argument about irregularity and it related to the fact that the amount owing under the original deed was expressed in US dollars. Had I been of the view that the judgment was otherwise regularly entered then I would not have regarded the question of the currency in which the judgment was expressed as being incapable of variation under r 290. See *Cusack v De Angelis* [2008] 1 Qd R 344.

[24] I order that the judgment be set aside. I will hear the parties on costs.