SUPREME COURT OF QUEENSLAND

CITATION:	*Rural Bank Ltd v Wallace* [2014] QSC 87
PARTIES:	**RURAL BANK LIMITED** (Plaintiff) **v** **CHARLIE WALLACE** (Defendant)
FILE NO/S:	SC No 7928 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 April 2014
JUDGE:	Atkinson J
ORDERS:	**1. The application filed on 11 April 2014 is dismissed.** **2. The defendant is to pay the plaintiff's costs of and incidental to the application to be assessed.** **3. The enforcement warrant issued on 23 January 2014 is stayed until 8 May 2014 at 9 am.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DEFAULT OF PLEADING – where default judgment was given on 10 January 2014 – where the defendant applied to have default judgment set aside ex debito justiciae – where there was confusion as to whether a notice of intention to proceed was sent or received – where the parties signed a deed of agreement whereby the defendant would not apply set aside the judgment – whether there was unconscionable dealing in the method by which the agreement was made – whether the judgment by default should be set aside – whether the enforcement warrant to enforce the judgment by default should be set aside

COUNSEL:	M Gynther for the plaintiff/respondent
	M J McDonald for the defendant/applicant
SOLICITORS:	Corrs Chambers Westgath for the plaintiff/respondent

HER HONOUR: This is the hearing of an amended application before the court which sought the following orders:

(1) that the judgment by default entered in favour of the plaintiff on 10 January 2014 be set aside pursuant to *Uniform Civil Procedure Rules 1999* (UCPR), rule 290;

(2) that the enforcement warrant issued by the court on 23 January 2014 to enforce the judgment by default be set aside pursuant to the same rule;

(3) that pursuant to rule 7 of the UCPR, the time within which the defendant must file a defence be extended to 21 days from the date any such order is made;

(4) that the plaintiff be restrained from enforcing or attempting to enforce the Enforcement Warrant, including but not limited to giving instructions to the receivers appointed pursuant to Deed of Appointment dated 6 January 2014, until further order; and

(5) that the plaintiff be permanently restrained from enforcing, or attempting to enforce, an undated Deed of Agreement and an undated Occupation Licence which is annexed to the Deed of Agreement marked "A".

Briefly, the history of this matter is that the plaintiff, Rural Bank Limited ("Rural Bank"), filed a claim for moneys owing pursuant to a mortgage in this court on 31 August 2012. A statement of claim was attached setting out the basis of the claim and the method by which the amount said to be outstanding had been calculated. On 1 November 2012, the defendant filed a document called a conditional notice of intention to defend which made some rather bizarre claims but has been withdrawn by the defendant who would not seek to rely upon its contents.

On 7 January 2014, the plaintiff filed a request for default judgment. Attached to that was an affidavit by a solicitor in the employ of the firm which acts for the Rural Bank, deposing to how the moneys said to be outstanding had been calculated. Judgment was requested in the amount of $6,819,787.09 and recovery of two pieces of land therein set out. Judgment was given on 10 January 2014 in the amount of $6,819,787.09 and recovery of the two pieces of land.

On 11 April 2014 an application was first filed to set aside the judgment by default and then an enforcement warrant which issued pursuant to that judgment.

The argument for the defendant commences with the submission that the judgment by default should be set aside pursuant to rule 290 of the UCPR because it was irregularly obtained and therefore should be set aside *ex debito justiciae*. That argument is based on an assertion that contrary to rule 389, the plaintiff did not give one month's notice of intention to proceed before default judgment was sought.

Mr Wallace, the defendant, has sworn that he did not receive a copy of a notice of intention to proceed. The plaintiff's solicitor sent to the defendant a copy of a notice of intention to proceed, together with a letter dated 18 November 2013 which he deposes he caused to be posted to the defendant. The solicitor for the plaintiff has given evidence that he caused it to be posted in accordance with his usual practice and the fact that a copy of the letter is on the file suggests to him that his usual practice of posting the original was followed. On the other hand, the letter from the solicitor also contains a note which suggests that it was sent by email, although searches by the solicitor at the instance of the defendant have found that it was not sent by email.

The fact that Mr Wallace said he did not receive it does not mean that it was not sent. However, there has been no request to cross-examine him, so I have to accept for the purposes of this application that he did not receive it. Therefore he was not in terms given notice. I am not suggesting that the solicitor for the plaintiff is being in any way dishonest. It is his normal practice, as he deposed, to keep a copy on file when the original has been posted. It is possible that the normal practice wasn't followed. As one might expect, he is unable to remember this specific case.

I am therefore drawn to the conclusion that one month's notice was not given strictly in accordance with the rule. Normally, one might expect that this would lead to the judgment being set aside. However, in this case, there is a complete answer to that. Mr Wallace signed a deed of agreement with the Rural Bank whereby he agreed that he would not apply to set aside the judgment and/or the enforcement warrant, and that the deed might be pleaded as a full and complete defence, response, or answer to any application by Mr Wallace to set aside the judgment or the enforcement warrant.

There has been a valiant attempt by Mr McDonald on behalf of Mr Wallace to persuade me that there is an arguable case that there was unconscionable dealing in the method by which the bank made that agreement with Mr Wallace. But there is nothing at all to suggest unconscionable dealing. Mr Wallace is a person of full capacity. True it is that receivers were residing on the property at the time, as they were entitled to do to manage the property, having been regularly appointed to do so. Mr Wallace received legal advice. He made a decision, presumably reluctantly, to sign that deed. But sign it he did. In my view, it is not arguable that the plaintiff took unconscientious advantage of Mr Wallace in requesting that he sign the deed, and it is a complete answer to this application.

In any event, I am far from satisfied that were Mr Wallace given leave to defend the action, that his defence has any prospects of success. It may delay what appears to be the inevitable situation of the bank taking possession of the property, but as I said, all the arguments valiantly put up by Mr McDonald do not convince me that there would be any viable defence to the action.

Accordingly, I dismiss the respondent's application.

...

The plaintiff has asked for indemnity costs against the defendant in view of the terms of the deed signed between the parties. In my view, the defendant was entitled to bring the application to endeavour to avoid the catastrophic effects of the plaintiff's action on his livelihood. He has not been successful, but in my view, he should be required to pay the indemnity costs to the plaintiff.

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HER HONOUR: The orders are simply that the application filed on 11 April 2014 is dismissed. The defendant is to pay the plaintiff's costs of and incidental to the application to be assessed. And the enforcement warrant issued on 23 January 2014 is stayed until 8 May 2014 at 9 am.