IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

BEFORE:

The Acting Chief Justice (Mr Justice McPherson S.P.J.)

Mr. Justice Shepherdson

Mr. Justice Williams

BRISBANE, 19 AUGUST 1991

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD.	(Plaintiff) Respondent

- and -

K.J. SHAW PTY. LTD.	(First Defendant) First Appellant

- and -

KENNETH SHAW and ANN MARIE SHAW	(Second Defendants) Second Appellants

JUDGMENT

THE ACTING CHIEF JUSTICE: I would dismiss the appeal with costs. I publish my reasons.

MR JUSTICE SHEPHERDSON: I agree with the order proposed and with the presiding judge's reasons.

MR JUSTICE WILLIAMS: In my opinion the appeal should be dismissed with costs. I publish my reasons.

THE ACTING CHIEF JUSTICE: The order of the Court is that the appeal is dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD	(Plaintiff)	Respondent

AND:

K.J. SHAW PTY LTD	(First Defendant)	First Appellant

AND:

KENNETH SHAW AND ANN MARIE SHAW	(Second Defendant)	Second Appellants

_____

McPHERSON SPJ

SHEPHERDSON J

WILLIAMS J

_____

Reasons for judgment delivered by

McPherson SPJ, Williams J on 19th August, 1991. Shepherdson J agreeing with the reasons of McPherson SPJ. All concurring as to the Order.

_____

“APPEAL DISMISSED WITH COSTS ”

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

Before the Full Court

The Acting Chief Justice

Mr Justice Shepherdson

Mr Justice Williams

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD.	(Plaintiff) Respondent

- and -

K.J. SHAW PTY. LTD.	(First Defendant) First Appellant

- and -

KENNETH SHAW and ANN MARIE SHAW	(Second Defendant) Second Appellants

JUDGMENT - McPHERSON A.C.J.

Delivered the Nineteenth day of August 1991

CATCHWORDS

Contract - Compromise - Alleged agreement to forego mutual claims - Bona fides of promisee's belief as to validity of claim foregone - Adverse finding as to credibility - Whether cross-examining counsel bound to put expressly that witness's belief not honest.

Counsel: Sofronoff Q.C., with him R.J. Douglas, for

	the Appellants
	P.A. Keane Q.C., with him Mrs D.A. Mullins, for the Respondent
Solicitors:	McCullough Robertson for the Appellants
	Corrs Chambers & Westgarth for the Respondent
Hearing Date:	16 and 17 July 1991

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD.	(Plaintiff) Respondent

- and -

K.J. SHAW PTY. LTD.	(First Defendant) First Appellant

- and -

KENNETH SHAW and ANN MARIE SHAW	(Second Defendant) Second Appellants

JUDGMENT - McPHERSON A.C.J.

Delivered the Sixteenth day of August 1991

The plaintiff sued the first defendant company and the second defendants K.J. Shaw and A.M. Shaw for $43,655.47 together with interest at 22% p.a. The debt due by the company arose out of a bill of mortgage dated 24 February 1982 given by it in favour of the plaintiff in respect of a lot on a building units plan. The two individual defendants were sued as guarantors of the indebtedness. After default by the company the plaintiff gave notice of exercise of the statutory power of sale of the mortgaged property. It sold the land leaving a deficiency on realisation of $43,655.57 (the “principal sum”). That sum, together with interest at 22% calculated to the date on which payment is made, is said to amount to more than $100,000.

At the trial the defences relied upon were these. First, it was alleged that in exercising power of sale the plaintiff failed to perform its statutory duty under s. 85 of the Property Law Act to take reasonable care to ensure that the property was sold at market value. This was said to have resulted in a loss of $10,000, which it was sought to set off against the plaintiff's claim. Secondly, it was alleged that a compromise of the plaintiff's claim had been effected between the plaintiff and the defendants under which the plaintiff agreed to accept payment at the rate of $80.00 per month in full satisfaction of the debt due to it and interest thereon.

The action was tried by Robin D.C.J. in the District Court at Brisbane. The first defence, based on the claim for damages for breach of s. 85 was pursued at the trial, but with progressively diminishing enthusiasm. His Honour's reasons for judgment record that in final addresses counsel for the defendants informed the court that the claim to a set-off on this basis was “not being pursued”. Despite this concession, his Honour considered and rejected it. It is not a subject of this appeal.

As regards the second ground of defence, the difficulty confronting the defendants was that the alleged compromise involved an agreement or promise by the plaintiff to accept less than the amount legally due to it. Such a promise is, of course, not binding unless supported by consideration, which was a matter expressly pleaded by the plaintiff in its amended reply. Accordingly, the defence in this respect underwent amendment at the end of the trial, emerging with an allegation of an agreement by which the plaintiff promised to forego its right to immediate payment of the principal sum and its claim to interest thereon in consideration of a promise by the defendants to forego claims on their part against the plaintiff. So much at least appears to have been the intention of the pleader of the amended defence. In fact what was pleaded was that the defendants had “performed their obligations under the agreement” of compromise, but

that the plaintiff had “refused to accept its obligations thereunder”. This amounts to an allegation that the consideration moving from the defendants was wholly executed, which cannot be the case because it is plain that it would take more than 43 years to pay off the principal debt at the rate of $80 per month. It must be, therefore, that what was being alleged was a compromise of the plaintiff's claim comprising mutual or reciprocal promises on either side to forego their respective claims, each against the other, to the extent agreed.

When one turns to proof of such an agreement, evidence of it is noteworthy primarily by its absence. The agreement is alleged to have been reached in the course of a conversation on 6 December 1983 between one Hunt acting on behalf of the plaintiff and the defendant K.J. Shaw acting on behalf of himself and other defendants. Hunt was then employed by the plaintiff as its collections officer. His immediate superior was Griffin who had had, a few months before, replaced one Lowry as the plaintiff's collections manager in Queensland. The plaintiff admitted that Hunt had agreed to accept repayments from the defendants of $80 per month; but it claimed that he had done so without the plaintiff's authority. His Honour found that Hunt had in fact no authority from the plaintiff to make the agreement alleged. This finding was challenged on appeal, but, for reasons that will appear, I do not find it necessary to resolve the point. There are other more formidable grounds upon which the defence must fail and the appeal should be dismissed.

A simple promise by the plaintiff to accept payment of its debt without interest at the rate of $80 per month would, as I have said, not be binding on the plaintiff because of the absence of valuable consideration moving from the defendants. To sustain the defendants' allegation of a promise made to them by Hunt on behalf of the plaintiff to forego its right to interest and to immediate payment of the principal sum, it was incumbent on the defendants to show that, in conformity with their amended

defence, they promised to forego claims by them against the plaintiff; and that they did so in reliance upon or in exchange for the reciprocal promise of the plaintiff. Nothing less would suffice. In attempting to demonstrate that such an agreement had been made, the first difficulty confronting the defendants was that at the trial the relevant evidence from Shaw had been directed primarily, and in the then state of the pleadings unnecessarily, to proof of a promise by Hunt on behalf of the plaintiff to accept $80 per month. Later, when the defence was amended at the end of the trial, so as to allege a mutual compromise of claims, the testimony of Shaw was found not to be capable of sustaining the amended allegation. The closest approach to it was a garbled passage in his evidence in which he testified that he had said to Hunt "Well, I am prepared to do a consideration, and our claims on each other is to pay $80 a month until the amount of $43,755.57 is paid without any further interest on that amount". He went on to say that Hunt had "agreed with that".

Even if accepted at face value and understood in the sense most favourable to the defendants, it is to my mind extremely doubtful whether it is possible to extract from that statement anything in the nature of an agreement embodying reciprocal promises by each party to forego mutual claims to the extent alleged. But in any event the defendants' first task was to persuade the learned trial judge of the veracity of Shaw as a witness and of the accuracy of his testimony with respect to the agreement that was, at the stage the evidence was given, yet to be alleged by the defendants. In this they failed completely. His Honour said he was "not prepared to find that, questions of Mr Hunt's authority apart, the agreement the defendants put up was made". He said he did not believe Shaw's evidence on this point to be true. In forming that conclusion the learned judge was naturally influenced by the metamorphosis that the alleged agreement had undergone in the course of the trial. The truth was, as his Honour found, that Mr Hunt was doing no more than "agree" to

accept payment of moneys owing by instalments of $80 per month. This did not preclude the plaintiff at any time from requiring payment of the whole. Indeed, the whole thrust of the attitude expressed by Shaw in his conversation with Hunt was that his liabilities were so extensive that, if the plaintiff pressed for more, the defendants would be forced into liquidation or bankruptcy, whereupon the plaintiff would receive nothing. The plaintiff had originally demanded $500 per month; Shaw offered $20 per month. They compromised on $80 per month. That is why the matter of Hunt's authority was never really relevant. The agreement that Hunt made was not that the plaintiff should give up its claim to the whole indebtedness and interest, but simply that it would accept payment by instalments of $80 per month. It did not undertake to forego anything. Upon notice to the defendants allowing a decent interval to elapse, it would be entitled to resume its right to insist on payment of the debt and interest, which had never been bargained away.

In any event, to make good the defendants' claim that there was valuable consideration for the plaintiff's promise to forego rights, it was necessary for the defendants to show that at the time the agreement was made Shaw entertained a bona fide belief in the validity of the rights that it was alleged the defendants were giving up. Those rights were said to consist of the claim for damages under s. 85 and the right to challenge the quantum of the debt due to the plaintiff. His Honour categorically rejected Shaw's assertion of the honesty of his belief with respect to either of these matters. He said he was not prepared to find that Shaw “had any honest belief in the claims it was said he was abandoning, either to challenge the quantum of the plaintiff's claim, or to proceed against it for a sale...at an undervalue”. Elsewhere the learned judge emphasised that he “did not find Mr Shaw a reliable witness”.

A proper sense of courtesy to witnesses imposes limits on the form in which judicial findings as to credibility

are expressed. His Honour plainly did not believe Shaw's evidence. On appeal no attempt was made to discharge the notoriously difficult task of challenging these adverse findings. What, however, was urged by the appellants was that Shaw's evidence was uncontradicted or unchallenged and ought therefore to have been accepted by his Honour. To say that it was not challenged in cross-examination is in my view very far from accurate. The whole thrust of the cross-examination of Shaw by Mrs Mullins (who was counsel for the plaintiff at the trial) was that he was not recounting either accurately or honestly the substance and effect of the conversation with Hunt that took place on 6 December 1983. It is true that she did not in precisely those words put to him that he held no honest belief in the validity of the claims he asserted he had put forward in conversation with Hunt. But to satisfy the requirements of the oft-quoted but constantly misunderstood "rule" in Browne v. Dunn (1894) 6 R. 67, counsel is not obliged to sacrifice the rapier for the bludgeon. The fundamental purpose and function of the rule are that "if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him" (per Lord Herschell L.C., at 70-71). It is no more than a particular application of the rule of natural justice or "procedural fairness" in the context of forensic proceedings.

As to that, Shaw was not only given, but actively seized, every opportunity to repeat his claims and his belief in their validity. In that respect his answers could, in a number of instances, fairly be characterised as unresponsive to particular questions put to him in cross-examination. Conscious as he evidently was of the legal issues involved, and testifying after the plaintiff's case had been presented and closed, Shaw was plainly under no illusions about what was being put to him. His testimony in cross-examination set out to refute that case with a vigour that evoked from his Honour a description of him as a witness who was "garrulous" and who "tended to guild the lily". In matters such as the bona fides of a person's

belief, it is in any event rarely possible to speak of a witness's particular assessment of his own honesty as "uncontradicted". The question whether Shaw honestly believed in the validity of his alleged claims against the plaintiff was inseparable from the conclusion formed by his Honour with respect to his credibility in general. That conclusion was, as I have said, wholly unfavourable to the witness.

No basis is shown on which those findings should or can be upset. For reasons I have given, his Honour's determination of the issues of fact and law was plainly correct. In view of the express provisions of the guarantee and mortgage the appellants by their counsel on appeal frankly and correctly abandoned their challenge to his Honour's decision to award interest at 22% on the sum claimed. The judgment below must therefore stand. The appeal should be dismissed with costs.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

Before the Full Court

Mr. Justice McPherson A.C.J.

Mr. Justice Shepherdson

Mr. Justice Williams

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD. (Plaintiff) Respondent

AND:

K.J. SHAW PTY. LTD. (First Defendant) First Appellant

AND:

KENNETH SHAW and ANN MARIE SHAW (Second Defendants) Second Appellants

JUDGMENT - G.N. WILLIAMS J.

Delivered the 19th day of August, 1991.

CATCHWORDS:

Contract - alleged agreement to forego mutual claims - guarantee - whether claim for liquidated sum or damages - Sunbird Plaza Pty. Ltd. v. Maloney (1988) 166 C.L.R. 245 considered - rule in Browne v. Dunn discussed.

Counsel: Mr. W. Sofronoff Q.C. and R.J. Douglas for Appellants.
Mr. P.A. Keane Q.C. and Mrs. D. Mullins for Respondents.
Solicitors: McCullough & Robertson for Appellants.
Corrs Chambers Westgarth for Respondent.
Hearing date: 16th and 17th July, 1991
IN THE SUPREME COURT OF QUEENSLAND Appeal No. 115 of 1990

FULL COURT

BETWEEN:

FINANCE CORPORATION OF AUSTRALIA LTD. (Plaintiff) Respondent

AND:

K.J. SHAW PTY. LTD. (First Defendant) First Appellant

AND:

KENNETH SHAW and ANN MARIE SHAW (Second Defendant) Second Appellant

JUDGMENT - G.N. WILLIAMS J.

Delivered the 19th day of August, 1991.

I have had the advantage of reading the reasons for judgment prepared by my brother McPherson and I agree with them; there are, however, some brief observations I would add with respect to some of the matters raised in argument.

The first, and perhaps the major, submission made by counsel for the appellants was that the rejection of Shaw's evidence "was made in the teeth of such evidence being uncontroverted by other evidence or by cross-examination." A reading of the transcript does not support that submission. There was no dispute that there was a conversation on 6th December, 1983 between Hunt and the appellant K.J. Shaw, but the whole conduct of the respondent's case at trial made it clear that the respondent was challenging Shaw's assertion as to the terms of the arrangement then reached. Clearly Shaw's credibility was put in issue during cross-examination and that must have been obvious to all, including Shaw himself. There was no infringement of the rule of practice derived from the decision in Browne v. Dunn (1894) 6 R. 67. In that case both Lord Herschell L.C. and Lord Halsbury formulated the rule in terms that the cross-examiner was obliged to give the witness an opportunity of making an explanation in order to defend his own character if it was under attack. But equally it is clear from their judgments that it is not necessary to waste time in putting specific questions where the point in issue has been "distinctly and unmistakably" raised. So much was recognised by the decision of the Court of Appeal in Seymour v. Australian Broadcasting Commission (1990) 19 N.S.W.L.R. 219. Glass J.A. said at 225 that "sometimes the suggestion that the evidence is false or that the conduct was motivated in a particular way is so manifest that it is not necessary to waste time in putting questions upon it." Mahoney J.A. said at 236: "Similarly, failure to cross-examine the witness may not found such an assumption or render the course of the trial unfair if it is clear from the manner in which generally the case has been conducted that his evidence will be contested. ... The nature of the defendant's case and the particulars given, and otherwise the conduct of it may make it sufficiently

clear that such an assumption is unwarranted and that there has been no surprise or prejudice concerning the matter."

When one reads the cross-examination of Shaw it is abundantly clear in my view that he was given every opportunity of answering the appellants' case, and indeed he took advantage of those opportunities on a number of occasions to assert his contentions to the contrary of that being put to him.

There is no substance at all in that submission made on behalf of the appellants.

The appellants also submitted that, given the terms of the guarantee, their obligation thereunder was enforceable only by a claim for damages and not by an action claiming a liquidated sum. In that regard reference was made to Sunbird Plaza Pty. Ltd. v. Maloney (1988) 166 C.L.R. 245. Mason C.J. (with whom Deane, Dawson and Toohey JJ. agreed) referred at 256 to "two common classes of guarantee of the payment of instalments by the principal debtor". His analysis drew heavily on the reasoning in Moschi v. Lep Air Services Ltd. (1973) A.C. 331 and Hyundai Heavy Industries Co. Ltd. v. Papadopoulos (1980) 1 W.L.R. 1129. The first class was that based on "an undertaking by the guarantor that if the debtor fails to pay an instalment he will pay". In such a case the "guarantor's obligation to pay arises on the debtor's failure to pay." The guarantor's obligation is to pay the specific sum of money. The second class is based on "an undertaking by the guarantor that the debtor will carry out his contract". In that latter situation the debtor's failure to perform his contract constitutes a breach by the guarantor of his obligation. The guarantor's liability for that breach is in damages. Against that background the Chief Justice went on at 257 to observe that "some guarantees are enforceable otherwise than by an action for damages for breach of contract"; essentially that would be all guarantees falling within the first class. He also cited with approval the observation of

Street J. in Re: Standard Insurance Co. Ltd. (in liq.) and the Companies Act (1970) 1 N.S.W.R. 392 at 395.

The appellants contended that the guarantee in this case fell within the second class so that their obligation was to pay such damages as may be assessed in order to compensate the respondent for the breach of contract involved. The argument recognised that the quantum of damages might well equate the principal debtors liability, but the importance of the distinction lay in the arguably lower rate of interest to which the respondent would be entitled if damages were the appropriate relief. If the judgment to which the respondent was entitled was truly to be characterised as damages then it was only entitled to interest pursuant to s. 72 of the Common Law Practice Act 1867. The Full Court in Serisier Investments Pty. Limited v. English (1989) 1 Qd. R. 678 accepted 12 per cent as a median figure for interest on damages pursuant to s. 72, whereas the rate provided for in the mortgage documents was 22 per cent; the learned trial Judge allowed interest at the rate of 22 per cent.

I now turn to the relevant provisions of the guarantee in question. The guarantee was collateral to and intended to secure the same moneys as were secured by the bill of mortgage given by the first appellant to the respondent on 16th November, 1983 (cl. 21). By the Deed the second appellants guaranteed "to the Corporation the due and punctual payment of the moneys hereby secured ... And ... Further Guarantees the due and punctual performance and observance by the Mortgagor of all the covenants obligations ... on the part of the Mortgagor to be observed and performed ..." Then by cl. 1 it was further agreed:—

> "That the moneys hereby secured are payable and the obligations hereby undertaken are to be performed in accordance with the terms of an existing or future security held by ... the Corporation in respect of the moneys hereby secured ... or in the event of any default in any such existing or future security or agreement on demand Provided That demand shall be necessary before a cause of action shall accrue against the Guarantor And a

> certificate signed by or on behalf of an Officer of the Corporation stating that the amount of moneys due and payable or the obligations to be performed by the Guarantor under this instrument at the date mentioned in the certificate shall be conclusive evidence against the Guarantor that the amount so stated is the amount of moneys due and payable by the Guarantor to the Corporation ...”

Further by cl. 5 it was provided that “this Guarantee shall be a principal obligation...”. In that regard cl. 10 also provided that “the Corporation shall be at liberty to act as though the Guarantor is the Principal debtor”. Clause 18 charged any land, goods, chattels or other assets of the second appellants so that thereafter “all such property ... shall be treated as charged with the payment of the amount of the moneys hereby secured from time to time outstanding.” By definition the “moneys hereby secured” included the amount owing under the mortgage referred to above.

Finally it should be noted that in the circumstances prescribed in cl. 9 the second appellants assumed a “separate and additional liability ... to indemnify the Corporation to the full extent in respect of such moneys.”

Given all those provisions of the guarantee I am of the view that it clearly falls within the first class discussed in Sunbird Plaza Pty. Ltd. v. Maloney and that the second appellants' obligation was to pay the mortgagor's indebtedness. It follows that the judgment was correctly for a money sum and not for damages.

Once that position was reached counsel for the appellants conceded that given the express terms of the guarantee (particularly cl. 8 and the definition of “the moneys hereby secured”) he could not contend that some rate of interest other than 22 per cent should be adopted.

In all the circumstances I agree that the appeal should be dismissed with costs.