IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN
109 of 1992

BETWEEN:
AUSTRALIAN GUARANTEE
CORPORATION LIMITED
Plaintiff
AND
GRAHAM JOHN FRANCIS
First Defendant
and
VALERIE JEAN WINCHESTER
Second Defendant

MASTER COULEHAN: REASONS FOR DECISION
(Delivered 15 July 1994)

On 10 March 1994 the plaintiff entered judgment against both defendants in the sum of $147,509-87 and costs in default of appearance, which judgment the defendants now seek to set aside.

The debts the subject of the judgment arose out of two finance agreements, a chattel mortgage of a prime mover dated 6 January 1987 and a lease of a caterpillar scraper dated 26 April 1988.

By the end of 1989 the defendants were in financial difficulties and unable to meet their commitments. The prime mover was sold by the plaintiff in about November 1989 and the scraper in March 1990.

The parties entered into an arrangement whereby the defendants would pay the debts by instalments of $50 per month.

This was confirmed by letter dated 15 February 1991 from the plaintiff to the first defendant. The letter, omitting formal

parts, reads as follows:-

> **"Further to previous correspondence in this matter, we agree to withhold legal action on this account subject to the following conditions.**
>
> **"1. Repayments of $50-00 per month to be made on or before the due date.**
>
> **"2. First payment due on the 1/3/91.**
>
> **"3. Subsequent payments to be made on the 1st of every month.**
>
> **"4. This arrangement is made having regard to your current ability to repay the account and will be subjected to further review on a regular basis.**
>
> **"We enclose an account card which we ask you to send with all payments."**

By letter dated 9 April 1992 the plaintiff's agent, Commercial Recovery Management Pty Ltd (**"CRM"**) gave notice that this arrangement was terminated and demanded payment in full.

The writ was issued on 30 April 1992 and served in May 1992. Following service there was a discussion in which Mr Hope of CRM was advised that the amounts claimed were disputed and he agreed to provide particulars. It was also agreed that the defendants would pay $250 per month and payments commenced on 1 June 1992. In paragraph 28 of his affidavit sworn on 25 May 1994 Mr Hope deposes that he **"... agreed to refrain from pursuing further legal action on the basis that the defendants pay $250 per month subject to review."**

There was a meeting between Mr Hope and the first defendant in December 1992. Mr Hope says that it was agreed that the defendants would increase payments to $1,000 per month, the first defendant says that he did not so agree. Payments continued at the rate of $250 per month.

By letter dated 16 August 1993 Mr Hope wrote to the defendants, which letter, omitting formal parts, reads as follows:-

> **"We refer to our last meeting in December 1992 in our office.**
>
> **"It was agreed at that meeting that you would increase your payments to $1,000.00 per month against a negotiated balance. You were to contact us in June of this year.**
>
> **"Your current balance, excluding interest from April 1992 is $123,393.53.**
>
> **"However, we will accept $99,000.00 at $1,000.00 per month with no further interest to apply. All of our legal costs would be borne by us.**
>
> **"This offer is valid for a period of 14 days. Please respond within that time."**

There was a conversation between the first defendant and Mr Hope following the receipt of this letter, however it appears to have been inconclusive. In paragraph 34 of his affidavit sworn on 30 April 1994 the first defendant deposes that he **"...thought the matter had been sorted out and that the plaintif would take no further action."**

The defendants continued to pay instalments of $250 per month until they were advised by letter dated 22 March 1994 from CRM that judgment had been entered.

It is contended that the judgment was defective and the defendants were entitled to have it set aside.

In its statement of claim the plaintiff claims the balance of moneys owing pursuant to two written agreements plus interest at the rate of 16% as provided in the agreements or alternatively interest pursuant to s84 of the **Supreme Court Act**.

The amounts due after realisation of goods recovered was stated, as was the amount claimed for interest to the date of issue

of the writ.

The summary of the plaintiff's claim reads as follows:-

> **"And the plaintiff claims against the defendants jointly, severally and in the alternative:-**
>
> **"(1) the sum of $93,222-60**
>
> **"(2) interest in the sum of $33,468-93**
>
> **and continuing to judgment or sooner payment at the daily rate of $40.87, alternatively interest at such rate for such period as the Court thinks fit assessed pursuant to s84 of the Supreme Court Act."**

It was argued that the manner in which the agreements were pleaded, separately, with the words **"Further, and in the alternative"** preceeding the pleading of the second agreement, created confusion, however this does not appear to me to be so.

Pursuant to Order 21.03 the plaintiff was entitled to judgment for the amount claimed **"... together with interest from the commencement of the proceeding to the date of judgment - (1) on any debt which carries interest - at the rate it carries ..."**

The defendants were entitled to credit for any payments made prior to the entry of judgment (see **Muir v Jenks (1913) 2 KB 412**).

The affidavit of R.A. Hope sworn 25 May 1994 contains details of the payments made by the defendants after issue of the writ and the figures by which the judgment sum was calculated. There appears to be no error which would invalidate the judgment.

The defendants also rely on the plaintiff's agreement not to

pursue legal action provided the defendants paid $250 per week. While it could not be said that this agreement required the plaintiff to continue on this basis indefinitely it required a change of position.

This may have come about by the failure of the defendants to make the agreed payments, by agreement or by the plaintiff giving notice that it no longer intended to be bound by the agreement, as occurred in April 1992.

The letter dated 16 August 1993 did not give notice that the plaintiff no longer intended to be bound by the agreement and there is no evidence of any discussions which may have conveyed such an intention.

There is no issue as to any delay by the defendants in making this application.

A defence on the merits is usually required before setting aside a judgment regularly entered (see **Evans v Bartlam (1937) AC 473, Davies v Pagett 70 ALR 793** and **Bratic v Toohey (1988) 2 Qd.R.140**).

The agreement between the parties as to payment by weekly instalments may constitute such a defence.

While there may be doubt that an agreement not to proceed to judgment in return for payment of a debt by weekly instalments is supported by valuable consideration (cf **Foakes v Beer (1884) 9 App.Cas. 605** and **Newton v Bellamy & Wolfe (1986) 1 Qd.R. 431, 444**) the circumstances are arguably sufficient to satisfy the requirements of promissory estoppel (see **D & C Builders v Rees (1966) 2 Q.B. 617** and **Waltons Stores (Interstate) v Maher 164 CLR 587, 428-9**).

The agreement was unambiguous, the defendants acted in reliance on the plaintiff's agreement to refrain from pursuing further legal action by paying weekly instalments and they have suffered

detriment in refraining from entering an appearance and having judgment entered in default.

In these circumstances there is a prima facie case that the plaintiff was not entitled to judgment until it had given notice to the defendants that the agreement was terminated and allowed them a reasonable time to enter an appearance.

The defendants have established a defence on the merits and I am satisfied that it would be just to set the judgment aside. It is unnecessary to consider the other defences raised.

The plaintiff requests that if the judgment is to be set aside, this be on terms to protect the plaintiff's priority in registration of a writ of execution on the defendants land based on this judgment. I am not disposed to accede to this request because it would, in effect, allow the plaintiff to derive an advantage arising from its breach of agreement.

I order that the judgment be set aside.