Centoid Pty Ltd & Anor v Osborne & Anor [2015] NTSC 64

PARTIES:	CENTOID PTY LTD AND TREPANG SERVICES PTY LTD v KERRY CLIVE OSBORNE AND DEAN STEWART OSBORNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	64 of 2015 (21534989)
DELIVERED:	28 September 2015
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Summary judgment – Principles to be applied in summary judgment applications – Requirement for the defendant to provide sufficient evidence – Residual discretion – Factors relevant to the exercise of the residual discretion.

Supreme Court Rules rr 22.02, 22.06

General Steel Industries Inc v Commissioner of Railways (NSW) (1964) 112 CLR 125.
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87.
Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd (1991) 1 NTLR 43.
Territory Loans Management v Turner (1992) 110 FLR 341.
Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd (1993) 113 FLR 106.
House v Diamond Leisure Pty Ltd [1987] NTSC 6.
Wilson v Union Insurance Company (1992) 112 FLR 166.
Nibbs v Australian Broadcasting Corporation [2010] NTSC 52.
Sportsbet Pty Ltd v Moraitis [2010] NTSC 24.
Australian Can Co Pty Ltd v Levin & Co Pty Ltd [1947] VLR 332.
Agar v Hyde (2000) 201 CLR 552.
De Saram & Anor v Brown & Anor [2015] VSCA 142.
Re Taylor, Ex parte Century 21 Real Estate Corporation (1995) 130 ALR 723.
Indigenous Business Australia v Kani [2012] NTSC 24.
Websdale & Ors v S & JD Investments Pty Ltd & Ors (1991) 24 NSWLR 573.
Costain Australia Ltd v State Superannuation Board, unreported, Supreme Court of New South Wales, Brownie J, 22 February 1991.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Christrup
Defendant:	Ms Brown

Solicitors:

Plaintiff:	HWL Ebsworth Lawyers
Defendant:	Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Centoid Pty Ltd & Anor v Osborne & Anor [2015] NTSC 64

No. 64 of 2015 (21534989)

BETWEEN:

CENTOID PTY LTD
First Plaintiff

AND:

TREPANG SERVCIES PTY LTD
Second Plaintiff

AND:

KERRY CLIVE OSBORNE
First Defendant

AND:

DEAN STEWART OSBORNE
Second Defendant

CORAM: MASTER LUPPINO

REASONS

(Delivered 28 September 2015)

[1] These reasons deal with an application for summary judgment. The core facts are that the Plaintiffs lent the sum of $5 million to the Osborne Family Holdings Pty Ltd ("the Debtor"). The loan was documented by a loan agreement which incorporated a guarantee given by the Defendants. Summary judgment is now sought against the Defendants pursuant to the

guarantee. Summary judgment is only sought for part of the claim, namely the amount of the principal sum, without interest.

[2] What is admitted on the pleadings is that the Plaintiffs and the Debtor entered into the relevant loan agreement, that the Defendants entered into the relevant guarantee, that the principal sum was advanced by the Plaintiffs to the Debtor, that the due date for repayment of the principal sum was 12 January 2015 and that the Defendants have not paid the principal sum or any part thereof or any interest.

[3] Although not admitted, there does not appear to be any dispute that the Debtor has not paid any amounts to the Plaintiffs by way of repayment, whether for principal or interest. In any event that is sufficiently proved for current purposes by the affidavit of John Robinson affirmed 31 August 2015.[1] The Defendants have not led any evidence to contradict that.

[4] It has been alleged in the pleadings, but not admitted, that the loan agreement provided that each Defendant jointly and severally guaranteed the payment by the Debtor to the Plaintiffs of the principal sum by 12 January 2015. For current purposes that allegation is sufficiently proved by the aforesaid affidavit of John Robinson and, also on this aspect, the Defendants have not adduced any contrary evidence. Even a cursory examination of the loan agreement confirms that.

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1 At paras 6 and 7.

[5] For current purposes I make findings of the facts referred to in paragraph 2 above in accordance with the admissions. Likewise I am also prepared to make findings in respect of the matters which have not been admitted and referred to in paragraphs 3 and 4 above. Essentially therefore there is a prima facie basis for the order sought by the Plaintiffs as, on the evidence produced on the application, the Plaintiffs have demonstrated that the Defendants do not have a defence to that part of the claim.

[6] Notwithstanding that, the Defendants can still demonstrate other reasons why there should be a trial. Summary judgment is provided for in Rule 22.02 of the *Supreme Court Rules* ("SCR"). Rule 22.06 of the SCR contains provisions which apply to the hearing of an application. Those rules, redacted of parts not relevant to the current application, are as follows:

> **22.02 Application for judgment**
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> (1) Where the defendant has filed an appearance, the plaintiff may at any time apply to the Court for judgment against the defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim, or no defence except as to the amount of a claim.
>
> (2)-(4) Omitted
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> **22.06 Hearing of application**
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> (1) On the hearing of the application the Court may:
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> (a) dismiss the application;
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> (b) give such judgment for the plaintiff against the defendant on the claim or the part of the claim to which the application relates as is appropriate having regard to the nature of the relief or remedy claimed, unless the defendant satisfies the Court that in respect of that claim or part a question ought to be tried or that there ought for some other reason be a trial of that claim or part;

(c) give the defendant leave to defend with respect to the claim or the part of the claim to which the application relates either unconditionally or on terms as to giving security, paying money into court, time, the mode of trial or otherwise; or

(d) Omitted

[7] Essentially the rules permit a plaintiff to apply to the Court at any time for judgment against a defendant on the basis that the defendant has no defence to the whole or a part of the claim. On the hearing of the application the Court may give such judgment as is appropriate unless the defendant satisfies the Court in respect of the claim, or part of the claim, that there is a question that ought to be tried or there is some other reason to proceed to trial of the claim.

[8] The authorities[2] in relation to applications for summary judgment are well known. I discussed the authorities in *Nibbs v Australian Broadcasting Corporation.*[3] In *Sportsbet Pty Ltd v Moraitis*,[4] Southwood J, after referring to and relying on *Australian Can Co Pty Ltd v Levin & Co Pty Ltd,* [5] *Fancourt v Mercantile Credits Ltd*[6] and *Agar v Hyde*,[7] summarised the principles as follows:-

> The substance of the criterion to be applied is that, after the matter involved has been explained to the Judge, there must be a real

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2 *General Steel Industries Inc v Commissioner of Railways (N.S.W)* (1964) 112 CLR 125; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87; *Civil & Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* (1991) 1 NTLR 43; *Territory Loans Management v Turner* (1992) 110 FLR 341; *Hibiscus Shoppingtown Pty Ltd v Woolworths (Q'Land) Ltd* (1993) 113 FLR 106*; House v Diamond Leisure Pty Ltd* [1987] NTSC 6; *Wilson v Union Insurance Company* (1992) 112 FLR 166.

3 [2010] NTSC 52

4 [2010] NTSC 24

5 [1947] VLR 332 at 334 – 5.

6 (1983) 154 CLR 87 at 99.

7 (2000) 201 CLR 552 at par [57].

> uncertainty as to the plaintiff's right to judgment. The power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear that there is no real question to be tried.
>
> A burden is cast on the defendant of satisfying the Court that there ought to be a trial and, if not, judgment. The provisions of O 22 of the Supreme Court Rules apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment.[8]

[9] His Honour then went on to elaborate on the relevant principles. Those that have particular relevance in the current case are:-

1. The Court will give the judgment unless the defendant shows cause against the application to the satisfaction of the Court.

2. A defendant will be granted leave to defend if there are facts which, if true, would constitute a defence to the plaintiff's claim. The Court is reluctant to try a case on affidavit where there are facts in dispute.

3. An important issue is whether the defendant's account of the facts has sufficient prima facie plausibility to merit further investigation, whether of fact or law.

4. The Court will normally require an affidavit by or on behalf of a defendant before a defendant will be granted leave to defend. The defendant is required to use such diligence as is reasonable in the circumstances to put before the Court in a summary form all of the evidence relied on by the defendant in defence of the plaintiff's claim.

5. A defendant should condescend into particulars. The evidence of the defendant must deal specifically with the facts relied upon by the plaintiff in support of its application. The affidavit of the defendant should state clearly and concisely what facts are relied on as supporting the defence.[9]

[10] The relevant provisions of the loan agreement for current purposes are:-

1. The Debtor was to repay the principal sum by the date determined in accordance with the Schedule (which is now

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8 [2010] NTSC 24 at paras 10-11.
9 [2010] NTSC 24 at para 12.

admitted to be 12 January 2015) and was to pay interest on the balance of the principal sum calculated daily at the rate specified in the Schedule (clause 2.1);

2. The rate of interest in the Schedule was 25% per annum during the first two years and thereafter at the rate of 35% per annum; interest was payable when the principal sum fell due; (Schedule, item 6);

3. Interest on default could be charged at 2% above a specified bank bill rate "*on any amount due and not paid by the borrower within the time required for payment…*" (clause 4);

4. If an "Event of Default" as defined in the loan agreement occurred, then the Plaintiffs had the option to require payment of the principal sum and all interest immediately (clause 2.2);

5. A default in payment of the principal sum or interest on the due date was the primary Event of Default (clause 5(a));

6. The Defendants unconditionally and irrevocably guaranteed the performance by the Debtor of the Debtor's obligations under the loan agreement, specifically including "*any obligation to pay money*" (clause 7.1(a)).

7. The guarantees of the Defendants were joint and several[10] (clause 7.9).

[11] Having regard to the foregoing and given the findings I have made, it is now incumbent on the Defendants to satisfy the onus on them to demonstrate that that summary judgment ought not be given and that the matter should proceed to trial. To satisfy that onus the Defendants must demonstrate, by sufficiently detailed affidavit evidence, that there are facts which would constitute a defence to the Plaintiffs' claim and that the Defendants' account has sufficient prima facie plausibility to merit further investigation, whether of law or of fact.

[12] In argument before me, Ms Brown for the Defendants based the Defendants' opposition to the application on three matters. These were firstly, that the demands erroneously calculated interest, secondly, that the Plaintiffs had elected to invoke clause 2.2 of the loan agreement and, lastly, on discretionary grounds.

[13] The demands referred to in the first basis refers to documents which were served on the Defendants on behalf of the Plaintiffs demanding payment of the principal sum and interest as calculated therein. The total amount demanded was over $11 million.

[14] The Defences filed on behalf of the Defendants do not plead invalidity of the demands or anything concerning an election in respect of clause 2.2.

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[10] There was a third guarantor who was not a party to the proceedings

That is not determinative as the question to be determined by the Court on an application for summary judgment pursuant to Rule 22.02 is not determined merely by reference to the pleadings.[11]

[15] The first basis of opposition by the Defendants relates to the inclusion of compound interest in the calculation of interest claimed in the demands. The Defendants argue that the demands are therefore invalid as, they allege, compound interest is not permitted by the loan agreement.

[16] However it is clear from an examination of the loan agreement that a demand is not required to be served either on the Debtor or on the guarantors. A demand is not a pre-condition pursuant to the loan agreement before the liability crystallizes. The liability to pay operates from the due date defined in the loan agreement and that date is an admitted fact. In *Re Taylor, Ex parte Century 21 Real Estate Corporation,*[12] it was confirmed that the general rule is that a demand is not required, nor does a guarantor have a right to require a demand, unless the contract so provides.[13]

[17] It is difficult to treat this claim of alleged invalidity of the demands as a plausible basis to oppose summary judgment in accordance with rule 22.06(1)(b) where it is based on an allegation of an incorrect calculation in a demand which was unnecessary at the outset and given that summary judgment is now sought for the principal sum alone and without any

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11 *De Saram & Anor v Brown & Anor* [2015] VSCA 142.
12 (1995) 130 ALR 723.
13 (1995) 130 ALR 723 at p 725 and 730.

component for interest. For these reasons, factors relating to the calculation of interest, or in respect of the giving of the demands, should be irrelevant for current purposes.

[18] In any case I will deal with the allegation of error in the calculation of interest. I think the position is that an error in calculation in a demand does not ordinarily invalidate that demand.[14] I discussed the issue of the validity of notices containing erroneous assertions in *Indigenous Business Australia v Kani*.[15] There I considered, and distinguished, the decision in *Websdale & Ors v S & JD Investments Pty Ltd & Ors*[16] where it was held that a notice which misstated the extent of the default did not comply with the relevant statutory provision. The statutory provision in that case was a notice required as a pre-condition to the exercise of a power of sale by a mortgagee. In that case the default by the mortgagor was a default in the payment of interest only but the notice served also incorrectly alleged a default in respect of payment of principal. The error there was significant and clearly erroneous and the consequences of non-compliance with the notice were drastic. Unlike the present case, as the notice in *Websdale* was a statutory notice, it was strictly required. Ordinarily if a demand is invalid, the demand would have to be re-served in valid form. In this case however, as a demand is not required, a finding of invalidity cannot make any

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14 *Westpac Banking Corporation Ltd v Swee Huan Lim & Ors*, unreported, Supreme Court of Queensland, Thomas J, 15 August 1995.

15 [2012] NTSC 24.

16 (1991) 24 NSWLR 573.

difference as the Plaintiffs would still be able to proceed with their action, and the application for summary judgment, notwithstanding such a finding.

[19] Moreover in the present case there is no obvious fault with the demands in that there will only be an error, arithmetic aside, if the loan agreement is interpreted such that compound interest is not permitted. Ms Brown submitted that in law compound interest is only payable by agreement or custom. I accept that but she went on to submit that there was no provision for compound interest in the loan agreement and with that I disagree. Although the term "compound interest" is not referred to anywhere in the loan agreement, relevantly clause 4 of the loan agreement, which relates to interest on default, does not refer to simple interest either but refers to interest being payable "… *on any amount due*". That supports an argument that compound interest is payable in the following way. As a demand is not required, and as interest is "*calculated daily*"[17], the interest up to each day becomes an "*amount due*" the following day[18] and therefore subject to liability for default interest. Although nowhere is compound interest specifically referred to in the loan agreement, such specificity is not necessary and I am of the view that the wording of clause 4 adequately provides for compound interest.

[20] Hence the Defendants' challenge to the application based on the alleged invalidity of the demands fails on a number of accounts.

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17 Clause 2.1 of the loan agreement

18 At least after the principal sum has become due and it is admitted that it fell due on 12 January 2015.

[21] As to the claimed election pursuant to clause 2.2 of the loan agreement, Ms Brown argued that as the demands served required payment of principal plus interest, the Plaintiffs have thereby exercised their option under clause 2.2 of the loan agreement and asserts that thereby the Plaintiffs are now not entitled to seek summary judgment in respect of the principal sum alone. Although the demands did demand payment of the principal sum and interest, I do not see how, by reason of that fact alone, it can be said that there has been an election pursuant to clause 2.2 of the loan agreement, or, more relevantly, that such an election deprives the Plaintiffs of the option of summary judgment for the principal sum only. No authority was advanced for that latter proposition but after enquiry it appears that this is put on the basis of estoppel. The detriment the Defendants rely on for the purposes of estoppel is that an order for summary judgment, and likely execution to enforce that judgment, without determination of the correct amount of interest payable by the Court, would disadvantage the Defendants in determining their ability to pay the total indebtedness or to secure finance for that purpose. At its highest, the Defendants case in this respect is put on the basis that the Defendants may be able to refinance the amount of their liability once the correct amount is determined.

[22] I am not satisfied that the Plaintiffs have invoked clause 2.2. What the Defendants rely on to demonstrate the election is the following extract from the letter which served the demands on each Defendant namely, "*As the Borrower has failed repay (sic) the Principle (sic) Sum and interest our*

clients are entitled to demand full and immediate payment from you under the terms of the guarantee and indemnity in the Loan Agreement."[19]

[23] This argument is not plausible and I agree with the Plaintiffs' submission that this is not evidence of such an election. Firstly the wording neither refers to clause 2.2, nor does it make an assertion consistent with the wording of that clause. The Plaintiffs have not referred to clause 2.2 anywhere in the demands or the covering letters. Although there are references to particular clauses of the loan agreement in various places in the demands and the letters, none refer to clause 2.2 specifically. Moreover the extract relied on by the Defendants and quoted above clearly refers only to a demand against the guarantors and clause 2.2 refers to the obligations of the Debtor.

[24] Even if I could be satisfied that the Plaintiffs had made an election pursuant to clause 2.2 it does not follow that that alone should deprive the Plaintiffs of an order for summary judgment for the principal sum alone. The only basis put for that is the estoppel argument I have referred to earlier. However even assuming there was evidence of an election pursuant to clause 2.2 there remains a question as to whether that would amount to the representation required for estoppel purposes. I have doubts about that but in any case, a detriment must be shown to flow from the representation and most importantly, I have no evidence of the detriment.

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[19] Affidavit of Collins, p1-2 of Annex JDC-1

[25] As discussed in the authorities referred to above, it is clear and well established that a defendant resisting a summary judgment application has an onus to provide, with sufficient detail and particularity, affidavit evidence to support the proposition that there is a serious question to be argued at trial. The only evidence produced on the application by the Defendants is that contained in the affidavit of Jeffrey David Collins sworn 11 September 2015. This largely annexes the loan agreement and copies of the demands and makes a number of assertions which are unsupported by any evidence. For example, although the Defendants rely on a possible disadvantage in respect of paying or refinancing their liability, there is no evidence as to their financial position, their available funds, any attempt made to obtain finance, how the different calculations of interest effect that ability and the like.

[26] Although much has been asserted by way of submissions as to disadvantages in securing finance and other such vague assertions, that is not evidence. Without the necessary evidence the estoppel argument therefore has no basis and cannot be contemplated. Also, although the Defendants assert that they have treated the demands as a claim for the total amount payable pursuant to the loan agreement and not just the principal sum, there is likewise no evidence to indicate what the relevance of this is, or how that makes the difference or how that disadvantages them. The Defendants' evidence overall falls far short of the requirements referred to in subparagraphs 3, 4 and 5 of paragraph 9 above.

[27] The challenge on this basis also fails.

[28] Lastly the Defendants rely on the Court's residual discretion. They submit that given the potential unfairness to the Defendants arising from what they claim is uncertainty concerning the amount of interest due, the Court should dismiss the application in the exercise of its discretion.

[29] As is often the case, the exercise of a judicial discretion involves a balancing exercise and the conduct of the Defendants is a relevant consideration. In that respect, as Mr Christrup pointed out, since January 2015 the Debtor, as well as the Defendants (the Defendants are directors of the Debtor), have been aware that the principal sum at least is due. However no part of that has been paid and there is no evidence that they have done anything at all about paying even what they concede is owing.

[30] Further, although the Defendants claim an inability to refinance, which claim is unsupported by any evidence, there is no evidence produced that the determination of interest by the court is imperative for that purpose. Moreover, despite that the Defendants have not produced any evidence to contradict the Plaintiffs' evidence as to non-payment, the Defendants have not admitted that in their Defences. That strongly suggests that the position the Defendants take is purely a delaying tactic.

[31] I draw some support for that from the fact that the Defendants have raised matters on the application for the first time and have not pleaded those

matters. I am of the view that they are matters which could have been pleaded if they were bona fide and not recent invention.

[32] Lastly in my view the reason given by the Defendants for not doing anything at all about payment i.e., that they needed to know the actual and final amount of their liability before assessing their capacity to meet that liability, lacks credit.

[33] I do not agree that the Court's discretion should be exercised in favour of the Defendants based only on their perceived uncertainty concerning the calculation of a part of the interest claimed and in circumstances where the Plaintiffs do not seek any component for interest in the order for summary judgment. I therefore decline to exercise my residual discretion in favour of the Defendants.

[34] I also note that rule 22.02 allows for summary judgment for part of the claim. In *Costain Australia Ltd v State Superannuation Board*,[20] a case involving a debt arising from the sale of goods, the defendant (the buyer) claimed the common law right to a reduction on account of breaches by the plaintiff seller. The approach taken in *Costain* was to assess the maximum possible value of the defendant's damages and to then give summary judgment to the plaintiff for the balance, leaving the trial solely to the question of the assessment of the precise assessment of the damages flowing from the plaintiff's breaches.

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[20] Unreported, Supreme Court of New South Wales, Brownie J, 22 February 1991.

[35] There is clearly scope for the application of that approach here. The Defendants do not argue that no interest is payable and rightly concede that some interest is payable. From the point of view of the Defendants, the best case scenario would result in a reduction of the amount currently claimed by the Plaintiffs of the order of $2.3 million. Likewise, the Defendants do not argue that the principal sum is not payable. That could not change irrespective of whether there was a finding of invalidity of the demands. All the Defendants argue is that it is not appropriate to separate judgment for the principal sum from the determination of interest, and I reject that proposition. Following the approach in *Costain*, the Plaintiffs may have been able to secure an order for summary judgment for the principal sum plus interest calculated according to the best case scenario for the Defendants, resulting in judgment of approximately $8.7 million.

[36] In the end, in my assessment, in respect of at least the principal sum referred to in the loan agreement, there is no serious question to be tried and the Defendants have no defence to that part of the claim. There is therefore no basis to refuse summary judgment. For the aforesaid reasons I am prepared to make an order in terms of the Plaintiffs' summons.

[37] There will be summary judgment for the Plaintiffs for the sum of $5 million and an order that the balance of the Plaintiffs' claim proceed to trial.

[38] I will hear the parties as to costs and any other ancillary orders.