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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA

No 18 of 1996

BETWEEN

TERRITORY SHEETMETAL PTY LTD

AND:

THE CORPORATIONS LAW

BETWEEN:

EC STEED AND PL SIMPSON

Plaintiffs

AND:

TERRITORY SHEETMETAL PTY LTD

Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 7 May 1996)

There is before the Court a document in the form of an Ex Parte Summons filed on behalf of the plaintiffs. It is brought in these proceedings which are for the winding up of the defendant on the application of the plaintiffs. That winding up application was to be heard on 28 March 1996, and on that day the solicitor for the plaintiffs appeared before the Master along with a solicitor who was noted as appearing for the defendant. There is no Appearance filed on behalf of

the defendant. At that time the proceedings were adjourned to 26 April 1996, apparently by consent, and there was "filed" a document in the form of a "Security Deposit Guarantee" (the Guarantee) dated 29 February 1996. It was limited to a maximum sum of \$20,000. It appears that that was done pursuant to arrangements made between the parties designed to resolve their differences (a claim arising out of a building dispute) and to bring an end to the proceedings.

The Deed evidencing the arrangement is undated, but by recital "I", it is said that the defendant had "lodged with the Supreme Court of the Northern Territory a Bank Guarantee in the sum of \$20,000.00". There is no order of the Court relating to any such security. The arrangement envisaged the defendant carrying out works on the residential premises of the plaintiffs to enable the building contract between them to be completed to the satisfaction of the plaintiffs.

The Deed provides (inter alia):

1. "The parties agree to settle upon the debt the subject of the Summons for Winding Up on the terms" set out therein.
2. The defendant was to complete the work by 20 April 1996 to the satisfaction of a Mr Mair, who apparently has authority to issue occupancy permits

under the *Building Act*, which was the outstanding matter under the building contract.

3. "It is hereby acknowledged and warranted by Territory Sheetmetal that in the event of any default of its obligations under this Deed right and interest in a Commonwealth Bank Security Deposit Guarantee made out in favour of the Supreme Court of the Northern Territory by Sheetmetal shall be and is hereby transferred to and for the benefit of the Owners.

Territory Sheetmetal hereby irrevocably appoints the Owners jointly and severally immediately on or at any time after any breach or default of this deed by Territory Sheetmetal its true and lawful attorney in respect of the Commonwealth Bank Security Deposit Guarantee lodge with the Supreme Court of the Northern Territory and hereby entitles the Owners the right to demand immediate payment from the Supreme Court of the Northern Territory as favouree of the said Bank Guarantee and without further reference to Territory Sheetmetal and notwithstanding any notice, action or proceeding given or brought by Territory Sheetmetal against the Owners."

4. Matters to be attended to assuming the arrangements were carried into effect.

The plaintiffs allege, in an affidavit sworn and filed by their solicitor, that the defendant has failed to complete the works in accordance with the arrangements and now seeks the following orders:

- "1. Declaration the Defendant is in default of the Deed.
2. Order the Registrar demand \$20,000.00 as favouree of a Security Deposit Guarantee from the Commonwealth Bank dated 29 February 1996.
3. Order the Registrar pay the Plaintiff the \$20,000.00 forthwith upon the demand pursuant to paragraph 2 having been satisfied pursuant to paragraph 2.

4. Alternatively, an order the Registrar deliver up the Security Deposit Guarantee to the Plaintiffs; and
5. Declaration the Plaintiff may make demand upon the Commonwealth Bank on the Security Deposit Guarantee as favouree or alternatively pursuant to power of attorney under the Deed.
6. Costs;
7. Such further Order as this Honourable Court sees fit."

The Guarantee reads:

"Commonwealth Bank

**Bank Guarantee
Security Deposit Guarantee**

**To The Supreme Court of the Northern Territory
("Favouree")**

**Security Deposit by Territory Sheetmetal Pty Ltd ACN 009
634 333 ("Customer")**

At the request of the abovementioned Customer and in consideration of the abovementioned Favouree at the request of the Commonwealth Bank of Australia ACN 123 123 124 (hereinafter referred to as the Bank) dispensing with the lodgement by the Customer of the Security Deposit for **Action 18 of 1996 between EC Steed and PL Simpson versus Territory Sheetmetal Pty Ltd ACN 009 634 333** the Bank unconditionally undertakes to pay on demand any sum which may from time to time be demanded by the Favouree to a maximum aggregate sum of **Twentythousanddollars (\$20,000.00)** (Amount of Security Deposit).

This undertaking is to continue until a notification has been received from the Favouree either that the Security Deposit is no longer required by the favouree or until payment to the Favouree by the bank of the whole of the said sum or such lesser sum as may be required by the Favouree. Should the Favouree notify the Bank that it desires payment to be made to it of the whole or any part of the said Security Deposit, it is unconditionally agreed that such payment or payments will be made to the Favouree forthwith without further reference to the Customer and notwithstanding any notice given by the Customer to the Bank not to pay same.

Provided always that the Bank may at any time without being required to do so pay to the Favouree the Security Deposit less any amount it may have already paid hereunder and thereupon the Bank's liability under this undertaking shall immediately cease and determine.

The benefit of this guarantee is personal and not capable of assignment.

Dated at ADELAIDE this 29TH
day of FEBRUARY 1996"

It purports to have been signed for and on behalf of the Bank.

The defendant was not present at the hearing of the application on the Ex Parte Summons, but it seemed to me that the plaintiff faced some difficulties both procedural and substantive.

Ex Parte Summons

The summons was issued in the winding up proceedings, but the relief sought had little to do with those proceedings; it arises out of the settlement evidenced by the Deed. In effect, the summons seeks to have the Court take action in regard to the Guarantee given by the Bank. If there is any right in the plaintiffs in relation to the matters it arises out of the Deed, even though the winding up proceedings are still on foot (they are presently adjourned to 2 May 1996, presumably to enable the arrangements between the parties to be carried out). A summons (ex parte or otherwise) is not the appropriate way to seek the relief.

No Service on the Defendant

Whatever the appropriate form of originating process, there is no reason why the Court should disregard the ordinary rules as to service, where, amongst other relief, there is sought a declaration that the defendant is in default of performance under the terms of the Deed. The affidavit of the plaintiffs' solicitor goes to the alleged failures of the defendant to perform its obligation. The solicitor for the plaintiffs, who appeared on the application, indicated that even if the Court was not prepared to make the declaration sought (in the absence of the defendant) it could nevertheless proceed to make appropriate orders in relation to the Guarantee without regard to any such default, and referred to *Malaysia Hotel (Aust) Pty Ltd v Sabemo Pty Ltd*, Supreme Court of New South Wales (Court of Appeal) 12 March 1993. The facts in this case are quite different from those in that case.

Form of Guarantee

On its face, see above, the document does not reflect reality. It suggests that the Bank made a request to the Court that the Court dispense with lodgement by the defendant of "the Security Deposit for Action 18 of 1996". There is no evidence going to any of that, no request from the Bank, no dispensation by the Court, and no requirement that the defendant lodge any such security deposit. There has been no other suggestion as to what would support any demand by the Court on the Bank for payment to it of the sum of \$20,000.

The Court does not and can not carry on business or enter into transactions of the type envisaged in the Guarantee, and ought not to allow itself to be used in the manner sought by the plaintiffs.

The application is dismissed.
