Armstrong & Anor v Alexandra Group Holdings Ltd & Ors [2015] QDC 96 (6 May 2015)

Last Updated: 8 May 2015

DISTRICT COURT OF QUEENSLAND

CITATION:	*Armstrong & another v Alexandra Group Holdings Ltd & others* [2015] QDC 96
PARTIES:	**ROBERT JOHN ARMSTRONG AND NORMA MAY ARMSTRONG** (plaintiffs) **v** **ALEXANDRA GROUP HOLDINGS LTD** **(ACN 146156167)** (first defendant) **and** **KAREN MARIE KIRBY AND MICHAEL JOHN KIRBY** (second defendants)
FILE NO:	BD901/2013
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2015 with final submissions received on 22 April 2015
JUDGE:	Kingham DCJ
ORDER:	Alexandra Group Holdings Ltd must pay the plaintiffs the sum of $384,358.78 (including all interest to this day) and must pay the plaintiff's costs of and incidental to these proceedings on an indemnity basis which costs are fixed in the amount of $53,762.98.
CATCHWORDS:	CIVIL – PROCEDURE –TRIAL – where first defendant did

not appear – where plaintiffs wished to proceed in its absence – where no satisfactory explanation given for failing to appear – where trial proceeded in absence of first defendant
CIVIL – CONTRACT- ENFORCABILITY OF AGREEMENT – where the first defendant entered into a loan agreement with the plaintiffs – where the first defendants defaulted on the loan - where there was disagreement between the parties regarding the methodology with which interest would be calculated because of conflict or ambiguity in the terms of the loan – where concluded this had been resolved by agreement when the plaintiffs agreed to a variation to the loan document - where an award was made on the basis of the agreed variation – where costs awarded to the plaintiffs on an indemnity basis as stipulated in the loan

COUNSEL: J D Andrews for the plaintiff
No appearance by any of the defendants

SOLICITORS: Lynch Andrews for the plaintiff

[1] Mr and Mrs Armstrong have claimed monies owed to them by Alexandra Group Holdings Ltd under a loan agreement for which Mr and Mrs Kirby were guarantors. The trial was listed for four days commencing on 20 April 2015 and proceeded against Alexandra Group Holdings in the absence of any representative. Because of this unusual proceeding before turning to the merits of the action it is necessary to spend some time on procedural matters.

[2] At the time appointed for the trial to commence there was no appearance for any of the defendants. Mr Andrews, the solicitor for the plaintiffs, brought to my attention that a trustee in bankruptcy had been appointed for Mr Kirby, one of the second defendants and that, on the weekend immediately past, Mrs Kirby had filed an application with respect to her status. Given this, Mr and Mrs Armstrong did not wish to proceed in the claim against Mr and Mrs Kirby at that time, having not sought leave to do so.

[3] Mr and Mrs Armstrong did wish, however, to proceed against the company. Mr Andrews provided a notice that the company was acting in person signed by Mrs Kirby on 17 March 2015. It seems the company provided this to Mr and Mrs Armstrong but did not ever file the document. I was provided with other correspondence that indicated the company's former representatives no longer act for the company. The correspondence demonstrated that Mrs Kirby, a director and secretary of Alexandra Group Holdings, was aware of the trial listing. That is evident from an email from Mrs Kirby to the Courts Civil List Manger, my associate and Mr Andrews sent this morning. In it, Mrs Kirby advised that action had been taken to liquidate the company and associated entities. She also stated that she is outside of Australia without legal representation. She asked for advice in relation to the matters and apologised for her lack of understanding.

[4] Mr Andrews tendered an ASIC search of the company which demonstrated no impediment to the matter proceeding against the company.

[5] There has been an unfortunate procedural history for this claim. When the plaintiff's application for summary judgment was refused in October 2013 the judge who heard that application directed that the matter should be determined speedily. Despite this repeated requests by the plaintiffs for the defendants to sign the request for a trial listing were ignored and, on a previous occasion, I directed that the matter should be listed without the defendant's signature on that request. Given the defendant's prior conduct in these proceedings and in the absence of any application to adjourn the trial or any evidence that proceedings against Alexandra Group Holdings could not proceed, I determined that the trial as against Alexandra Group Holdings could continue as listed.

[6] Neither Mr nor Mrs Armstrong appeared at the hearing due to serious medical conditions described by their son, Stephen Armstrong who did appear. Mr Armstrong holds their enduring

power of attorney and is their litigation guardian. He has also been involved throughout with both the loan transaction and this litigation. He filed an affidavit attaching letters from his parents' doctor confirming their inability to attend court because of their medical conditions.

[7] At times Mr Armstrong has been the lay representative for his parents. He appeared personally on the application to dispense with the defendants' signature on the request for a trial date. He was conscious of the requirements of the rules and provided the relevant and necessary material.

[8] Mr and Mrs Armstrong swore an affidavit in support of their application for summary judgment in 2013. Their son, Stephen, was able to confirm the purpose for which the affidavit was filed and its accuracy because of his personal knowledge of the transaction and because of the role he has played in assisting and advising his parents throughout.

[9] The defendants did not file material which contested the merits of the claim made by Mr and Mrs Armstrong on a factual basis. Its defence raised a legal argument about the enforceability of the agreement because of an inconsistency alleged between clause 2.1 of the loan agreement, which prescribes the basis for calculation of interest, and clauses 3.1 and 3.2, which define the term of the agreement, and items in the schedule dealing with the monthly repayment figure and the repayment date. In their defence, the defendants alleged they had made more payments than were pleaded by the plaintiffs. However, those assertions are adopted in the expert report relied upon by the plaintiffs for calculation of the amount owing under the loan agreement. Given there was no apparent contest, then, about the basis upon which the plaintiffs sought judgment except for legal argument about the enforceability of the loan agreement, I ruled that the matter could proceed in the absence of Mr and Mrs Armstrong.

[10] Turning to the merits of the claim, it is based on a loan agreement signed on 23 February 2012. The agreement was reached when the plaintiffs accepted an investment financing proposal made by Alexandra Group Holdings sometime before 23 February 2012. Exhibit RNA2 to the plaintiffs' affidavit of 8 July 2013 sets out the amount of the loan ($300,000), the term of the loan (three years), the interest rate (12%) and the monthly repayments ($11,333). The day before it was executed, Mr Armstrong spoke with Mr Hartley, an agent for Alexandra Group Holdings, about the draft loan agreement. Mr Armstrong specifically noted that the draft did not include the term that there would be 36 payments of $11,333 over the three year term of the loan. Mr Armstrong gave evidence that that was subsequently included in the form of the loan agreement his parents executed on 23 February 2012.

[11] Very early in the loan term, Alexandra Group Holdings fell into arrears. In a conversation more than a month after the loan agreement was signed, Mr Hartley raised with Mr Armstrong (Mr Stephen Armstrong) that potential inconsistency between clause 2.1 of the loan agreement, which set out a methodology by which interest was to be calculated, and the requirement for 36 monthly payments of $11,333. Assuming interest was not capitalised, the repayment schedule would have the loan paid out before the three year term. Mr Hartley raised two options for the Armstrongs to consider. The first was that the loan was an interest only loan, in which case they would receive the interest component only each month and the loan amount at the end of the loan term. The other was that they receive monthly payments of $11,333 but that the loan would be paid out earlier than the three year term. Stephen Armstrong was then about to be hospitalised in relation to heart problems and reiterated that the agreement was 36 payments of $11,333.

[12] On 11 May 2012, after the Armstrongs had informed Alexandra Group Holdings they were in default under the loan agreement, a solicitor for the company wrote to the Armstrongs and suggested the figure for monthly repayments was a mutual calculation error and suggested a deed to rectify the error. Stephen Armstrong rejected that suggestion and noted the funding proposal outlined the monthly repayment. Subsequently, however, Mr and Mrs Armstrong, through an email sent by their son, agreed to payments of $9,964.29 over 36 months, representing a fixed rate of 12%. Alexandra Group Holdings, however, did nothing to vary the documents.

[13] The company now seeks to rely upon the apparent ambiguity in the loan agreement as a basis for avoiding any obligations it might have under its agreement with the Armstrongs. To the extent that there was any ambiguity in their contractual dealings, it seems to me that this was resolved by agreement on 24 May 2012 when Mr and Mrs Armstrong accepted the variation to the loan documentation offered or proposed by the solicitor for the company.

[14] It is uncontroversial that the general approach taken by the courts to interpretation of contracts is to give effect to the parties' agreement. If a contract contains contradictory provisions, the court's task is to resolve the conflict, looking at the contract as a whole.[1] If confronted by unclear language, the courts will prefer to interpret an ambiguous clause to provide for a sensible rather than irrational meaning. Sometimes, a court must choose between two equally tenable but mutually exclusive meanings.

[15] However, on the materials placed before the court, it seems to me that the parties both identified and resolved the apparent inconsistency between the standard conditions of the loan agreement and the special conditions outlined in the schedule, in a sensible way that conformed with the essential structure of the loan agreement – an advance of $300,000 for a three year term at a 12% interest rate.

[16] The affidavit material from Mr and Mrs Armstrong and their son Stephen Armstrong establishes that the loan funds were advanced. Further, assuming repayments of $9,964.29, the company was in default, at the latest, by December 2012 when no monthly payment was made. Mr **Ponsonby**, a forensic accountant, provided two reports to the court. In his most recent report dated 9 February 2015, he calculated the value of the loan on a principal and interest basis at 12% at $399,502.29.[2] He recorded payments as pleaded by the company of $85,131.26, leaving a sum of $314,371.03 outstanding under the loan agreement, before accounting for the calculation of default interest. There can be no issue, therefore, that Alexandra Group Holdings is in default under the loan agreement.

[17] The only question remaining is calculation of the judgment sum. In his supplementary report, Mr **Ponsonby** includes a schedule of calculation of interest and balances for interest charged in arrears on daily balances at the rate of 12%. This methodology is consistent with the terms of the loan agreement as advocated by or on behalf of Alexandra Group Holdings in correspondence with the plaintiffs and is consistent with the resolution reached in May 2012. In schedule 2, Mr **Ponsonby** calculated default interest on the basis that the company was in default from April 2012. I have noted that the company was certainly in default by December 2012. Given the compromise reached in May 2012, there could be some argument that the company was not in default at an earlier time. However, the only material I have about this matter is from Mr and Mrs Armstrong. The reports prepared by Mr **Ponsonby** were provided to Alexandra Group Holdings or their representatives. It is, therefore, uncontested evidence before the court. In the absence of evidence or argument to the contrary, I accept Mr **Ponsonby**'s calculations of the amount outstanding, including default interest.

[18] Mr and Mrs Armstrong also seek costs on an indemnity basis. That is provided for under the loan agreement itself by clause 2.3. It is not, therefore, a matter of discretion, but enforcement of a contractual right. Mr Armstrong gave evidence of the amounts that his parents had incurred, and which he had paid, for professional fees and disbursements. He also confirmed the terms of the retainer of Mr Andrews which provided for a minimum payment for preparation and representation at a trial of up to two days in length. The total costs proved by the evidence are $53,762.98. I will award costs in that sum.

[19] I order Alexandra Group Holdings Ltd to pay the plaintiffs the sum of $384,358.78 including all interest to this day and to pay their costs of and incidental to these proceedings on an indemnity basis which costs are fixed in the amount of $53,762.98.

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[1] *Australian Guarantee Corp Ltd v Balding* [1930] HCA 10; (1930) 43 CLR 140 at 150-3.

[2] Report of Steven David **Ponsonby**, filed 3 March 2015, at p 6.
