

JUDGMENT : Master Harrison : New South Wales Supreme Court : 3rd March 2004

- 1 By summons filed 29 August 2003 the plaintiff seeks firstly an order that the default judgment of Registrar Dafkovski of the Downing Centre Local Court dated 19 May 2003 be set aside; secondly, an order that the court grant leave to the plaintiff to file its original notice of grounds of defence dated 16 May 2003; thirdly, an order that the court grant leave to the plaintiff to file an amended notice of grounds of defence and a notice of cross-claim; fourthly, an order that all previous costs orders against the plaintiff be set aside; fifthly, costs. The plaintiff relied on the two affidavits of Neil O'Shea sworn 12 September 2003 and 12 November 2003 and the two affidavits of Dajana Malnersic sworn 28 August 2003 and 7 November 2003. The defendant relied on the two affidavits of Ralph Sydney Davis sworn 27 October 2003 and 11 November 2003.
- 2 The plaintiff/applicant (defendant in the local court proceedings) is MD Webster Constructions Pty Limited. The defendant/respondent (plaintiff in the local court proceedings) is Rhinosteel Pty Limited. For convenience, I shall refer to MD Webster Constructions Pty Limited as the plaintiff and Rhinosteel Pty Limited as the defendant.

Grounds of appeal

- 3 The grounds of appeal relied on by the plaintiff as stated in the document filed 22 September 2003 for the plaintiff entitled 'Statement of Grounds pursuant to part 51Br8' are that by refusing to set aside the defendant's default judgment in Downing Centre Local Court Proceedings No.3347 of 2003 on 19 May 2003, the Registrar erred in law in that he failed to take account of firstly, the Plaintiff's outstanding request for further and better particulars of the Defendant's Statement of Liquidated Claim, which were served on 12 May 2003 and prior to 19 May 2003, being the date on which default judgment was sought; secondly, that a copy of the Plaintiff's draft Notice of Grounds of Defence was sent to the Defendant prior to 19 May 2003, being the date on which default judgment was sought; thirdly, the cause of action pleaded in the Plaintiff's Notice of Grounds of Defence; fourthly, that if the Defendant had provided replies to the request for particulars. The Plaintiff would have amended its *draft* defence to refer to the failure of the Defendant to correctly serve its payment claim under the **Building and Construction Industry Security of Payment Act 1999** (NSW) (the Act); fifthly, the general proposition that a defendant should be able to know the case against it, to be able to meet it".
- 4 The plaintiff also relies on the following further grounds, namely sixthly, the Defendant's Statement of Liquidated Claim pleads no valid cause of action and is inadequately particularised; seventhly, the Defendant failed to comply with the requirements of the Act when issuing its payment claim; and eighthly, the Plaintiff and/or Andrew Webster have a cross-claim against the Defendant which exceeds the amount claimed by the Defendant.

The Local Court proceedings

- 5 There is no transcript of the proceedings before the Registrar. Both parties put on evidence as to what occurred. There are some disputed areas, such as to whether the submissions concerning the Act were put to the Registrar. As I cannot reconcile this dispute, this ground of appeal fails. The main issue to be determined is whether the default judgment should be set aside.
- 6 The contract between the plaintiff and defendant is Quote No. 1656. On 19 February 2002 the quote was accepted and signed by Andrew James Webster. This document does not refer to the names of the parties. On 18 March 2002, the defendant varied the contract to increase the price to include a beam they had failed to include in the original quote. On 4 April 2002 the defendant issued a payment claim/tax invoice in the sum of \$16,335.00 to the plaintiff. The defendant addressed its documents to MD Webster Constructions Pty Limited.
- 7 On 1 April 2003 the defendant filed a statement of liquidated claim against the plaintiff in Local Court (Civil Claims) proceedings 3347 of 2003 claiming the sum of \$16,335.00 plus interest and court fees. On 19 May 2003, the defendant obtained default judgment against the plaintiff for the sum of \$18,063.71.
- 8 On 24 June 2003 the plaintiff filed a notice of motion to set aside the default judgment. On 7 August 2003, the motion to set aside the judgment was listed before Registrar Dafkovski in the Local Court (Civil Claims) Downing Centre Sydney. Dajana Malnersic, solicitor, appeared for the plaintiff. Ralph Sydney Davis, solicitor, appeared for the defendant. No record of the hearing of the motion was made. Registrar Dafkovski dismissed the notice of motion.

The Law

- 9 The principles according to which this court is to decide whether the Magistrate's discretionary decision to set aside a default judgment in favour of the defendant is correct are stated definitively in a short passage in the joint judgment of Dixon, Evatt and McTiernan JJ in **House v The King** (1936) 55 CLR 499 at 504-505. It is, I think, useful to re-state them as follows: *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."*

- 10 The authorities on setting aside default judgment are *Evans v Bartlam* (1937) AC 473 at 489; *Vacuum Oil Pty Limited v Stockdale* (1942) 42 SR 239; *Cuttle v Brand* (1947) 64 WN 96 at 97; and *Adams v Kennick Trading (International) Ltd & Ors* (1986) 4 NSWLR 503. From these cases clear principles emerge. These include: Bona fide defence on the merits, an adequate explanation of delay as matters relevant to, but the latter not finally determinant of, the exercise of the discretion which is conferred upon a judicial officer in determining whether or not to set aside a judgment and a duty to do justice between the parties. As relevantly noted by Priestley JA in *Cohen v McWilliam* (1995) 39 NSWLR 476, it is a fundamental duty of the court to do justice between the parties.
- 11 In the plaintiff's verified defence it denied that it was a party to the alleged contract. However, the plaintiff did not furnish any explanation as to why the contract and other documents were addressed to it.
- 12 On the statement of claim in the local court, the defendant nominated its address to be 319B Slopes Road, Kurmond, NSW 2757. The plaintiff's solicitor forwarded subsequent correspondence including the defence to the defendant's old Prestons address and fax number. Hence, the defendant did not receive that correspondence until after default judgment had been entered. Grounds of appeal 1, 2, 4 and 5 fail. Grounds 6 to 8 also fail.
- 13 It is my view that it was open to the Registrar on the evidence before him to determine that the plaintiff had no bona fide grounds of defence. It was therefore open to the Registrar to refuse to set aside the default judgment.
- 14 The appeal is dismissed. The decision of Registrar Dafkovski of the Downing Centre Local Court dated 19 May 2003 is affirmed. The plaintiff's summons filed 29 August 2003 is dismissed.
- 15 Costs are discretionary. Costs normally follow the event. The plaintiff is to pay the defendant's costs as agreed or assessed.

Orders

- 16 The court orders that:
- (1) The appeal is dismissed.
 - (2) The decision of Registrar Dafkovski of the Downing Centre Local Court dated 19 May 2003 is affirmed.
 - (3) The plaintiff's summons filed 29 August 2003 is dismissed
 - (4) The plaintiff is to pay the defendant's costs as agreed or assessed.

Mr M Pesman (Plaintiff) instructed by Ms D Malnersic of NRG Legal
Ms P. M. Sibtain (Defendant) instructed by Mr R Davis of R S Davis & Davis