JUDGMENT : McGill DCJ. DISTRICT COURT OF QUEENSLAND : 25th May 2007

[1] This is an appeal from a decision of a magistrate who on 1 December 2006 ordered that an order made by a Deputy Registrar on 9 August 2006 be quashed, the order being a nullity because of lack of jurisdiction, and directed pursuant to s 40 of the Commercial and Consumer Tribunal Act 2003 ("the Act") that the plaintiff restart the proceeding before the Commercial and Consumer Tribunal. The decision of the magistrate was based on s 40 of the Act, which provides so far as is relevant: *"If a proceeding is started in a court and the proceeding could be heard by the tribunal under this Act, the court must order the entity who started the proceeding to start the proceeding again before the tribunal under s 31 ."*

[2] The balance of the section is irrelevant for present purposes, though it may be noted that by subsection (5) any time between when a proceeding is started and when an order is made under (relevantly) subsection (1) does not count for the purposes of any time limit fixed for the start of the proceeding.

[3] What happened in this case was that a proceeding was commenced in the magistrates court by the appellant. The claim was served, no notice of intention to defend was filed on behalf of the respondent, and default judgment was signed on 9 August 2006 by a deputy registrar. On 1 September 2006 an application was filed by the respondent seeking to have the default judgment set aside under rule 290, and in the meantime that enforcement of the default judgment be stayed under rule 800. The affidavit in support of that application deposed to the defendant's having been served on or about 7 July 2006, and to the defendant having a prima facie defence and counterclaim; a proposed notice of intention to defend and defence and counterclaim were exhibited.

[4] The plaintiff's claim was for $12,397.77, as money due and owing for goods and services provided by the plaintiff to the defendant. A statement of claim revealed that this involved building work in connection with the construction of a particular property, and it is not disputed by the appellant that the claim was a building dispute for the purposes of the Queensland Building Services Authority Act 1991, and that the Commercial and Consumer Tribunal did have jurisdiction to entertain the dispute. There was therefore a dispute to which s 40 of the Act applied.

[5] It was submitted on behalf of the appellant that the effect of s 40 was not to deprive the ordinary courts, relevantly the magistrates court, of jurisdiction to deal with the matter, but simply to require the court to deal with the matter in a particular way. Accordingly, the conclusions that the court had no jurisdiction, and that the judgment was a nullity, were wrong. I agree with that submission. There is nothing in s 40 which provides in terms that the ordinary courts do not have jurisdiction in a matter where the tribunal has jurisdiction. The effect of s 40 was considered by the Court of Appeal in ***Fraser Property Developments Pty Ltd v Sommerfield*** [2005] QCA 134, but it was not said in that case that its effect was to deprive the ordinary courts of jurisdiction. The effect of the decision was to the contrary.

[6] Since the ordinary courts covered by s 40 include the Supreme Court, there is engaged the strong presumption that the legislative intention was not to deprive the Supreme Court of jurisdiction: Berowra Holdings Pty Ltd v Gordon (2006) 80 ALJR 1214 at 1222. That decision is also authority for the proposition that even when a proceeding has been commenced in a court in circumstances where there was a statutory prohibition on commencing such a proceeding, the proceeding so commenced is not a nullity. Section 40 does not amount to a statutory prohibition on commencing a proceeding; indeed, it assumes that it is possible to commence a proceeding in an ordinary court, and therefore possible for such a proceeding to be validly commenced. The fact that the statute provides that where such a proceeding is commenced the court is required to make a particular order does not have the effect of depriving the court of jurisdiction.[1]

[7] It appears the jurisdictional point was raised by the magistrate, who referred to the Fraser Property Development case, made the finding that the matter was a building dispute for the purposes of the Act, and said: *"The result therefore is that as the Tribunal is empowered to deal with the dispute, this tribunal[2] is not by virtue of s 40 of the CCT Act ... It seems futile and beyond power to consider the defendant's application to set aside judgment in circumstances where that judgment from the registry of this court is beyond jurisdiction. In setting aside the deputy registrar's judgment of 9 August 2005, I do so, in an administrative sense, to correct the court's record, by declaring that order a nullity. Specifically, I have not and cannot on reflection embark upon a consideration of the merits of the defendant's application to set aside judgment."*

[8] In my opinion, that reasoning was incorrect. The effect of s 40 is not to deprive the ordinary courts of jurisdiction, but simply to require that, when a matter came before them, they deal with it in a particular way. The magistrate referred to an unreported decision of Dutney J in ***Keech v Hennessy***, apparently given in Rockhampton on 31 January 2005. Although apparently copies were made available to the parties by the magistrate, no-one was able to provide me with a copy, and I have not been able to lay my hands on one. Nevertheless, it is sufficient for me to say that if his Honour's conclusion was to the contrary, and if he was of the view that a proceeding in a court to which s 40 applied was a nullity, then I would respectfully differ from that conclusion, which is not binding on me.

[9] The respondent did not seek to support the reasons given by the magistrate for arriving at the decision arrived at, but nevertheless submitted that the decision was correct. The respondent relied on the fact that the magistrate

1 ***F. J. Bloemen Pty Ltd v Commissioner of Taxation*** (1981) 147 CLR 360 esp at p 376.
2 Presumably the magistrates court.

had made an order setting aside the judgment, and submitted that, once that had occurred, it as appropriate to make the order, which was also made, required by s 40. The position was simply that, once the judgment was set aside, the court was bound to apply s 40(1) and in those circumstances make an order putting an end to the proceeding in the court. Accordingly the magistrate had ultimately made the appropriate order, albeit for the wrong reasons.

[10] The respondent's submission was that, in circumstances where the proceeding was one to which s 40(1) applied, it followed that it as inappropriate for there to be a default judgment, so any default judgment should be set aside ex debito justitiae. Alternatively, it was submitted that although there had been a judgment in the proceeding, it was a default judgment and therefore under the rules liable to be set aside, so that the existence of the default judgment did not mean that there was not a dispute, and s 40(1) still applied to that dispute, so that when the application to set aside the default judgment came before the magistrate, the magistrate was still bound by s 40 anyway to order that the proceeding be started again before the tribunal, and in those circumstances it was also necessarily appropriate to set aside the judgment.

[11] The consequence of the decision of the High Court in ***Berowra Holdings v Gordon*** (supra) for a case where there had been a default judgment was the subject of consideration in a case argued with that one, ***Brighton Und Redfern Plaster Pty Ltd v Boardman*** (2006) 80 ALJR 1239. In that case, the proceeding which had been commenced contrary to the requirements of the New South Wales statute had produced a default judgment before the point was taken by the defendant. On appeal to the High Court, the submission was advanced that the effect of the statute was that the proceedings which had been commenced were void ab initio and therefore could not lead to a valid judgment, but that submission was rejected by the court: p 1242.

[12] Kirby J in a separate concurring judgment at p 1248 analysed the position in this way: *"It was necessary for the appellant, if it wished to invoke the requirements of [the New South Wales statue] to plead it in its defence. If it found itself out of time for relying on that subsection in its defence, it was obliged to secure the leave of the District Court to file a relevant defence out of time. Necessarily, that need, in the absence of nullity or invalidity, engaged the powers and discretions of the primary judge of the District Court who was asked to permit the belated ground for defence. Such powers and discretions had to be exercised according to law and with regard to the relevant considerations. But it was not obligatory for the primary judge to permit the defence to be raised belatedly. Whether that should be done would depend on all the circumstances of the case."*

[13] In my opinion, the same applies in the present case. Once there was a judgment, the position was different so far as s 40 was concerned: s 40 no longer applied, because the preconditions for the application of that section no longer existed. One of the preconditions is that *"the proceeding could be heard by the tribunal",* and the tribunal's jurisdiction under the relevant statute depended upon the existence of a *"building dispute"* as defined in that statute. There were various requirements which could be satisfied in order to create a *"building dispute",* not all of them necessarily applying in all cases, but one requirement which did have to apply in all cases was that there had to be a dispute between the parties.

[14] The effect of a judgment of a court is to put an end to any dispute between the parties, because so long as that judgment stands the rights of the parties the subject of the dispute are merged in the judgment, and the outcome of the dispute is defined by the judgment.[3] There may be subsequently a dispute as to whether that judgment should stand, pursued either by way of an application to set it aside or by way of appeal, but unless and until the judgment is set aside one way or another, it stands and resolves what had previously been a dispute between the parties. Accordingly, so long as a former dispute has been resolved by judgment, there is no longer anything which could properly be submitted to the tribunal and heard and determined by the tribunal under the legislation governing its operation, and therefore s 40(1) does not apply.

[15] Because s 40 does not deprive the ordinary courts of jurisdiction, if in a particular case the proceeding in the ordinary court produces a judgment before s 40(1) has been complied with, there is then no occasion to comply with it, and it ceases to be applicable. That is so whether the judgment is a default judgment or a judgment given in some other way. The judgment of the court is a judgment of the court, whether it was given by default or after a trial, and takes effect in my opinion in the same way and has the same effect for the purposes of the operation of the Act. Once there was a default judgment, s 40 no longer applied to this dispute. The question therefore was the same as the question in ***Brighton Und Redfern***: whether by the application of the ordinary principles in relation to setting aside default judgments, the judgment should be set aside. If those ordinary principles resulted in the judgment being set aside, at that point the dispute was no longer resolved by that judgment, there was again a dispute between the parties, there was something which could be validly submitted to the tribunal for determination, and s 40(1) again applied, and the appropriate course was to make the order required by that subsection.

[16] I do not consider that the mere fact that the judgment had been given in a proceeding to which s 40(1) applied meant that the judgment was to be set aside ex debito justitiae. Section 40(1) is a requirement that a court make an order, and the ordinary circumstances under which a court makes an order are when a matter is brought before a judge in accordance with the ordinary processes of the court. That may be at the trial, though I think it is not confined to that situation; the matter may come before the court simply because one of the parties to the

[3] ***Blair v Curran*** (1939) 62 CLR 464 at 532; ***Port of Melbourne Authority v Anshun Pty Ltd*** (1981) 147 CLR 589 at 597; ***Chamberlain v Deputy Commissioner of Taxation*** (1988) 164 CLR 502 at 510.

proceeding files an application seeking an order under s 40(1). I am prepared to assume that as a general proposition if a matter to which s 40(1) applies is otherwise before a judge it would be open for the judge to take the point as to the application of s 40(1) even if neither of the parties had taken the point. But I do not think that it follows that this is a matter properly to be considered by a registrar on an application for default judgment.

[17] I do not think that the legislature can have contemplated that an order under s 40(1) would be made by a registrar before whom an application is made to enter default judgment. Apart from anything else, there would plainly be no utility in such a step; if the proceeding is not being defended, there would be no point in requiring the plaintiff to go away and start again in another place. Section 40(1) does not say specifically that it is to be applied administratively, for example by a registrar considering an application for default judgment, and in my opinion there would be strong presumption that that was not the intended operation of the section. Accordingly, this was not something properly to be considered by the registrar, and accordingly there cannot be said to be any irregularity because of the failure of the registrar to make an order under s 40(1). Accordingly, it is not the case that the judgment is irregular merely because it was given in circumstances where s 40(1) applied.

[18] It may be, however, that the judgment was irregular on some other ground. The respondent's application does not appear to me to allege any irregularity, but it would have been open to the respondent on the hearing of the application, had the magistrate proceeded to hear it by reference to the ordinary principles applicable on an application under rule 290, to have relied on any irregularity which emerged. In the alternative, the respondent could have sought to set aside the judgment on discretionary grounds, on the basis that it had a good defence to the plaintiff's claim, or at least that there was sufficient reason to think that it might have a good defence to make it inappropriate for it to be shut out from disputing the appellant's claim. The difficulty in the present case is that the magistrate made no findings as to whether the judgment would have been set aside on the application of the ordinary principles under rule 290. As well, there was no argument advanced before me as to what the outcome of the application of those principles ought to be in the present case.

[19] Nevertheless, I consider that the mere fact that prior to judgment the proceeding was subject to s 40(1) of the Act did not give rise to a defence on the merits, so as to justify setting aside the judgment. There would, I think, be no point in setting aside a judgment which was within jurisdiction and therefore validly terminated the dispute simply in order to enable the matter to be litigated in the tribunal, if that were the only ground for defence alleged. If that were the only matter, there would be no dispute as to the plaintiff's entitlement to the amount claimed, and so no "building dispute" and s 40 would not apply. The ordinary test for setting aside a judgment regularly entered, in relation to the merits of the defendant's position, could not be satisfied. In other words, the defendant would have to show some reason to think that there really was a proper basis for a dispute about the plaintiff's entitlement to the amount claimed. If there was, then the judgment can be set aside, and at that point the dispute as to the plaintiff's entitlement to the amount claimed is to be resolved by the tribunal rather than by the court.

[20] It follows that in my opinion the magistrate's approach was incorrect. The magistrate should have heard and determined the application under rule 290 in the ordinary way, and only if by the application of ordinary principles that judgment came to be set aside did it become appropriate to apply s 40(1) and order that the proceeding be started again before the tribunal. The appeal must therefore be allowed and the order of the magistrate set aside; I will hear further submissions as to whether I should go on and deal with the question of whether the default judgment should be set aside, or whether I should remit that question to be decided by a magistrate. The respondent should pay the appellant's costs of the appeal, but since the point was raised by the magistrate I will give the respondent a certificate under the Appeal Costs Fund Act.

P. McCafferty for the appellant instructed by Hewlett Walker Lawyers
I. A. Erskine for the respondent instructed by Q5 Law