24/95

SUPREME COURT OF VICTORIA

BROOKFIELD v DAVEY PRODUCTS PTY LTD

Smith J

28 June, 15 July 1994

CIVIL PROCEEDINGS – DEFAULT JUDGMENT ENTERED IRREGULARLY – APPLICATION MADE TO AMEND JUDGMENT – MATTERS TO BE CONSIDERED IN EXERCISE OF DISCRETION.

DPP/L obtained an order against B. in default of defence. A warrant of execution was subsequently issued but the attempt was unsuccessful. Bankruptcy proceedings were taken against B. and B. issued proceedings against DPP/L and others in the Federal Court. When B. applied to the Magistrates' Court to have the default order set aside, DPP/L applied to amend the amount of the order by reducing it due to payments and credits. The Magistrate granted the application to amend and reduced the order accordingly. Upon appeal—

HELD: Appeal allowed. Amending order set aside. Default order set aside.
1. The order amending the default judgment was a final order in that it finally disposed of the rights of the parties. Accordingly, it was open to B. to appeal to the Supreme Court against the order.
***Licul v Corney* [1976] HCA 6; (1976) 180 CLR 213; (1976) 8 ALR 437; (1976) 50 ALJR 439; and**
***Carr & Anor v Finance Corporation of Australia* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397, applied.**

2. Where a judgment is entered in default of defence for an amount in excess of what is due to the person obtaining the order, the person against whom the order is made is entitled as of right to have the judgment set aside. Further, it is for the person in whose favour the order was made to persuade the court to exercise a discretion to amend.

3. Having regard to the fact that DPP/L tried to enforce the judgment without having it first corrected, only applied for amendment in response to B.'s application to set aside and that B. had an arguable defence to the claim, the magistrate was in error in granting the application to amend.

SMITH J: *[After setting out the facts of the making of the default judgment, the application to amend, the nature of the appeal proceedings and the reasons given by the magistrate, His Honour continued]...*
[7] The order below a final order?
It is necessary next to consider whether the order amending the default judgment was a final order. The test is whether, as a matter of law, the order finally disposed of the rights of the parties: (*Licul v Corney* [1976] HCA 6; (1976) 180 CLR 213; (1976) 8 ALR 437; (1976) 50 ALJR 439, *Carr & Anor v Finance Corporation of Australia* [1981] HCA 20; (1981) 147 CLR 246; 34 ALR 449; 55 ALJR 397). Counsel for the respondent submitted that the amending order was an interlocutory order and not a final order. In my view, however, the correct analysis is that the judgment, as a matter of law, finally disposed of the rights of the parties and an order amending the amount for which the judgment was entered is of the same character. I am satisfied, therefore, that the appeal from the order is competent. I turn to the questions of law raised by the appellant.

Issues raised by appellant
The appellant relied on a number of matters in support of its arguments in both the proceedings. It raised, first of all, some arguments that were not raised below and which may well have been capable of being addressed below. I refer to the arguments based on the failure to comply with the *Magistrates' Courts Rules*, Rule 4.02 requiring certain information to be contained in the complaint. In view of the **[8]** reasons I have formed on some of the other matters raised, it is not necessary for me to consider whether the appellant plaintiff should be allowed to rely upon the rule 4.02 arguments and, if so, what would be the result if the arguments were successful.

The principal matter raised before me was that the learned Magistrate had erred in law in the exercise of the discretions conferred upon her. (Question (e) in the appeal and grounds 2 and 3 in the application). In elaboration of the issue the appellant alleged that the learned Magistrate

did not take into account or did not take sufficiently into account one or more of the following:

> "(a) The Federal Court proceeding and the legitimate interest of the Federal Court in determining common issues corresponding to B's proposed defence in the current proceeding;
>
> (b) the legitimate interest of the Federal Court, seized of the entire dispute and a superior court with jurisdiction able to deal with the entire claim by the appellant against the respondent being in excess of $600,000 not to suffer the danger of estoppel upon matters of liability resulting from the Magistrates' Court default judgment;
>
> (c) failing to give any or any sufficient weight to the assertion by the appellant of a complete defence;
> (d) giving excessive weight to the delay of the appellant in moving to set aside the judgment when the onus to do so did not fall upon him;
>
> (e) failing to give any or any sufficient weight to the failure of the respondent to move to correct the judgment which the respondent had as by its bankruptcy notice realised to be in error;
>
> (f) failing to give any sufficient weight to the failure of the respondent to apply to amend them till after the setting aside application had been filed;
>
> (g) failing to apply the rules of natural justice in all the circumstances."

[9] The appeal – focus

I will consider these matters initially in the context of the appeal. The order from which the appeal is brought being the order purporting to amend what was a final order, the focus of the appeal must be on the exercise of the discretion to amend the default judgment. It is to be noted that it is not suggested that the power to do so was absent.

Tests to be applied on the appeal

The test to be applied in appeals such as this was recently considered by Hedigan J in *Urban No. 1 Co-operative Society v Kilavus* [1993] VicRp 69; [1993] 2 VR 201; [1993] ANZ Conv R 397; [1992] V Conv R 54-452, a case involving an appeal from a discretionary judgment of a Magistrate. His Honour said:

> "The principles governing appeals against discretionary judgments are well-established. The appellate court is not free to act upon its own conclusions but may only alter the decision of the tribunal at first instance if it has acted on a wrong principle of law, misapprehended the facts or made a wholly erroneous assessment of the relevant issue. In such cases, there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that that decision should be affirmed unless the appellate court of review is satisfied that it is clearly wrong: *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p627; *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513; (1979) 29 ALR 129; [1979] FLC 90-716; (1979) 54 ALJR 243; (1979) 5 Fam LR 719; 44 ALT 153; *McKenna v McKenna* [1984] VicRp 58 at p683; *Australian Dairy Corporation v Murray Goulburn Co-operative Ltd* [1990] VicRp 33; [1990] VR 355."

The order appealed from in this case was made in the exercise of the discretion to amend an irregular judgment. It is, therefore, necessary to identify the principles to be applied when exercising that discretion. It has been established for many years that a defendant is entitled *ex debito justitiae* to have a judgment set aside where a judgment is signed in default of appearance **[10]** or defence for an amount in excess of what is due to the plaintiff. At the same time it is also established that that right is subject to a right in the plaintiff, in a proper case, to apply to have the amount of the judgment reduced: *(Muir v Jenks* [1913] 2 KB 412, *Hughes v Justin* [1894] 1 QB 667; 70 LT 365; 63 LJQB 417; 10 TLR 291, *Armitage v Parsons* [1908] 2 KB 410; 77 LJKB 850, *Building Guarantee and Discount Co. Ltd. v Dolejsi* [1967] VR. 764 and *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VicRp 53; [1977] VR 463). It appears reasonably clear from these authorities that, prima facie, the defendant is entitled to have the judgment set aside and it is for the plaintiff to persuade the court to exercise the discretion to amend the judgment.

In *Muir v Jenks* (above) the application to have the judgment set aside as irregular had been dismissed on the ground that the defendant had delayed. It was said by Buckley LJ that the delay by the defendant in having the order corrected was not something that precluded the defendant from having the judgment set aside. He thought such a conclusion would be wrong: "It is the duty of the creditor if he obtains the wrong judgment to have it set right. It is not the

duty of the debtor against whom he has obtained the judgment to do so. The question, therefore, does not turn upon delay by the debtor. The position is this. Here is a judgment which is wrong. The person who holds it has not sought to set it right, on the contrary he has said that there was no good in doing so." The Court of Appeal held that the judgment should be set aside with costs. There was apparently no application in that case, however, to amend the judgment either at the original hearing before the Master and later on appeal. In *Armitage v Parsons* (above), however, the judgment was **[11]** corrected. In that case the plaintiff had entered judgment for costs in the amount of £5.6s. instead of £4.14s. The Court allowed the judgment to be amended. It would appear that there was no dispute about the amount in question. I note that in both cases the plaintiff had been attempting to enforce the original judgment at the time when the application to set aside the judgment was made.

In *Building Guarantee and Discount Co v Dolejsi* (above) the plaintiff entered judgment against the defendant in default of appearance for $6076.56. This was the amount originally claimed. The amount in fact owing at the time judgment was entered was $5683.46 being the amount originally claimed less a payment of $393.10 made prior to the entry of judgment. McInerney J reviewed the authorities as they applied to the case before him in the following terms:

> "On the facts of the case, it is clear, therefore, that the defendant is entitled *ex debito justitiae* to have the judgment set aside unless, in the exercise of my discretion, I accede to the plaintiff's application to amend the judgment. There may be cases in which it is perfectly proper to exercise that discretion in favour of the amendment, and the discretion will almost certainly be so exercised where the application is one initiated by the plaintiff independently of and not in response to an application to set aside the judgment." (at 766)

His Honour went on then to consider the case before him. He commented:

> "The application to set aside is one made only after the defendant's application to set aside the judgment had been instituted: it was made only on the return day of that summons and there had, prior to the making of the application to amend the judgment, been demands by the plaintiff for costs based on the taxation carried out in execution of the judgment. Furthermore, it appears from the material filed in support of the second ground of the application, that the case is one in which there is a substantial conflict of fact between the plaintiff and the defendant as to whether the judgment was as the defendant alleges and the **[12]** plaintiff denies, entered in breach of an understanding between the respective solicitors."

Having regard to the above matters his Honour decided that he should not accede to the application for an amendment in the exercise of his discretion but should accede to the application to set aside the judgment. In *CML v Giannarelli* (above) judgment had been entered in default of appearance for a sum which included interest upon interest. That interest had been claimed pursuant to s78 of the *Supreme Court Act* 1958. In his reasons, McInerney J stated that while such interest was recoverable under s78 of the *Supreme Court Act* 1958, the Prothonotary did not have the power to award it. Thus the default judgment had been obtained for an amount greater than that to which the plaintiff was legally entitled and was, therefore, irregular. His Honour considered that the defendant was entitled to have the judgment set aside *ex debito justitiae* subject to the discretion to amend the judgment (at 471). The case was similar to the *Dolejsi* case in that the plaintiff had applied for leave to amend at the late stage of the argument on the application to set aside the judgment. His Honour decided, however, that the application to amend should be allowed. He said:

> "In the first place, the defendants do not dispute the debt and it would seem fatuous not to amend the judgment to reduce it to the amount admittedly due."

He also relied upon the fact that the granting of interest by the Prothonotary had been a practice in the Prothonotary's Office since the coming into operation of an amendment to the *Supreme Court Act* in 1962.

From these authorities it may be said that relevant considerations for the exercise of a discretion to amend an **[13]** irregular default judgment include whether the proposed amended amount is in dispute, whether the plaintiff has been relying upon the irregular judgment without seeking to have it rectified and whether the application to amend is made in response to an application to set aside the judgment. The courts appear, in the past at any rate, not to have been

impressed by an application to amend an order which was brought in response to an application to set it aside as irregular. The courts also appear to have seen the onus as being on the plaintiff to ensure the judgment is correctly entered and to view delay on the part of the defendant to secure such a result as not being relevant to the exercise of the discretion to amend the judgment on behalf of the plaintiff.

The appeal – error below?

What will be relevant in any given case will vary, of course, with the circumstances of the case. The appellant has suggested that a number of relevant matters were not considered by the learned magistrate in this case. Of particular significance, and sufficient to mention in these reasons, are two matters:

- The statement in the learned Magistrate's reason that: "there is ongoing litigation in the Federal Court about that (the faulty pumps). I do not see those proceedings of any relevance here today".

- Whether the learned Magistrate regarded the debt as being in dispute or not.

The two matters overlap. The nature of the dispute between the parties is set out in an affidavit sworn by the appellant on 13 December **[14]** 1993 and filed and used in the application to set aside the judgment before the learned Magistrate. In it he deposes to the sale of a large number of pumps to him by the respondent being pumps identified as "Davey Lowara Doc.3" and "Davey Lowara Doc.7" pumps and pumps described as "Sumprats". He deposes to the fact that all the "Doc.3" and "Sumprat" pumps failed and many of the "Doc.7" pumps failed. He refers to some 60 being replaced under warranty but complains of costs incurred in travelling all over South Australia and as far as New South Wales and Queensland to replace faulty pumps sold to him by the respondent. He deposes to admissions made by the respondent as to design faults in the pumps.

An exhibit to the above affidavit is a copy of the application filed in the Federal Court. The Statement of Claim attached to that application is a lengthy and detailed one. It pleads causes of action against the respondent –

- under the *Trade Practices Act* for false and misleading conduct which claims are based upon conversations that took place between the appellant and one Dallas Wilsdon alleged to be a servant or agent of the respondent;

- for breaches of contracts for the sale of goods, namely breach of express or implied terms of contracts for the sale and purchase of the pumps that they were of merchantable quality and fit for the purpose made known to the respondent;

- for negligent misstatement.

The respondent filed affidavits in opposition. On the authorities it is relevant for a Judge or Magistrate faced with the request by a plaintiff to amend an **[15]** irregularly entered judgment to consider whether there is a dispute about the debt for which the plaintiff seeks to retain the judgment. The situation is one where prima facie the defendant is entitled to have the judgment set aside and what the plaintiff is seeking to do is to have a different figure, admittedly a lesser one, substituted. If there is no dispute about the debt, as McInerney J stated, there would seem to be little justification for not amending. Where there is a genuine dispute, however, it becomes difficult, if not impossible, in my view, for a plaintiff to succeed in having the figure it nominates substituted.

It may be said that the appellant placed evidence before the Magistrate which supported a strongly arguable case of an entitlement to an equitable set-off for damages that flowed from the false and misleading statements alleged and a right to a set-off under the *Goods Act* 1958 (s59) in respect of the alleged breaches of the terms as to merchantable quality and fitness for purpose. Such set-offs whether for the whole or part of the respondent's claim put in dispute the amount for which the respondent could enter judgment. In assessing the *bona fides* and strength of such a case it was in my view relevant to consider what steps the appellant had taken to raise the issues and pursue them in court. It was therefore highly relevant to have regard to the litigation in the Federal Court. It was also relevant that the liquidator has joined in those proceedings. (Cf. the relevance of the involvement of the liquidator in the plaintiff company on security for costs

applications: *Spiel v Commodity Brokers Australia Pty Ltd (In Liq)* (1983) 35 SASR 294; (1983) 8 **[16]** ACLR 410; *John Arnold's Surf Shop Pty Ltd (In Liq.) v Heller Factors Pty Ltd* (1979) 4 ACLR 492 at 496; *Re Pavelic Investments Pty Ltd* (1983) 1 ACLC 1207; (1983) 8 ACLR 417).

The federal litigation was also relevant, in my view, because its pleadings set out in some detail the nature of the case put forward and the nature of matters which could be raised by way of defence to the claim made in the Magistrates' Court proceedings. It is true, as pointed out by the respondent, that it involved another plaintiff but, in respect of the claims made against the respondent, the contracts alleged were alleged to be between the appellant and the respondent and did not involve the other plaintiff. The other plaintiff is alleged to have been the joint venturer in a project to produce various types of sewerage treatment plants in which the pumps were to be installed. The affidavit deposes to it being the appellant who incurred the costs of servicing the defective pumps. Thus, it does not appear to me that the presence of another plaintiff in those proceedings in any way negatives the alleged rights to set-offs against the respondent's claim in the Magistrates' Court. The material filed by the appellant before the learned Magistrate did not quantify the claims in detail but asserted an overall claim of $600,000 against the three defendants in the Federal Court proceedings. The amount in dispute between the parties, however, is said to be approximately $15,000 and if, as alleged by the appellant, a large number of pumps failed, it would not take many flights to Queensland and New South Wales or many wasted hours on each pump to produce a substantial cross-claim and set-off.

[17] The brevity of the learned Magistrate's reasons is understandable but they do not resolve the difficulty for the respondent that the learned Magistrate appears to have ignored relevant matters. While she referred to her consideration of all of the facts and circumstances in the matter, she did so only in the context of saying that those facts and circumstances made the matter properly a matter "within the discretion of the Court" and then simply ordered the judgment to be amended. Those facts and circumstances consistently with what was stated earlier in the reasons did not include the litigation in the Federal Court.

Appeal – conclusion

In my view, the appeal against the order amending the judgment should succeed on the ground that relevant matters were ignored and the order should be set aside. If my analysis of the orders made below is correct, that conclusion is sufficient to dispose of the appeal. If the correct view is, however, that the learned Magistrate also ordered that the application to set aside the judgment be dismissed, counsel for the respondent conceded that any implied order dismissing the application to set aside the judgment could not be sustained if the amending order could not be sustained. Adopting that analysis, it needs to be borne in mind that such a dismissal order is not a final order and cannot be directly challenged on the appeal. The implied dismissal order could be set aside, however, in the exercise of the powers contained in s109(6) of the *Magistrates' Court Act* 1989 by an order giving effect to the determination of the appeal from the amendment order.

[18] On either analysis the question then arises as to what course should be followed. During argument I suggested that it would be appropriate to refer back to the learned Magistrate the applications to set aside the judgment and to amend for hearing and determination according to law. On reflection, however, it appears to me desirable that I deal with the application. The parties have incurred considerable costs. To refer the application back to the Magistrates' Court would impose a further costs burden upon them. At the same time, I have all the material before me that was and could be placed before the learned Magistrate.

I am satisfied that the application to amend the default judgment should not be allowed. The application to amend the default judgment was made only in response to and at the time of the hearing of the application to set aside the judgment. The respondent tried to enforce the judgment without having it corrected. The appellant has demonstrated that it has an arguable defence on the merits to the respondent's claim for the reduced amount. In that regard it is true that the defendant had delayed in attempting to have the judgment set aside but it did offer some explanations consistent with a *bona fide* defence but a lack of funds. They have to be assessed and weighed in the balance when assessing the defences raised. I am satisfied that if the judgment is amended the respondent will press on with bankruptcy proceedings against the appellant based on the judgment [involving] the arguable defences. To date it has not proposed a stay of execution

pending the determination of the Federal Court proceedings. The application to amend having been refused, the judgment should be set aside *ex debito justitiae*.

APPEARANCES: For the Appellant Brookfield: Mr G Herbert, counsel. Solicitors: Stedman Cameron. For the Respondent Davey Products Pty Ltd: Mr PC Golombek, counsel. Solicitors: Hassell & Byrne.
