**18/13; [2013] VSC 241**

**SUPREME COURT OF VICTORIA**

# *CHEOK v PAPANASTASSIS*

**Beach J**

**8, 10 May 2013**

**CIVIL PROCEEDINGS – APPLICATION FOR A REHEARING OF A CIVIL PROCEEDING – DEFAULT JUDGMENT MADE – APPLICATION TO SET ASIDE DEFAULT JUDGMENT – WHETHER DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE – APPLICATION TO QUASH MAGISTRATES' COURT ORDER REFUSING TO SET ASIDE JUDGMENT – NO ERROR OF LAW MADE BY MAGISTRATE – APPLICATION REFUSED.**

C. made an application to the Magistrates' Court to set aside a default judgment. The magistrate refused C.s application. Upon an application seeking an order quashing the Magistrate's decision—

**HELD: Application dismissed.**

**1. In relation to the submission by C. that the Magistrate took into account C.s failure to attend for cross-examination, nothing in the Magistrate's reasons suggested that the failure of C. to attend for cross-examination was taken into account against her. When one examined the whole of the reasons for decision, and in particular what was said on the topic of C.s failure to attend, there was no basis for saying that the Magistrate took into account, for the purpose of deciding the application, C.s non-attendance at the hearing of the application.**

**2. An applicant who seeks to invoke the discretion of the court to set aside a default judgment that was entered regularly must demonstrate to the Court grounds upon which the discretion ought to be exercised in his favour. The primary consideration for the judge is that there are merits in the defences to which the Court should pay heed. If there are merits in one or more of those defences the Court will ordinarily exercise its discretion in favour of allowing the matter to pass to final adjudication, provided that the applicant shows that he has an adequate explanation for his failure to file a defence. It is not for the judge, on an application of this nature, to determine the merits of the defence for himself or to seek to resolve factual issues which might at that stage appear to exist on the materials before him.**

***Lau v Citic Australia Commodity Trading Pty Ltd* [1999] VSCA 34, applied.**

**3. The Magistrate did not purport to embark upon a trial of the facts; nor did she impermissibly cross the line in the way described in *Lau*. Having identified that there were matters in dispute between the parties on the affidavits filed, her Honour then analysed whether there were merits in the defences to which the court should pay heed.**

**4. In relation to the *non est factum* defence, The Magistrate was well justified in concluding that on a proper examination of the plaintiff's own material, the *non est factum* defence had no real prospect of success. However, even if the *non est factum* defence had some arguable prospects (on the basis that almost anything can be said to be arguable), that fact alone was not the end of the exercise. Questions of delay and explanations for the delay remained relevant considerations to be taken into account.**

**5. The Magistrate performed a careful analysis of all of the issues raised in this case, and then determined the application correctly by reference to accepted principles.**

**6. Accordingly, C.s application was dismissed.**

## BEACH J:

### Introduction

1. Alexandros and Vasiliki Papanastassis, the first defendants, were the plaintiffs in a Magistrates' Court proceeding commenced in December 2010. In that proceeding, Lucille Cheok, the plaintiff, was the second defendant. The claim related to a guarantee alleged to have been given by the plaintiff in relation to a lease.

2. On 17 August 2011, the first defendants obtained default judgment against the plaintiff[1]

in the sum of $100,000 together with interest in the amount of $8,116.43 and costs in the amount of $2,879.44.

3. On 31 May 2012, the plaintiff made application to the Magistrates' Court to set aside the default judgment. The application to set aside the default judgment was heard by Cure M on 19 July and 3 August 2012. On 3 September 2012, her Honour delivered judgment refusing the plaintiff's application.

4. In this proceeding, the plaintiff seeks an order quashing the order made by Cure M on 3 September 2012 and an order returning the application to set aside the default judgment to the Magistrates' Court for determination in accordance with law.

5. The plaintiff's grounds for seeking the order she seeks were encapsulated in paragraph 12 of her amended originating motion:

> 12. The decision and order of the Magistrates' Court of Victoria dated 3 September 2012 disclose an error of law, namely:
> a. The default judgment dated 17 August 2011 is irregular and ought to be set aside on the basis that it is in excess of the amount of the Claim as stated in the statement of claim therein;
> b. The default judgment dated 17 August 2011 is irregular and ought to be set aside on the basis that it was not obtained in accordance with the *Magistrates' Court General Civil Procedure Rules* 2010, namely order 21.02(b) which requires such a default judgment to be made only by reference to the Court and not by a registrar;
> c. The default judgment dated 17 August 2011 is irregular and ought to be set aside on the basis that the first defendants failed to comply with the *Magistrates' Court General Civil Procedure Rules* 2010, namely order 36, in that the first defendants were required to obtain leave of the Court or consent of the plaintiff in order to be entitled to file and serve an amended statement of claim for the sum as ultimately sought in the default judgment;
> d. The default judgment dated 17 August 2011 is irregular and ought to be set aside on the basis that the first defendants failed to comply with the *Magistrates' Court General Civil Procedure Rules* 2010, namely order 36, in that the first defendants were required to file and serve an amended statement of claim for the sum as ultimately sought in the default judgment;
> e. The decision discloses an error of law apparent on the face of the record in taking into account in the exercise of her Honour's discretion, the irrelevant consideration of the plaintiff's failure to attend for cross-examination; and/or
> f. The decision discloses an error of law, namely the learned Magistrate's finding that the default judgment should not be set aside on the application by the plaintiff, when the plaintiff had adduced evidence of an arguable defence to the first defendants' claim and an explanation or basis upon which the plaintiff failed to file and serve a notice of defence within the time period prescribed in the *Magistrates' Court General Civil Procedure Rules* 2010.

6. The first defendants resist the plaintiff's application. The Magistrates' Court of Victoria, the second defendant, has taken no active role in the proceeding and has said that it will abide the decision of this Court in accordance with the principles enunciated in *R v Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors*.[2]

**The proceeding below**

7. The Magistrates' Court complaint was issued on 17 December 2010. On the front page of the complaint, the following appeared:

> Nature of Complaint – Money owed
> Amount of claim: $77,184.31

8. The complaint was endorsed with a statement of claim which pleaded the existence of a lease and then the existence of a guarantee and indemnity in which the plaintiff in the present proceeding was the guarantor.[3] The statement of claim alleged certain breaches of the lease and asserted that the first defendants had suffered loss and damage. The prayer for relief included a claim for "$77,184.31 and monthly rent continuing until [the first defendants have] mitigated their loss by reletting the leased premises". The prayer for relief also included claims for damages.

9. The first defendants had difficulty effecting service. On 27 April 2011 an order for substituted service was made.

10. On 17 August 2011, Hubble M gave judgment in default of defence in the sum of $100,000 together with the interest and costs to which I have already referred. The application for default judgment was made on the basis that by this time (17 August 2011), the amount of the first defendants' claim totalled $154,652.21. However, the amount of $54,652.21 (which was in excess of the Magistrates' Court jurisdictional limit) was abandoned.

11. On 31 May 2012, the plaintiff applied for an order setting aside the default judgment and an order that the complaint be reheard. In the application for rehearing, the plaintiff asserted that she did not file a notice of defence because she did not receive notice of the complaint and because she was not aware of the proceeding.

12. The application for rehearing was supported by an affidavit of the plaintiff sworn 31 May 2012 ("the plaintiff's first affidavit").

13. In the plaintiff's first affidavit, a number of assertions and complaints are made:

> (a) First, the plaintiff referred to page 15 of the lease where she was listed as guarantor and said "I did not initially intend to be the guarantor for the lease". This was expanded upon as follows:
> After my brother signed the lease, [Mr] Kay turned to me and said words to the effect "Lucy, you might as well sign as well". As I was there to support my brother, I didn't think why I was required to sign the lease. I just signed where indicated by Kay.
> I note that my name was originally on the lease as a lessor. I now believe that Kay undertook a business name search and realised that I was not part of Sunshine Furnishings and this is why the lease was altered. I believe Kay inserted the words "as guarantor". It is neither mine nor my brother's handwriting.
> (b) Secondly, the plaintiff asserted that she was not aware of her obligations as guarantor. In addition, she said she was not given the opportunity to consider the guarantee or take it away.
> (c) Thirdly, the plaintiff alleged there was a four month rent-free period offered which she said either needed to be taken into account or was a representation which "impacted" on her brother's decision to enter into the lease.
> (d) Fourthly, she asserted that $30,000 had been spent on renovating the premises and installing signage.
> (e) Fifthly, she said there were defects in the roof and the roof leaked.
> (f) Sixthly, she said that a further three month rent-free period was agreed in consideration for the renovations referred to, and to compensate for the damage done by the leaking roof.
> (g) Seventhly, she said road works in front of the premises between May and August 2010 had a negative impact on the business. This, she alleged, was recognised by one of the first defendants agreeing to grant a further four month rent-free period.
> (h) Eighthly, she said no credit had been given by the first defendants in respect of a payment made by the plaintiff in the sum of $5,000.
> (i) Ninthly, she asserted that on a number of occasions the premises were locked without notice. It was, she said, her belief that these lockouts resulted in a loss of profit which she estimated to total $40,000.

14. In the course of the plaintiff's first affidavit, the plaintiff deposed that both she and her brother wished to defend the claim, relying on the matters identified in the previous paragraph. Further, in this part of the plaintiff's first affidavit, she went on to say, "I also want the opportunity to seek an order that the guarantee be set aside as it was obtained by misleading and deceptive conduct".

15. The plaintiff's first affidavit dealt with when the plaintiff first knew that judgment had been entered against her. The affidavit asserted that the plaintiff learnt of the judgment in August 2011. The affidavit then went on to explain the delay between that time and the issuing of the application to set aside the judgment in May 2012. With reference to the delay between November 2011 and May 2012, the plaintiff explained this by reference to a medical condition which she described in general terms, stating that "the doctors have so far been unable to diagnose the cause of [her] condition".

16. On 18 July 2012, the solicitor for the first defendants filed an affidavit in response to the plaintiff's application. This affidavit set out certain procedural matters and exhibited a number of relevant documents.

17. On 19 July 2012, the plaintiff's solicitors swore an affidavit in support of the plaintiff's

application to set aside the judgment. This affidavit exhibited a proposed defence and went on:
At 10.27pm on Wednesday 18 July 2012, I received an email from [the plaintiff] noting that she is currently suffering from her pre-existing blood disorder, and will be unable to attend the application in person today.

18. In the proposed defence:

> (a) The plaintiff denied entering into the guarantee alleged by the first defendants, and said further that "she was not aware that she had signed a guarantee and indemnity". Particulars were then given of this denial and assertion as follows:
> The lease has been amended by hand to include [the plaintiff] as guarantor. [The plaintiff] was not made aware of the obligations incidental to signing the lease.
>
> (b) The plaintiff pleaded the existence of three alleged rent-free agreements.
>
> (c) The plaintiff pleaded re-entries of the premises and lockouts during business hours that were made without notice.

19. On 19 July 2012 (the same day as the plaintiff's solicitor's affidavit), the matter came on for hearing before Cure M. The matter proceeded on that day on the basis that the default judgment was regularly entered. There was argument about each of the plaintiff's alleged defences.[4] Towards the end of the hearing on that day,[5] there was a discussion between her Honour and counsel as to the plaintiff attending to be cross-examined on her affidavit. During the course of this exchange, her Honour made it clear to counsel for the plaintiff that it was the plaintiff's affidavit she was "finding deficient". The plaintiff's counsel[6] said that he understood what her Honour was saying.

20. On 1 August 2012, the plaintiff swore a second affidavit in support of her application to set the default judgment aside ("the plaintiff's second affidavit"). In the plaintiff's second affidavit, the plaintiff:

> (a) gave further evidence in relation to her medical condition;
> (b) described her previous work "in the furniture wholesale business for a number of years importing furniture and selling it wholesale";
> (c) described how she obtained her Certificate IV in Property Services (Real Estate) in July 2011;
> (d) described how she had commenced work as a real estate agent on 1 February 2012; and
> (e) said that she believed she signed the lease the subject of the proceeding "as a witness" (at the same time acknowledging that she initialled next to her name on page 16 of the lease).

21. On 2 August 2012, the solicitor for the first defendants swore a further affidavit in response to the plaintiff's application. This affidavit exhibited, amongst other documents, an email from the agent Mr Kay, in which it was stated that it was clear the plaintiff was signing the guarantee to assist her brother. In the email, Mr Kay said:

> She [the plaintiff] spoke and understood English clearly. She was the contact person and the negotiator in this lease. She had assured me that she had two other warehouses in Campbellfield and that she had a strong relationship with a large Australian retailer in importing furniture. The only reason why she put the lease in her brother's name was to get her brother started in business.

22. On 3 August 2012, the plaintiff's adjourned application came back on for hearing. On that occasion, the plaintiff was represented by new counsel.[7] During the course of the second day of the hearing, a medical certificate was tendered to explain the absence of the plaintiff. It appears there was general agreement that the medical certificate was insufficient to properly explain the plaintiff's absence from the hearing. However, neither side sought to adjourn the matter and the application proceeded to a conclusion on that day.

23. On the second day of the hearing, the plaintiff raised for the first time an argument that the default judgment was irregular. The argument relied upon an assertion that the dispute between the plaintiff and the first defendants was a "retail tenancy dispute" within the meaning of s 81 of the Retail Leases Act 2003.[8] The argument was misconceived, and the plaintiff did not seek to resuscitate it in this proceeding.

**The magistrate's decision and the reasons for decision**

24. On 3 September 2012, her Honour dismissed the plaintiff's application.

25. Her Honour's reasons for dismissing the plaintiff's application run to some 27 paragraphs. The reasons commence by setting out the history of the matter and the basis for the application.[9] There then follow paragraphs setting out the plaintiff's alleged defences;[10] the circumstances in which the plaintiff learnt of the default judgment;[11] the alleged reason why the plaintiff was not aware of the proceeding before judgment;[12] the steps taken by the plaintiff after she became aware of the judgment and the reasons for any delay between August 2011 and May 2012;[13] the reason for the adjournment of the application from 19 July 2012 to 3 August 2012;[14] the fact of the plaintiff's supplementary affidavit sworn 1 August 2012 and her failure to attend for cross-examination on the second day of the hearing;[15] and an analysis of the merits of the plaintiff's application by reference to her proposed defences, her reasons for judgment being entered, her explanation for any apparent delay and her argument that the default judgment was in any event irregular.[16]

26. In the course of the reasons for decision, her Honour said:[17]

> There is no doubt that the [plaintiff] became aware of the judgment midway through 2011 and instructed her solicitors to act. Her account that she was too unwell to pursue the matter is inconsistent with the fact that she completed a course to become a licensed Real Estate Agent in January 2011 and then set up a business as a franchisee of Century 21 Real Estate commencing on 1 February 2012.
>
> It was submitted on her behalf that her conduct in the delay in making the application was not unreasonable and that she had been negligent and put her "head in the sand" at the very worst. Any prejudice to the plaintiff she says can be addressed by an order for costs. In all the circumstances I do not find her conduct as being reasonable or the explanation as being satisfactory. That alone however is not the end of the matter.

27. Having said that the matters above were "not the end of the matter", her Honour then went on to deal with the various defences raised by the plaintiff and the plaintiff's *Retail Leases Act* argument. With respect to the signing of the guarantee, her Honour said:[18]

> The [plaintiff] is shown to have been either a director or secretary of a number of registered companies over the years and has what might be described as a high degree of business involvement. The [first defendants'] affidavit refers to correspondence from the agent acting for the [first defendants] in preparing the lease back in 2008. The agent says that in dealing with Ms Cheok (who he identifies as the Lucy Peng from the real estate profile on the web) he found her to be confident and was helping to get her brother, [the other defendant to the Magistrates' Court proceeding], started in business. She told him about her extensive experience and negotiated the lease with him.
> ...
> The [plaintiff] in her application for rehearing argues that she has an arguable defence on the merits that she did not sign a guarantee and indemnity or understand that she had done so. Given the matters raised by [the first defendants] relating to the agent [Mr Kay][19] I do not accept that this has any merit. I am of the view that she has considerable business experience on her own admission.[20]

28. Finally, her Honour concluded:[21]

> Having considered the affidavit material I refuse this application for a rehearing. I am not satisfied on the affidavit material that the [plaintiff] raises a defence with any merit for either party and I am not satisfied that only VCAT could have dealt with the claim. I am of the view that the [plaintiff's] conduct was unreasonable and on the material before me there are serious concerns about the veracity of the claim in her affidavit material. I was deprived of an opportunity to asses her evidence by her inability to appear before the court.

**The hearing of this proceeding**

29. At the commencement of the hearing of this proceeding, I raised with counsel for the plaintiff the fact that there was no argument in his outline of submissions in support of paragraph 12(b) of the originating motion. I was told that this ground was abandoned. No doubt this was because a plain reading of the document recording the default judgment disclosed that the order was made by a magistrate, and not by a registrar.

30. I then raised with counsel grounds 12(a), (c) and (d) on the basis that none of these arguments were run below. Counsel for the plaintiff then abandoned these grounds. For the sake of completeness, I should say that counsel was correct to abandon these grounds: first, even if they had been run below, they were without merit; and secondly, the failure to run these grounds below told against the granting of relief in the nature of *certiorari* based upon the arguments contained within them.

31. Counsel for the plaintiff confined himself to arguing the matters referred to in paragraph 12(e) of the originating motion, and then paragraph 12(f) of the originating motion – but only in respect of the defence of *non est factum.*[22] The other alleged defences run below were abandoned.

**Ground 12(e)**

32. Paragraph 12(e) of the amended originating motion makes complaint that her Honour took into account what was said to be the irrelevant consideration of the plaintiff's failure to attend for cross-examination. The plaintiff submits that the taking into account of this so-called irrelevant consideration discloses an error of law on the face of the record.

33. I reject these submissions. In her reasons for decision, Cure M notes the history of the plaintiff's failure to attend.[23] Her Honour then notes that a supplementary affidavit of the plaintiff was filed,[24] before saying:

> I have been denied the opportunity to hear her response to questions on these issues and therefore must rely upon the affidavit material of both parties.

34. Her Honour then dealt with other relevant issues before saying at the end of the penultimate paragraph of her reasons,[25] merely, that she "was deprived of an opportunity to assess [the plaintiff's] evidence by her inability to appear before the court".

35. There is nothing in the material to suggest that her Honour did not rely appropriately upon all of the affidavit material filed by both sides in the application before her. The case is quite different from the facts in *Australian Foods Company Pty Ltd v Harvest Grain Pty Ltd & Anor.*[26] In that case, the magistrate quite clearly took into account against a deponent the fact that he did not attend for cross-examination. However, in that case there was no order that the deponent attend for cross-examination – nor any agreement between the parties as to that issue. In concluding there was error in that case, Williams J said:[27]

> A recommendation by the court that the deponent attend to explain himself would not suffice to make his absence a relevant consideration to be taken into account in the way it was in the assessment of the weight to be given to his evidence.

36. Nothing in the reasons of Cure M suggests that the failure of the plaintiff to attend for cross-examination was taken into account against her. When one examines the whole of the reasons for decision, and in particular what was said on the topic of the plaintiff's failure to attend,[28] there is no basis for saying that her Honour took into account, for the purpose of deciding the application before her, the plaintiff's non-attendance at the hearing of the application.[29]

**Ground 12(f)**

37. As was noted by Chernov JA[30] in *Gajic v Poyser*,[31] the principles that govern the determination of an application to set aside a default judgment are not in great doubt. They were summarised by Winneke P in *Lau v Citic Australia Commodity Trading Pty Ltd.*[32] Winneke P said that an applicant who seeks to invoke the discretion of the court to set aside a default judgment that was entered regularly:

> must demonstrate to the Court grounds upon which the discretion ought to be exercised in his favour. The primary consideration for the judge is that there are merits in the defences to which the Court should pay heed. If there are merits in one or more of those defences the Court will ordinarily exercise its discretion in favour of allowing the matter to pass to final adjudication, provided that the applicant shows that he has an adequate explanation for his failure to file a defence. ... It is not for the judge, on an application of this nature, to determine the merits of the defence for himself or to seek to resolve factual issues which might at that stage appear to exist on the materials before him.[33]

38. As identified by Chernov JA in *Gajic*,[34] the principal error that was made by the primary judge in *Lau* was that he embarked upon a trial of the facts, and more particularly the credibility of a party, in coming to the conclusion that the defence raised was unarguable. As was held in that case, the line was impermissibly crossed by the trial judge, primarily because his Honour assessed the credibility of the testimony of the person alleging that he had an arguable defence.

39. Chernov JA went on:[35]

> A like view was expressed by Street ACJ in *Reinehr Industrial Lease & Finance Pty Ltd v Jordan,*[36] namely, that in an application to set aside a default judgment:
> "... the court is concerned rather to evaluate such evidence as is put forward in order to see whether, in the interests of justice, a defendant, who has for some procedural default been deprived of a right

> to due determination of his defence, should nevertheless be put back into the position of enjoying that right. This necessarily involves care being taken not to embark upon attempted resolutions of conflicts in evidence given by a defendant who may have been cross-examined during the course of an application to set aside a default judgment".
>
> I consider, however, that his Honour did not impermissibly cross the line between, on the one hand, assessing with care whether an arguable defence has been established and, on the other, seeking to determine the credibility of particular deponents or the merits of the claimed defence. His Honour said in his reasons that he accepted that his task was confined to determining whether "there are merits in the defence – rather than determining the merits of the defence or seeking to resolve factual issues". It is true that his Honour went on to say that this "[did] not mean that the court must accept uncritically as giving rise to a genuine dispute every statement in an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents, or other statements by the same person, or inherently probable".[37] But it does not follow from this observation, or from the reasons read as a whole, that his Honour impermissibly sought to resolve the matters as is claimed by the appellants. There may have been some force in the appellants' case on this issue if the contest were confined to "oath against oath" where, for example, the opposing parties swore affidavits giving different versions of the one event. In those circumstances, it may be that absent cross-examination and a trial it could not be fairly determined if the appellants' claim was arguable. But that was not this case. The relevant evidence as to whether the representation was made was not confined to that of the first appellant and Mr Wainwright. In coming to the impugned conclusion, his Honour took into account, as contradicting the first appellant's material, not so much what was said by Mr Wainwright, but the documentary evidence, including Mr Zindilis' certificate, and objective surrounding circumstances that clearly pointed against there being a roll over agreement or representation as was contended for by the first appellant in his affidavits.[38]

40. In my view, there are parallels between *Gajic* and the present case. Cure M did not purport to embark upon a trial of the facts; nor did she impermissibly cross the line in the way described in *Lau*. Having identified that there were matters in dispute between the parties on the affidavits filed, her Honour then analysed whether there were merits in the defences to which the court should pay heed.

41. Closely examined, the so-called *non est factum* defence was, if not hopeless, as thin a defence as could possibly be imagined.[39] On page 15 of the guarantee, the plaintiff signed her name next to the words, "Signed sealed and delivered by the said Lucille Cheok". Underneath these words, the words, "In the presence of" and the word "Witness" appeared. The plaintiff's signature was in fact witnessed by Mr Kay.

42. On page 16 of the lease, in item three there is the word, "Guarantor:". Underneath this word was originally typed, "not applicable". The words "not applicable" were crossed out and the plaintiff's name and address was printed. Next to the plaintiff's name and address appears the signature of the plaintiff.[40]

43. In the plaintiff's first affidavit,[41] the plaintiff deposed as follows:

> The Guarantee
> 6. My brother and I were living at my house at 1715 Sydney Road, Campbellfield in the State of Victoria ("the Campbellfield Address"). Douglas Kay (Kay), real estate agent for the Plaintiffs, attended the Campbellfield Address on or about 17 July 2008 with a standard lease, after my brother had expressed interest in leasing the Premises.
> 7. I witnessed Kay having a short conversation with my brother and then asking my brother to sign the Lease. Now produced and shown to me and marked "LC2" is a true copy of the Lease.
> 8. I refer to page 15 of the Lease, where I am listed as Guarantor. I did not initially intend to be the Guarantor for the Lease.
> 9. After my brother signed the Lease, Kay turned to me and said words to the effect "Lucy, you might as well sign as well". As I was there to support my brother I didn't think why I was required to sign the Lease. I just signed where indicated by Kay.
> I note that my name was originally on the Lease as a Lessor. I now believe that Kay undertook a business name search and realised that I was not part of Sunshine Furnishings and this is why the Lease was altered. I believe Kay inserted the words "as guarantor". It is neither mine nor my brother's handwriting.
> 10. I was not aware of my obligations as Guarantor, nor was I given the opportunity to consider the guarantee or take it away. I did not know that I was signing a guarantee.
> 11. Once the Lease was signed, Kay left my house. He did not leave a copy of the Lease with my brother and me.

44. Nothing was said in the plaintiff's first affidavit about page 16 of the lease. This matter was taken up by counsel for the first defendants before her Honour on the first day of the application. [42] In the plaintiff's second affidavit,[43] the plaintiff revisited the matter as follows:

> *Signed as Guarantor for the Lease*
> 17. I acknowledge that I initialled next to my name on page 16 of the Lease. I refer to my affidavit sworn 31 May 2012 and confirm that I was not aware that I was signing as a Guarantor. I believed that I was signing the Lease as a witness and simply signed and initialled in all of the places Douglas Kay asked me to sign. I did not get a chance to read the Lease and no obligations were explained to me at the time of signing.

45. A number of points may be made:

(a) First, the plaintiff does not expressly say that any of the alterations she refers to were made after she signed pages 15 and 16 of the lease.

(b) Secondly (and perhaps more specifically), the plaintiff does not in terms assert that the words "(as guarantor)" were inserted after she signed page 15 of the lease.

(c) Thirdly, the statement by the plaintiff that she did not *initially* intend to be the guarantor of the lease begs the question of whether she intended to be the guarantor at any other time (and perhaps when the lease was executed).

(d) Fourthly, while the plaintiff asserts that Mr Kay did not leave a copy of the lease with either her or her brother, no explanation is given as to how she was able to exhibit a true copy of the lease to her first affidavit.[44]

(e) Fifthly, if it is said that at some time following her signing pages 15 and 16 of the lease, the plaintiff obtained a copy of it with its alterations, it is at least curious that the plaintiff has not deposed to making any complaint to Mr Kay about any alterations she contends were made after she signed the document.

(f) Sixthly, the plaintiff's description of the lease as a "standard lease" belies the suggestion that she did not know what she was signing or why she was signing the lease.

46. While the plaintiff makes somewhat vague assertions about the various hand written alterations made to the lease (perhaps inviting speculation that they may have been made after she signed it), when one looks at the initials and signatures placed on the lease by her brother, it appears that the alterations to his name and to the name of the tenant must have been made at the time the lease was executed by him (and therefore also at the time it was signed by the plaintiff). The same may be said in respect of the deletion of the words "not applicable" and the insertion of the plaintiff's name in the item "Guarantor" on page 16.

47. In my view, Cure M was well justified in concluding that on a proper examination of the plaintiff's own material, the *non est factum* defence had no real prospect of success.[45] However, even if the *non est factum* defence had some arguable prospects (on the basis that almost anything can be said to be arguable), that fact alone was not the end of the exercise. Questions of delay and explanations for the delay remained relevant considerations to be taken into account.[46] In my view, Cure M performed a careful analysis of all of the issues raised in this case, and then determined the application correctly by reference to accepted principles.

48. Cure M did not embark upon a trial of the facts of the proceeding before her. There is no substance to ground 12(f). Neither the order made, nor the reasons for decision, disclose any error of law as alleged by the plaintiff.

**Conclusion**

49. The plaintiff's proceeding must be dismissed.

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[1] And also the other defendant to the Magistrates' Court proceeding (Zhong Liang Peng trading as Sunshine Furnishings).

[2] [1980] HCA 13; (1980) 144 CLR 13; 29 ALR 289; (1980) 54 ALJR 314.

[3] While the plaintiff in this proceeding was the second defendant in the Magistrates' Court proceeding, in this judgment I will uniformly refer to her as "the plaintiff". Similarly, I will uniformly refer to the two plaintiffs in the Magistrates' Court proceeding as they are referred to in the originating motion – namely, as "the first defendants".

[4] In addition, there was also reference to an *Amadio* defence (T45.28 of the transcript of the hearing below: cf *The Commercial Bank of Australia Limited v Amadio & Anor* [1983] HCA 14; (1983) 151 CLR 447; 46 ALR 402; (1983) 57 ALJR 358; 19 ATPR 41-288; [1983-84] ANZ Conv R 169).

[5] T48-T58 of the transcript of the hearing below.

[6] Not counsel who appeared for the plaintiff in this proceeding.

[7] The same counsel as counsel who appeared for the plaintiff in this proceeding.

[8] See further, s89(4) of the *Retail Leases Act* 2003.
[9] Paragraphs [1]-[5].
[10] Paragraph [6].
[11] Paragraph [7].
[12] Paragraph [8].
[13] Paragraphs [9]-[11].
[14] Paragraph [12].
[15] Paragraph [13].
[16] Paragraphs [14]-[27].
[17] Paragraphs [20]-[21].
[18] Paragraphs [19] and [22].
[19] See the supplementary affidavit Yvonne Lim sworn 2 August 2012 and filed on behalf of the first defendants.
[20] See paragraph 12 of the supplementary affidavit of the plaintiff sworn 1 August 2012.
[21] Paragraph [26].
[22] T4.29 – T6.23.
[23] Paragraph [12].
[24] Paragraph [13].
[25] Paragraph [26].
[26] [2004] VSC 161 (Williams J).
[27] Ibid [25].
[28] Paragraphs [13] and [26].
[29] That said, it should not be thought that I necessarily agree with the proposition that the magistrate, in the circumstances of this case, was not entitled to take into account the fact that the plaintiff did not attend for cross-examination on the second day. The matter was clearly adjourned to allow that course to occur – the fact that no formal order was made, in my view, reflects no more than an understood basis upon which the application was to proceed (that is, understood by the magistrate and both counsel). See further, *Magistrates' Court General Civil Procedure Rules* 2010, rr40.02, 40.03 and 40.04.
[30] With whom Ashley and Neave JJA agreed.
[31] [2007] VSCA 175, [15].
[32] [1999] VSCA 34.
[33] Ibid [5].
[34] [2007] VSCA 175, [15].
[35] *Gajic v Poyser* [2007] VSCA 175, [16]-[17].
[36] Unreported, NSWCA 4 June 1974.
[37] As has been noted, in support of this approach, his Honour cited the observations to this effect by McLelland CJ in Eq in *Eyota* (1994) 12 ACSR 785, 787; (1994) 12 ACLC 669 where his Honour referred in that context to *Eng Mee Yong v Letchumanan* [1980] AC 331, 341; [1979] 3 WLR 373, a case in which the Privy Council came to a like view in relation to the "vague, self-contradictory and implausible assertions" of a caveator who unsuccessfully sought the removal of the caveat.
[38] Footnotes in original.
[39] Putting the facts as deposed to by the plaintiff to one side for the moment, see generally *Wilton v Farnworth* [1948] HCA 20; (1948) 76 CLR 646, 649; [1948] 2 ALR 445 (Latham CJ); and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, 181-2 [46]-[47]; (2004) 211 ALR 342; (2004) 79 ALJR 129; 1 BFRA 280; [2005] Aust Contract Reports 90-204 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
[40] While in her supplementary affidavit sworn 1 August 2012, the plaintiff admits to initialling next to her name on p16 of the lease, the initials she refers to appear to be identical to the signature she admits to on p15 of the lease. Further, both of the plaintiff's signatures on pp15 and 16 of the lease appear identical to her signatures on her affidavits sworn in this proceeding.
[41] Sworn 31 May 2012.
[42] T30.27 of the application below.
[43] Sworn 1 August 2012.
[44] While one might speculate that the plaintiff obtained a copy from her solicitors (who themselves obtained it from the first defendants' solicitors under cover of a letter dated 19 September 2011 (Exhibit YL-1 to the affidavit of Yvonne Lim sworn 18 July 2012)), it should be noted that in paragraph 49 of the plaintiff's first affidavit, she only deposes to receiving from her solicitors a copy of the Magistrates' Court Complaint at about this time.
[45] Cf s63 of the *Civil Procedure Act* 2010. See further, *Day v Royal Automobile Club Motoring Services Limited* [1999] 1 All ER 1007; [1999] 1 WLR 2150 wherein the English Court of Appeal said that the test to be applied in deciding whether to set aside judgment obtained in default of defence was whether there was an arguable case; not whether there was a real likelihood of success; and that the arguable case must carry some degree of conviction – but that there should not be a trial of fact on evidence from affidavits where the facts were apparently credible and were to be set against facts being advanced by the other side.
[46] For the sake of completeness I should say that to the extent ground 12(f) involved a submission that the mere swearing to an arguable defence (no matter how inherently unlikely or marginal), together with an (or some) explanation for the failure to file a defence within time, mandated an exercise of discretion in favour of setting aside a regularly entered default judgment, that submission must be rejected as contrary to both authority and principle (see, in addition the authorities I have already referred to, *Evans v Bartlam* [1937]

AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689; *Rosing v Ben Shemesh* [1960] VicRp 28; [1960] VR 173; and *Kostokanellis v Allen* [1974] VicRp 71; [1974] VR 596.

**APPEARANCES:** For the plaintiff Cheok: Mr A Strauch, counsel. Rothwell Lawyers Pty Ltd, solicitors. For the first defendants Papanastassis: Mr J McKay, counsel. Kennedy Guy, solicitors. For the second defendant The Magistrates' Court of Victoria: No appearance.

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