Dinh & Anor v NT Construction Accounting Service Pty Ltd
[2005] NTSC 34
No LA 16 of 2004 (20401213)

PARTIES:	DINH PHUC CONG
	And
	LE LIEU THI
	v
	NT CONSTRUCTION ACCOUNTING SERVICE PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA 16 of 2004 (20401213)
DELIVERED:	27 June 2005
HEARING DATES:	14 April 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – LOCAL COURT APPEAL

Appeal from local court interlocutory decisions – competency of application for leave to appeal – leave to appeal granted – appeal allowed – judgment in default of defence not obtained in good faith – judgment in default of defence set aside ex debito justitiae – Magistrate did not err in holding judgment in default of defence was not irregularly obtained because all necessary parties had not been joined to the proceeding – Magistrate did not

err in granting leave to cross examine the first applicant and a witness who had sworn affidavits filed by the first applicant.

Local Court Act

Cash v Wells (1830) 1 B & Ad 375; 109 ER 826; *Chitty v Mason* [1926] VLR 419; *St George Bank Ltd v O'Reilly* (1999) 150 FLR 27; *Saunders v Hammond* [1965] QWN 39; *Sullivan v Henderson* [1973] 1 All ER 48, applied;

Deputy Commissioner of Taxation v Abberwood Pty Ltd (1990) 19 NSWLR 530, cited

Gamble v Killingsworth [1970] VR 161, considered;

Taylor & Others v Diamand & Zikos Developments Pty Ltd & Others (1997) 6 NTLR 164, referred to

REPRESENTATION:

Counsel:

Appellant:	Ms McLaren
Respondent:	Mr Alderman

Solicitors:

Appellant:	Ms McLaren
Respondent:	Mr Crane

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dinh & Anor v NT Construction Accounting Service Pty Ltd
[2005] NTSC 34
No. LA 16 of 2004 (20401213)

BETWEEN:

DINH PHUC CONG
First Applicant

AND

LE LIEU THI
Second Applicant

AND:

NT CONSTRUCTION ACCOUNTING SERVICE PTY LTD
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 27 June 2005)

Introduction

[1] This is an application for leave to appeal from two interlocutory decisions of the Local Court that were respectively made on 26 October 2004 and 23 November 2004 during the course of a hearing before a Magistrate of an appeal from a Judicial Registrar of the Local Court.

[2] On 18 February 2004 the Respondent obtained judgment in default of defence in the sum of $55,186.72 against the Applicants. On 14 April 2004

Judicial Registrar Monaghan dismissed the Applicants' application to set aside the judgment in default of defence. On 4 May 2004 the Applicants filed an application seeking to set aside the order of the Judicial Registrar. On 26 October 2004 the hearing of the application to set aside the order of the Judicial Registrar commenced before Ms Blokland SM. The application remains part heard before her Worship. On 26 October 2004 during the hearing of the application to set aside the order of the Judicial Registrar her Worship granted the Respondent leave to cross examine the First Applicant and Mr Mitterhuber who had sworn affidavits that were filed by the Applicants. On 23 November 2004 her Worship refused to set aside the judgment in default of defence *ex debito justitiae* and directed the hearing continue as to the merits of the proposed Notice of Defence at a date to be fixed. Ms Blokland SM decided that there was an insufficient breach of good faith by the Respondent and its solicitor to set aside the judgment in default of defence for irregularity. Her Worship also decided that all necessary parties had been joined to the proceeding that had been commenced by the Respondent.

[3] On 7 December 2004 the Applicants filed a Notice of Appeal in the Supreme Court. On 3 February 2005 Martin CJ granted leave for the Notice of Appeal dated 7 December 2004 to be substituted with the Application for Leave to Appeal which is the subject of this judgment.

The Issues

[4] There are four principal questions in this application. First, is the application for leave to appeal to the Supreme Court competent? In particular, have any orders been made by the Local Court which could be the subject of an appeal to the Supreme Court? Secondly, was the judgment in default of defence obtained in bad faith? Thirdly, was the judgment in default of defence irregular because the Respondent had not joined all of the necessary parties to the proceeding? Fourthly, did the learned Magistrate err in granting leave to the Respondent to cross examine the First Applicant and Mr Mitterhuber?

[5] In my opinion both the application for leave to appeal and the appeal should succeed. The two interlocutory decisions of the Local Court were orders of the Local Court which could be the subject of an application for leave to appeal to the Supreme Court. The application for leave to appeal to the Supreme Court is competent and, contrary to her Worship's decision, the judgment in default of defence was obtained in bad faith. The Applicants are entitled *ex debito justitiae* to have the judgment in default of defence set aside.

[6] However, the learned Magistrate did not err in holding that the judgment in default of defence had not been irregularly obtained because not all of the necessary parties had been joined to the proceeding. All necessary parties had been joined to the proceeding in the Local Court. The Respondent's cause of action is for the balance of the price of mangoes that the

Respondent alleged it had sold to the Applicants. All necessary parties are joined to the proceeding for that purpose. The fact that the Applicants' defence is that the mangoes were purchased from a third party, not the Respondent, does not make it necessary for the Respondent to join the third party to the proceeding. If the Applicants wish to pursue their counterclaim against Mr Cavanagh then it is up to them to join Mr Cavanagh to the proceeding.

[7] Nor did the learned Magistrate err in granting leave to the Respondent to cross examine the First Respondent and Mr Mitterhuber about the affidavits which they had sworn in the proceeding. It was submitted by Counsel for the Applicants that because the application to set aside the judgment in default of defence was an interlocutory application the application should be decided on the affidavits without there being any cross-examination. However, this ground of appeal must fail in limen. Unless there is substantial injustice, a decision of a Magistrate to grant leave to a party to cross examine the deponents of affidavits in an interlocutory application is not a decision in respect of which this Court would ordinarily grant leave to appeal. To do so would unnecessarily split such interlocutory applications in the Local Court and would cause unnecessarily protracted litigation and costs.

[8] Although it is undesirable for a court during the course of an interlocutory application to hear oral evidence or cross-examination on affidavits: *Taylor & Others v Diamand & Zikos Developments Pty Ltd & Others* (1997)

6 NTLR 164 at 167, *Sullivan v Henderson* [1973] 1 All ER 48 at 51, the learned Magistrate did not err in exercising her discretion to allow the Respondent to cross examine the First Applicant and Mr Mitterhuber. A deponent who swears in an affidavit to facts going to show a substantial ground of defence may be cross-examined on limited, specific issues but not merely as to credit: *Saunders v Hammond* [1965] QWN 39; *Sullivan v Henderson* (supra) at 51.

The Competency of the Application for Leave to Appeal

[9] It was common ground between the parties that the decisions of the Local Court that are the subject of the application for leave to appeal to the Supreme Court were other than final determinations. They were interlocutory. Consequently, the right to bring the application for leave to appeal is governed by s 19(3) of the Local Court Act.

[10] Section 19 of the Local Court Act (NT), so far as is relevant, provides that:

> "19. Appeal to Supreme Court
>
> (1) …
>
> (2) …
>
> (3) A party to a proceeding may, within 14 days after the day on which the order complained of was made, appeal to the Supreme Court from **an order of the Court, (other than a final order) in that proceeding,** with the leave of the Supreme Court (*emphasis added*).
>
> (4) …
>
> (5) An appeal under this section shall be brought in accordance with the Rules of the Supreme Court.

(6) After hearing and determining the appeal, the Supreme Court may make such order as it thinks fit, including an order remitting the case for re-hearing to the Court with or without directions on the law.

(7) …

(8) In this section –

"order of the Court" means an order made by a magistrate exercising the jurisdiction of the Court;

"proceeding" does not include a proceeding under the "

[11] Other than what is stated in s 19(8) of the Local Court Act, "order of the Court", is not defined in the Act. The expression should be given its ordinary meaning. An order of the Court includes a decision, determination, command, direction and judgment, whether final or otherwise. Such a construction is consistent with the definition of "order" contained in r 1.09 of the Local Court Rules.

[12] If an order of the Local Court includes a decision, determination, command, direction and judgment, whether final or otherwise of the Local Court, then the decision of the learned Magistrate that the judgment in default of defence should not be set aside *ex debito justitiae* and her decision to grant the Respondent leave to cross-examine the deponents of the Applicants' affidavits, were orders of the Court that may be the subject of an application for leave to appeal to the Supreme Court and the application for leave to appeal that is before the Supreme Court is competent.

Good Faith

[13] There is a great difference between judgments which are regularly obtained in good faith and judgments which are irregularly obtained or obtained in bad faith. The first class are not in general set aside save upon an affidavit of merits. The second class are set aside *ex debito justitiae*, irrespective of the merits of the party applying: *Chitty v Mason* [1926] VLR 419 at 423 per Dixon J.

[14] Bad faith in this context has a broad equitable meaning. It does not necessarily imply moral turpitude or dishonesty. Nor does it necessarily involve an irregularity. It is enough to set aside the default judgment if the conduct of the Respondent in obtaining the judgment was such that it would be unconscionable or unfair to allow it to stand: *St George Bank Ltd v O'Reilly* (1999) 150 FLR 27 at 31. It is not necessary for the Court to consider the merits of the defence in such circumstances. The judgment is set aside irrespective of the merits of the party applying. The statement of McInerney J in *Gamble v Killingsworth* [1970] VR 161 at 168 that was relied on by her Worship at paragraph 12 of her Reasons for Decision is not a statement that is contrary to the last proposition. When he made the statement that was relied upon by her Worship, his Honour was referring to the first class of cases referred to by Dixon J in *Chitty v Mason* (supra) at 423.

[15] The judgment in default of defence in this case was obtained in the following circumstances. On 14 January 2004 a Statement of Claim was

filed and served on the Applicants. The Statement of Claim contained an endorsement that, "If you intend to defend this claim you must, not later than 28 days after being served with this statement of claim file a notice of defence with the Registrar of the Local Court at Darwin and serve a copy on the plaintiff". Pursuant to the endorsement and to r 8.01 of the Local Court Rules, the Applicants were required to file and serve a Notice of Defence by the close of business on 11 February 2004. On 10 February 2004, which was within the 28 day period for filing a Notice of Defence, the First Applicant met with Peter Cavanagh, the owner of the Respondent Company. During the meeting the First Applicant offered to pay the amount of money claimed in the Statement of Claim in instalments if the Respondent dropped the court case against the Applicants. He did so in a genuine attempt to resolve the dispute. Mr Cavanagh told the First Applicant to speak to his solicitor, Mr Brian Johns. Mr Cavanagh said that after he had taken Mr Johns' advice he would make a decision and get back to the Applicant. Mr Cavanagh told the First Applicant his solicitor's name and contact details. The First Applicant then called on Mr Johns at his office on 12 February 2004. The First Applicant told Mr Johns about his conversation with Mr Cavanagh and again offered to pay the amount claimed by instalments if the court case was dropped. Mr Johns told the First Applicant that he would take his client's instructions and he would then write to him. On 13 February 2004 Mr Johns filed an application in the Local Court for an Order for Default Judgment. He did so without

contacting either of the Applicants. Judgment in Default of Defence was given by the Local Court on 18 February 2004. On 20 February 2004 Mr Johns wrote to the First Applicant enclosing the Order of the Local Court for Default Judgment and offering not to enforce the judgment if the outstanding judgment sum was paid in instalments by a certain date. As Mr Johns did not get back to the First Applicant until 20 February 2005, the First Applicant had formed the belief that the Respondent had accepted his request to drop the court case. At all material times up to and including 20 February 2004 the First Applicant was unrepresented. The First Applicant is Vietnamese and he has a limited command of the English language.

[16] There is a dispute between the parties as to whether the First Applicant also told Mr Cavanagh that he did not believe that he owed the sum of money claimed in the Statement of Claim and as to whether the First Applicant denied he owed the debt claimed.

[17] Implicit in Mr Cavanagh's response to the First Applicant during their meeting on 10 February 2005 was a representation that he was not insisting on strict compliance with the rules and that judgment would not be entered until he had taken his solicitor's advice and he or his solicitor had further communicated with the First Applicant. Likewise, implicit in Mr Johns' response to the applicant during their meeting on 12 February 2005 was a representation that his client was not insisting on strict compliance with the rules and that judgment would not be entered until he had taken

instructions from his client and had written to the First Applicant. However, it is apparent from the fact that the Application for an Order for Default Judgment was filed on 13 February 2004, the day after Mr Johns spoke to the First Applicant, and from the fact that Mr Johns did not write to the First Applicant until 20 February 2004 which was after the default judgment had been obtained, that both Mr Cavanagh and Mr Johns misrepresented the Respondent's position to the First Applicant. Mr Cavanagh's misrepresentation of the Respondent's position deprived the Applicants of an opportunity to file and serve a Notice of Defence within the time contemplated by the Local Court Rules. As her Worship found it was reasonable to infer that the First Applicant was under a belief that no further action would be taken until he was further contacted. He was under such a belief because of what Mr Cavanagh and Mr Johns had said to him. It must have been known to both Mr Cavanagh and Mr Johns that the Applicants would not file a Notice of Defence until the First Applicant was again contacted by one or other of them. The Respondent and its solicitor unfairly took advantage of this situation.

[18] The judgment in default of defence was obtained in bad faith and should be set aside *ex debito justitiae*. The case is not dissimilar to the cases of *Cash v Wells* (1830) 1 B & Ad 375; 109 ER 826 and *St George Bank Ltd v O'Reilly* (1999) 150 FLR 27. In *Cash v Wells* the bad faith complained of was the breach of the terms imposed by a cognovit given by the defendant, which restrained the plaintiff from signing judgment unless default were

made in payment of a bill of exchange falling due on a certain date. The payment of the bill was punctually made on the certain day, notwithstanding which the plaintiff subsequently signed judgment and seized the defendant's goods. In *St George Bank Ltd v O'Reilly* the bad faith was the action of the solicitor for the plaintiff snapping judgment and ignoring the request of the solicitor for the defendant not to take any steps in the action until after the provision of particulars which had been requested by the solicitor for the defendant. See also *Deputy Commissioner of Taxation v Abberwood Pty Ltd* (1990) 19 NSWLR 530.

[19] The situation in this case is different to the ordinary case where a plaintiff insists on strict compliance with the rules and enters judgment immediately upon the expiry of the time for filing a defence without further notice to the defendant than that endorsed on the Statement of Claim.

Orders

[20] The orders of the Court are therefore:

(1) The decision of the learned Magistrate not to set aside the judgment in default of defence *ex debito justitiae* is set aside.

(2) The judgment in default of defence that was given by the Local Court on 18 February 2004 is set aside.

(3) Leave granted to the Applicants to file a Notice of Defence.

[21] I will hear the parties as to the time for filing and serving the Notice of Defence and as to costs.