(tho95004)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 109 of 1992

BETWEEN:

AUSTRALIAN GUARANTEE CORPORATION LIMITED
Appellant

AND:

GRAHAM JOHN FRANCIS
First Respondent

AND:

VALERIE JEAN WINCHESTER
Second Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 24 February 1995)

This is an appeal from the decision of the Master delivered 15 July 1994, making orders that the judgment obtained by the appellant be set aside.

Judgment had been entered in favour of the appellant against the first and second respondent on 10 March 1994, in the sum of $147,509.87. Judgment was obtained by the appellant in default of appearance by the respondent.

This matter proceeded as a rehearing (*Southwell v Specialists Engineering Services Pty Ltd* 70 NTR6 Supreme Court rule 77.5.7).

As a rule the court will not set aside a default judgment which has been entered regularly if the defendant has no possible defence, for the setting aside the judgment would serve no useful purpose (*Evans v Bartlam* (1937) AC 473 at 481-2 2 All ER 350; *Collins Book Depot Pty Ltd v Bretherton* (1938) VLR 40; *Davies v Pagett* 70 ALR 793; *Bratic v Toohey* (1988) 2 Qd R. 140).

A judgment entered or given in default of appearance or defence may be set aside under rule 21.07.

Williams Civil Procedure - Victoria Vol 1, paragraph 21.07.10 states:

> "[**I21.07.10**] **Regular and irregular judgments**. A judgment entered or given in default of appearance or defence may be set aside under r21.07. The rule gives the court a discretion to set aside the judgment, and in exercising that discretion a distinction is drawn between a judgment which is regularly entered, that is, in accordance with the rules or an order of the court, and one which is not. 'There is a great difference between judgments which are regularly obtained in good faith and judgment 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 AJ. See also: *Gamble v Killingsworth & McLean Publishing Co Pty Ltd* [1970] VR 161 at 168; *Re Zagoridis; Ex parte Q'Plas Group Pty Ltd* (1990) 98 ALR 718 at 723 (Fed C of A)."

An irregular judgment ought not to be on the records of the court (*R.T. Co Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168 at 170).

The appellant maintains judgment was regularly obtained.

In his submissions in reply, counsel for the respondents submitted that the judgment had not in fact been regularly obtained and referred to rule 3.05 of the Supreme Court Rules, which states:

> " Where a year or longer has elapsed since a party has taken a step in a proceeding, a party desiring the proceeding to continue shall give to every other party not less than one month's notice in writing of his desire."

Rule 3.05 should be read with rule 2.01, which states:

> " (1) A failure to comply with this Chapter is an irregularity and does not render a proceeding or step taken, or a document, judgment or order, in the proceeding a nullity.
>
> (2) Subject to rules 2.02 and 2.03, where there has been a failure to comply with this Chapter, the Court may -

(a) set aside the proceeding, either wholly or in part;

(b) set aside a step taken in the proceeding or a document, judgment or order in the proceeding; or

(c) exercise its powers under this Chapter to allow amendments and to make orders dealing with the proceeding generally."

It would appear that the first time rule 3.05 has been adverted to was when counsel for the respondents were in reply. It was not a matter apparently argued before the Master. It was not raised in the respondents' summons to set aside judgment nor in an affidavit and it was not referred to by counsel for the respondent until he was in Reply. Counsel for the appellant objected to the respondents being allowed to make submissions on rule 3.05 as it was not a matter arising in Reply and was introducing new material. I allowed the submission as being in reply to the appellant's submission that judgment had been regularly obtained. However, as rule 3.05 had not been raised before, I allowed counsel for the appellant to make further submissions in respect of the issue raised by the respondents of the effect of rule 3.05 in this matter.

It is the submission of Mr Tippett, counsel for the respondent, that rule 3.05 of the Supreme Court has not been complied with and that accordingly the judgment has not been regularly obtained and should be set aside. Mr Tippett submits there is no evidence that rule 3.05 has been complied with.

In deciding what is "a step in a proceeding" I adopt with respect the following criteria: ".... to constitute a "proceeding" the act or activity must have the characteristic of carrying the cause or action forward" (*Citicorp Australia Limited v Metropolitan Public Abattoir Board* (1992) 1 Qd R 592 at 594. "The word is one that suggests something in the nature of a formal step in the prosecution of an action" (*Mundy v Butterly Co* (1932) 102 L.J. Ch 23, 26). "It need not be a step taken or act done in a court or its registry ...." (*Citicorp Australia Limited v Metropolitan Public Abattoir Board* (supra) at 594).

Counsel for the appellant argues the following matters in respect of the respondents' argument that rule 3.05 has not been complied with:

(1) There is no evidence that the appellant had not taken a step in the proceedings during the relevant time. The respondents gave no warning of their reliance on rule 3.05 and the appellant has had no opportunity to call evidence. It is too late for the respondents to raise the issue of rule 3.05 in his submissions in Reply and there is no evidence on which to base this submission.

I do not accept this argument. It is not in dispute that the Writ and Statement of Claim issued on 30 April 1992. It is not in dispute that the Writ and Statement of Claim was served on the second respondent, Valerie Jean Winchester, on 2 May 1992. The Writ and Statement of Claim was served on the first respondent, Graeme John Francis, on 23 November 1992 (paragraph 7 affidavit of Ronald Adrian Hope sworn 25 May 1994). Counsel for the appellant submitted that he should put on record that the correct date of service upon the first respondent was 31 December 1992. The evidence, which was before the Master and before this court on appeal, is contained in the affidavit of Ronald Adrian Hope sworn 25 May 1994 and 8 June 1994, affidavit of Graham John Francis sworn 30 April 1994, affidavit of Valerie Jean Winchester sworn 9 June 1994. The appellant filed a further affidavit in the proceeding before this court being affidavit of Ronald Adrian Hope sworn 29 August 1994. These affidavits refer to discussions and correspondence between the parties. These discussions and correspondence do not amount to a step in the proceedings (*Re Burns v Korff* (1985) 8 Qld. Lawyer 201 at 204). There is no evidence from either the appellant or the respondents that the appellant did take a step in the proceeding between 23 November 1992, or assuming Mr Wyvill is correct the 31 December 1992 when the Writ and Statement of Claim was served on the first respondent, and 10 March 1994 when judgment in default of appearance was entered, a period in excess of twelve months. In the course of his submissions, counsel for the appellant handed up a document titled:

AGCV Francis & Winchester
Chronology

This document notes the following two events between service of the Writ and the signing of default judgment.

> "16.08.93 Letter CRM to defendants offering to accept $1,000 if accepted within 14 days (Annexure H to Francis' affidavit of 30/4/94)
>
> August 93 Francis states to Hope that he could not afford $1,000 per month. Hope states to Francis that amount outstanding could be negotiated (Francis 30/4/94 Para 33).

Neither of these two events could be regarded as a step in the proceeding. I appreciate this document is only put forward as an aide to submissions, however, I think it relevant to note that in the appellant's own summary of the chronology of events, there is no reference to a step in the proceeding between the time of service of the Writ and the obtaining of the default judgment. Similarly, a perusal of the court file does not disclose any step in the proceedings between service of the Writ on the first respondent and the obtaining of a default judgment. I accept a perusal of the court file is not conclusive. I mention it only as a further indication of the lack of evidence that the appellant had taken "a step in the proceeding". The affidavit evidence includes details of letters and discussions between the parties but no reference to any matter which could be regarded as a "step in the proceedings" between the services of the Writ on the first respondent in December 1992 and date of signing judgment in March 1994 a period exceeding one year. Counsel for the appellant in his submissions did not suggest there had been contact between the parties other than set out in the affidavit material. Counsel for the appellant did not seek an adjournment to be able to put evidence to the court that there had been a step taken in the proceedings to satisfy the requirements of rule 3.05.

Taking all of these matters together which on their own would not be sufficient, I am satisfied on the balance of probabilities

that a year or longer elapsed since the appellant had taken a step in the proceedings and that accordingly the appellant was required under the provisions of rule 3.05 to give the respondents not less than one months written notice of its desire to enter judgment by default.

(2) Counsel for the appellant submits that rule 2.03 required the respondents to make an application based on the irregularity. Rule 2.03 states:

> " The Court shall not set aside a proceeding or a step taken in a proceeding, or a document, judgment or order in a proceeding, on the ground of a failure to which rule 2.01 applies on the application of a party unless the application is made within a reasonable time, and before the applicant has taken a fresh step, after becoming aware of the irregularity."

The following is a statement in *Williams - Civil Procedure in Victoria* - Volume 1 page 2261:

> "**[I 2.03.0] Application to set aside**. Rule 2.03 reproduces the substance of the former O70 r2. The court will not set aside a proceeding or step in a proceeding which is an irregularity by reason of non-compliance with the rules if the party objecting has not applied to the court within a reasonable time or has taken a fresh step in the proceeding after becoming aware of the irregularity. The rule is taken from s81(3) of the Supreme Court Act 1970 (NSW), which in turn is based on O2 r2(1) of the 1965 rules in England.
>
> The requirement on the former O70 r3 that on an application to set aside proceedings for irregularity, the grounds of objection should be stated in the summons has not been reproduced. Nonetheless, it is submitted that since the party whose proceeding is impeached should in fairness be given notice of the grounds of objection, as a matter of practice the grounds ought to be stated. If the grounds are not set out in the summons, they should appear in any affidavit filed in support. See *Abraham v Della Ca (No 2)* (1897) 23 VLR 454; *Re Sanders* (1919) 147 LT Jo 212."

In this matter the grounds of the objections were not set out in the summons and were not included in any affidavit material. In fact it appears the first time non compliance with rule 3.05 was ever mentioned was in the respondents' reply in respect of the appeal to this court from a decision of the Master. The rules do

not specifically provide that the grounds of objection be stated in the summons or contained in the affidavit material. If indeed there has been a failure to comply with rule 2.03 in this respect, then I would consider this an appropriate matter to waive compliance with a requirement of this chapter in accordance with rule 2.04 which states:

> " The Court may dispense with compliance with a requirement of this Chapter, either before or after the occasion for compliance arises."

In exercising the discretion I have under rule 2.04 I consider any prejudice suffered by the appellant because the respondents did not set out grounds for objection on the basis of irregularity is outweighed by prejudice to the respondents in allowing the judgment to stand when the preponderance of the evidence is that rule 3.05 has not been complied with.

I have concluded that the application was made within reasonable time. The summons to set aside judgment was filed on 3 May 1994. I do not consider the respondents' failure to set out the grounds of the objection in the summons or their failure to argue the effect of rule 3.05 before the Master should preclude them from being able to include this in the application heard by this court.

(3) Counsel for the appellant argues that the application before the Master was a "fresh step in the proceedings after becoming aware of the irregularity" and that pursuant to rule 2.03 they are now precluded from making this application to set aside judgment for irregularity.

> " The condition that a party applying to have proceedings set aside for irregularity should not have taken a fresh step after becoming aware of the irregularity derives from the concept of waiver. 'Its basis is the unfairness likely to result if a party aware of an irregularity nevertheless proceeds with the litigation and then, at some later date, springs a surprise on the opposing party by seeking to rely on the seemingly waived irregularity': *Brickfield Properties Ltd v Newton* [1971] 2 NSWLR 726 at 741." Williams Civil Procedure Victoria Vol 1 p 2261.

I do not consider the application before the Master is a fresh step in the proceeding. It was an application to have judgment set aside. The matter now before me is an appeal from the Master's decision. The respondent has never indicated explicitly or implicitly that it accepted the judgment had been regularly obtained. There has been no waiver by the respondent of any objection to the appellant obtaining judgment and in particular no waiver of any objection based on irregularity.

(4) Counsel for the appellant argues that the irregularity does not invalidate the proceedings under rule 2.01. I agree that irregularity does not invalidate the proceedings. In particular an irregularity does not render a judgment a nullity. However, if an irregularity is established by the respondents on the balance of probabilities, then that is a ground to set judgment aside.

(5) Counsel for the appellant argues that even if the irregularity has been established it does not make the judgment a nullity and there being no prejudice suffered because of the irregularity the court can waive the irregularity (*Commonwealth Bank of Australia v Buffett* (1993) 114 ALR 245.

I do not agree with the submission of counsel for the appellant that the irregularity in failing to comply with rule 3.05 caused no prejudice to the respondents. Counsel for the appellant states the respondents must have been aware from letters and discussions the appellant wished to prosecute this claim. In this particular matter the affidavit material before the court would indicate the discussions between the parties and the letter dated 16 August 1993 (Exhibit H to affidavit of Graham John Francis) were inconclusive.

It would appear the purpose of rule 3.05 is to require the appellant to give at least one month's written notice of its desire to enter judgment, thus ensuring there is no mis-understanding as to the appellant's intentions.

In this matter the respondents may have been led to believe the matter was either dormant or the appellant did not intend to

prosecute the claim because more than twelve months have elapsed and there has been no "step in the proceedings".

I consider the respondents have been prejudiced by the appellant's failure to comply with rule 3.05.

I am satisfied on the balance of probabilities that judgment was irregularly obtained in that rule 3.05 was not complied with and the respondents are accordingly entitled to have judgment set aside.

The basis of my decision is in respect of a matter which was not raised before the Master. However, for different reasons I have come to the same conclusion as the Master. Accordingly, in my opinion, this appeal should be dismissed.

I give leave to the parties to make an application on the question of costs.