[2003] QSC 210

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Date: 18 June, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

AMBROSE J

No S7663 of 1999

PAULS LIMITED ACN 009 698 015	Plaintiff
and	
DETUTA PTY LTD ACN 003 615 861	First Defendant
and	
TARLOCHAN SINGH PANDHER	Second Defendant

BRISBANE

..DATE 10/06/2003

JUDGMENT

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HIS HONOUR: This is an application by the second defendant to set aside a judgment or order made by Justice MacKenzie on 3 February 2003. The effect of part of that order was that judgment be entered for the plaintiff against both defendants in the sum of $107,894.74. The case is a rather unusual one in my experience. Initially, the matter became before me on - more than three years ago - on 13 March 2000. Prior to that time, an order for substituted service had been obtained by the plaintiff because of the difficulty it had in effecting personal service on the defendants.

Eventually substituted service was effected in accord with the terms of the order conditions imposed and there was still no appearance, so the matter came on for hearing on an application for judgment in default because there was no appearance.

The judgment or order made on 13th of March was twofold. First, that an injunction be granted restraining the first defendant by its servants or agents which would include the second defendant from selling the plaintiff's product in places other than India, the assertion being, by the plaintiff, that contrary to the agreement the defendant had been selling its product in China which was causing difficulty on loss commercially to it because of the arrangements it had for selling its milk product through specified agents in China.

So there was an injunction, a permanent injunction was the first part of the order which was an order in default of defence.

The second order was that the plaintiff recover damages to be assessed in the District Court and another order be made with respect to payment of costs of the action.

Well, the judgment was effected. The injunction, of course, had operation immediately, and eventually damages were assessed by Judge Forno in the District Court in the sum of just over $107,000.

Well, an application was made by the defendant before Justice Holmes successfully to set aside that judgment by default and to support that application the defendant, the second defendant, on behalf of both them, I suppose, filed an affidavit asserting that the defendants had a defence to the action.

No similar affidavit has been filed upon this application, but the defendant, second defendant in any event, relies upon the content of the affidavit read before Justice Holmes which resulted in the setting aside of the judgment by default and getting leave on conditions to defend the plaintiff's claim.

That affidavit comprised a variety of exhibits and contained an assertion towards the end that it was the belief of the second defendant that all milk products he had purchased from

the plaintiff had been sent either directly or indirectly to India.

Evidence was available which has been placed before me which I will not analyse from which it might strongly be inferred that that was not the position, however, before Justice Holmes it was held that the defendants had sufficiently discharged the onus on them, on that sort of application, to be granted leave to defend and leave to defend was granted conditionally, however, upon the provision by the defendants of security for costs.

This, I think, was for the sum of $30,000. This - the security was a security by way of bank guarantee and was provided to secure the costs of the plaintiff in the event of the defendants failing in its defence and being ordered to pay the plaintiff's costs. This security was effected by the securing of a bank guarantee limited, however, for a period of 12 months, or roughly 12 months.

The position at the moment is that the plaintiff has not secured the costs because, of course, that bank guarantee has run out.

In my view upon a proper reading of the condition it was not satisfied by the provision of a guarantee to last for a period of only 12 months. The order on its face clearly required the security to the extent of $30,000 for costs incurred by the

plaintiff up until probably the date of judgment, at least till date of trial, probably date of judgment.

So although it is asserted that the liberty to defend granted by Justice Holmes was unconditional it clearly was not and in my view that condition upon which judgment was set aside has not been complied with and it is not complied with at the moment.

Well, there has been a history of delay and alleged breach of rules relating to the making of disclosure and so on in this case.

Towards the end of last year the plaintiff had made disclosure, had requested disclosure by the defendants and that disclosure has not been effected.

Well, after a series of letters designed to comply with rule 444 of the UCPR disclosure was sought, but it seems not to have been effected and eventually the matter came on for hearing before Justice Mackenzie.

On 3 February of this year Justice Mackenzie ordered, pursuant to UCPR 371, that the defence of the defendants be struck out again, or be struck out, and that again judgment be entered for the plaintiff against the defendants on the basis of their failure to comply with their obligations under the rules relating to disclosure.

So for a different reason the defendants then found themselves back in the position that they had been in before they had the judgment by default set aside by Justice Holmes about three years ago.

Again, pursuant to the relevant UCPR rule judgment was entered, again, for the plaintiff in precisely the same sum as it had been entered pursuant to the defendant judgment by default I gave so long ago. That is it was ordered by Justice Mackenzie that judgment be entered for the plaintiff against the defendants in the sum of $107,894 and 74 cents.

The effect of striking out the judgment entered for the plaintiff in my view really left the plaintiff in the position that it was in before it obtained the default judgment from me, back so long ago.

I think the probability is that at the moment, on a proper construction, although it is perhaps not essential to the determination of this matter, the probability is that the injunction has not arisen like a Phoenix, but the position is that the applicant could or the plaintiff could, if it so desired, seek to get another order for an injunction, on the basis that its application for one is not defended, but it does not matter really on this application to determine whether the effect of Justice Mackenzie's order was to revive the order for injunction or not.

The real question in this case, is whether Justice Mackenzie's order should also be set aside, on the basis that essentially, there had been undue delay by the plaintiff in delivering a reply to the defence delivered, pursuant to the order of Justice Holmes, it clearly being a delay, but it seems to me under the Rules, that that delay does not really affect the validity or the legal effect of the delivery of the reply about - I think it was about 20 months after it should have been delivered.

The application is sought to be determined urgently - today - because tomorrow there is apparently an application to have the second defendant declared bankrupt, pursuant to a bankruptcy notice, served by the plaintiff on him, on the basis of his failure to comply with the order made by Justice Mackenzie in February 2003, resulting in a judgment that he pay something over $107,000 to the plaintiff.

The appropriate notice was given, payment was not made, so the proceedings have been instituted against him, after - according to the material that I have read - very significant problems in effecting service on him.

This case seems to have been one in which substituted service has been required over the years by the plaintiff on the defendants. In any event, eventually service was effected and I am told the matter comes on tomorrow for hearing.

The second defendant is anxious to have this judgment set aside - that is Justice Mackenzie's judgment set aside - so that he may (a) defend the action - the plaintiff's action; and (b) raise this as a matter relevant to the consideration of the bankruptcy court when it considers whether there has been an act of bankruptcy, constituted by the second defendant's failure to comply with the bankruptcy notice, given in respect of a judgment which has been set aside.

I have looked at the material, fairly quickly, I must confess, in the time that has been available to me and I have looked particularly at the affidavit of the persons who have attempted to effect service of various legal documents on the second defendant.

I have considered his evidence - his affidavit, which - both affidavits really - in which the only thing that is obvious to my mind, is the absence of any swearing to the nature of the defence that he seeks to raise bona fide. There is certainly an assertion that he did not sell material. That is - a long time ago, that was the defence that was advanced before Justice Holmes, on 21 May 2001, more than two years ago, but there is nothing in the current affidavit filed on this application fairly recently.

In my view, on my assessment of all the material, albeit a quick assessment because of time constraints - I have come to the conclusion that in all probability, the second defendant has quite deliberately taken steps to make it as difficult as

possible for the plaintiff to proceed with its action against him and also as difficult as possible for the plaintiff to proceed with its bankruptcy proceedings against him in the Federal Court tomorrow.

At the end of the day, I have come to the conclusion that there is no excuse demonstrated for the failure to comply with the time constraints imposed upon him by the Rules and brought to his attention by the plaintiff, with respect to making disclosure.

I am not persuaded on the material that he has a bona fide defence to the plaintiff's claim. His conduct over the years, which is fully illustrated in the various affidavits, is consistent only with him making it as difficult as possible, to bring the issue between him and the plaintiff before the Court for its proper determination.

In the circumstances, I am unpersuaded that there is any basis upon which I could properly set aside the judgment of Mr Justice Mackenzie and I decline to do so.

MR SULLIVAN: Your Honour, we'd seek costs of the application.

HIS HONOUR: Can you say anything about that, Mr Lilley?

MR LILLEY: I can't, your Honour.

HIS HONOUR: No, very well. I order that the - it's only an application by the second defendant, isn't it, I think?

MR LILLEY: No, the application was-----

HIS HONOUR: Was it by both defendants?

MR LILLEY: Both defendants, your Honour.

HIS HONOUR: Oh, I looked at the application and it says the second defendant is applying for the following.

MR SULLIVAN: That's how we went into this.

HIS HONOUR: Eh? Oh, there's another one as well, is there?

MR SULLIVAN: Is there a second application, is there?

HIS HONOUR: Oh, there's a second one. I'm looking at the wrong one, am I?

MR LILLEY: The application I'm reading taken as the second defendant is applying to the Court.

HIS HONOUR: Oh well the second defendant. All right. But it's-----

MR LILLEY: That the judgment entered against the first and second defendants be set aside.

HIS HONOUR: Right. Okay. I must have been looking at the wrong one. The application that I have is one that's filed on 8 May. There's a second one, is there?

MR LILLEY: No, your Honour is quite right. The opening lines say, "The second defendant is applying."

HIS HONOUR: Yes.

MR LILLEY: But the first order is-----

HIS HONOUR: Oh, I see. Oh, I'm sorry.

MR LILLEY: -----that both judgments be set aside.

HIS HONOUR: It is the application for the second defendant, to set aside the judgment against both defendants. I simply dismiss that application and I suppose the consequences that the only order for costs will be an order against the second defendant and not against both defendants.

MR SULLIVAN: I think my friend says he doesn't mind if it's made against-----

HIS HONOUR: He doesn't mind-----

MR SULLIVAN: Against both, given that the relief was sought, was for the benefit of the first and second.

HIS HONOUR: Yes, well it's just that the second defendant doesn't seem to have made an application.

MR SULLIVAN: I think it was the first to the cup.

HIS HONOUR: All right.

MR SULLIVAN: We'd just be seeking costs of and incidental.

HIS HONOUR: I order that the first defendant and the second defendant, pay to the plaintiff, its costs of and incidental to the application, to be assessed on a standard basis.
