# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Secure Funding Pty Ltd v Dean* [2017] QSC 126 |
| PARTIES: | **SECURE FUNDING PTY LTD**<br>ACN 081 982 872<br>(first plaintiff)<br>**LIBERTY FINANCIAL PTY LTD**<br>ACN 077 248 983<br>(second plaintiff)<br>**v**<br>**GARY KEVIN DEAN**<br>(first defendant)<br>**DEBBIE KAY DEAN**<br>(second defendant) |
| FILE NO/S: | BS No 6241 of 2013 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 19 June 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 April 2017 |
| JUDGE: | Martin J |
| ORDER: | **1. The default judgment contained in order 3 of the orders made by Justice Douglas on 21 October 2013 is set aside.**<br>**2. The default judgment contained in order 3 of the orders made by Justice Margaret Wilson on 11 November 2013 is set aside.**<br>**3. The defendants are to pay the plaintiffs' costs of the application.**<br>**4. The defendants are directed to file and serve their Defence and Counterclaim by no later than 26 July 2017.** |
| CATCHWORDS: | PROCEDURE – CIVIL PROCEEDINGS IN STATE AND |

TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – SETTING ASIDE – GENERALLY – where the respondent lent $500,000 to the applicants – where the applicants defaulted on the loan – where the respondent successfully applied for default judgments against the applicants in 2013 – where the applicants brought an application to set aside the default judgments – whether the default judgments were regularly entered – whether the default judgments should be set aside even though regularly entered

*Cook v D A Manufacturing Co Pty Ltd* [2004] QCA 52

*Cusack v De Angelis* [2008] 1 Qd R 344

*Deputy Commissioner of Taxation v Johnston* (2006) 230 ALR 575

*Embrey v Smart* [2014] QCA 75

*National Mutual Life Association of Australasia Limited v Oasis Developments Pty Ltd* [1983] 2 Qd R 441

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| COUNSEL: | R Ivessa for the applicant/defendants<br>C Gobbo for the respondent/plaintiffs |
| SOLICITORS: | Colwell Wright for the applicant/defendants<br>Directly instructed by Liberty Financial Pty Ltd |

[1] In October and November 2013, default judgments were entered against the first defendant, Gary Dean, and the second defendant, Debbie Dean, respectively. Over two years later they filed this application to have those judgments set aside. It took more than a year for the application to be heard.

[2] The applicants contend that the judgments were entered irregularly. In the alternative they submit that the judgments, if not entered irregularly, should be set aside in any case.

**The basis of the claim upon which judgments were entered**

[3] In 2011, Secure Funding Pty Ltd lent $500,000 to the defendants to refinance a home loan. The loan was secured by a mortgage over property at Burleigh Waters.

[4] In the same year the defendants, for themselves and in their capacity as directors of Eaglefarm Investments Pty Ltd, sought financial accommodation in the form of a floor plan facility and a refinance investment loan from Liberty Financial Pty Ltd. As part of the arrangement for the finance, the defendants guaranteed repayment of all money owing by Eaglefarm under the floor plan facility and the refinancing loan.

[5] The guarantee misdescribed Liberty Financial as Secure Funding. That was rectified in the defendant judgments and no relief is sought with respect to that.

**The statement of claim**

[6] The statement of claim seeks a number of orders and those orders were made by default. The defendants only challenged that part of the judgments which related to the floor plan facility and the guarantee of that facility. With respect to that part of the pleading, Liberty Financial alleged:

(a) the existence of the guarantee;

(b) that it contained, among other things, the following clause:

> "3. Guarantee
>
> (a) You guarantee that the Debtor will pay all amounts Payable under the guarantee agreements when they are due. This guarantee continues until all these amounts have been paid in full or You in the Guarantee and Indemnity under clause 7. Except as required by law, You cannot withdraw from, end or limit this guarantee and indemnity.
>
> (b) Upon request from us, You must pay Us any amount which the Debtor does not pay Us when it is due under the guaranteed agreements. We do not need to first require payment from the debtor.";

(c) that on 13 December 2012 the amount owing under the floor plan facility was $1,929,784.36;

(d) that on that date the amount owing by the defendants under the guarantee was the same amount;

(e) that on 19 December 2012 Liberty Financial demanded repayment of all money owing by the defendants under the guarantee; and

(f) the defendants failed to pay the amount demanded in the letter of 19 December 2012.

[7] It was also pleaded that Eaglefarm went into voluntary liquidation on 23 March 2012. That was not in issue.

**Were the judgments regularly entered?**

[8] The defendants submit that the judgments were irregularly entered because it was not pleaded in the statement of claim that either of the plaintiffs advanced money to Eaglefarm under the floor plan facility.

[9] In *Cusack v De Angelis*,[1] Muir JA (Lyons J agreeing) examined authorities relating to the concept of irregularity so far as default judgments are concerned. Irregularity, as that term is used in relation to default judgments, normally results from a failure to comply with the rules of court relating to the entering of default judgment. His Honour said:

> "[37] But the concept of irregularity has been given a more extended meaning. A number of cases support the proposition that where judgment is entered for too large an amount, the defendant is entitled to have them set aside *ex debito justitiae*. …
>
> [43] The cases in which default judgments have been held to be irregular are ones in which there was either some deficiency in the steps prerequisite to the entering of default judgment or an abuse of process or something akin to it resulting from the plaintiffs obtaining a judgment to which the plaintiff knew or ought reasonably have known he or she was not entitled. …"[2]

[10] A pleading must inform the other party of the claim made against that party and the facts upon which the claim is based and which in law entitle the plaintiff to the relief sought. It is not necessary in a claim for moneys owing under a guarantee to plead that the money sought was originally advanced to the principal debtor.

[11] In this case, the plaintiffs pleaded the existence of the guarantee, its material terms, the amount owing by the defendants under the guarantee and the demand made of the guarantors. There is no need to plead a demand made upon the principal debtor because the guarantee specifically provides that payment is due upon request and that the creditor need not first require payment from the principal debtor.

[12] The pleading was not defective. The judgments were regularly entered. This leads to the second part of the applicants' argument.

**Should the judgments be set aside even though regularly entered?**

[13] Rule 290 of the *Uniform Civil Procedure Rules* provides:

> "The court may set aside or amend a judgment by default under this division, and any enforcement of it, on terms, including terms about costs and the giving of security, the court considers appropriate."

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1 [2008] 1 Qd R 344.

2 At 351-352.

[14] It is generally accepted that the discretion to set aside a regularly entered judgment is unfettered by the provisions of that rule. But, over time, a number of matters have been recognised as being relevant to the exercise of that discretion. In *Deputy Commissioner of Taxation v Johnston*,[3] Atkinson J said:

> "… There are three matters which will usually be relevant to the exercise of the discretion:
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> (1) whether the defendant has given a satisfactory explanation of the failure to defend;
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> (2) whether the defendant's delay in making the application to set aside precludes it from obtaining relief; and
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> (3) whether the defendant has a prima facie defence on the merits."[4]

[15] The defendants need not demonstrate each of the above matters. Rather, they inform the exercise of the discretion.[5]

[16] In considering those matters, one must also bear in mind what was said on this subject by McPherson J (as he then was) in *National Mutual Life Association of Australasia Limited v Oasis Developments Pty Ltd*,[6] namely, that an applicant seeking to set aside a judgment obtained in default of appearance is required to show by affidavit a defence on the merits, that is a "prima facie" or "substantial" defence. That is the most important aspect of any application to set aside a default judgment for, as his Honour noted:

> "[It will] not be often that a defendant who has an apparently good ground of defence will be refused the opportunity of defending, even though a lengthy interval of time had elapsed in making his application provided no irreparable prejudice is thereby done to the plaintiff."[7]

*Has there been a satisfactory explanation for the failure to defend?*

[17] Mr Dean suffered a heart attack a few months before being served with the claim in these proceedings. He says that he had an operation and that he was medicated, extremely anxious, and unable to perform his job. He also says that he was unable to cope at the time he should have been instructing solicitors to prepare a defence.

[18] Mrs Dean says:

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3 (2006) 230 ALR 575.

4 At 576.

5 *Cook v D A Manufacturing Co Pty Ltd* [2004] QCA 52 at [16].

6 [1983] 2 Qd R 441.

7 At 449.

> "When I was served with the plaintiff's claim in these proceedings, I felt there was nothing I could do about it. The plaintiffs are very large companies, and I felt there was no use fighting them. I had no financial resources available to hire a lawyer to see if I had a defence. Even if I had a defence, I couldn't afford to fight them about it in Court."

[19] She went on to say that she presumed that the amount claimed was overstated and that there had to be some "accounting later for the amount they received from such a sale".

[20] Serious ill-health and the stress associated with the defendants' business can explain the failure to file a defence within the allotted time. However, this is not a particularly strong case. Mr Dean's heart attack occurred in March 2013. The claim was served on 9 July 2013, more than three months later. Judgment was first obtained on 21 October 2013, about seven months after his heart attack and more than four months after service. Given his claimed health problems, it is likely that he would have, had he applied, been able to file a defence out of time.

[21] Mrs Dean did not have the same health problems. Her reason for doing nothing was that she couldn't afford to retain solicitors and because she thought the claim was inflated. That is not an excuse.

[22] If this were the only factor to take into account, I would dismiss the application.

*Does the delay in making the application preclude the defendants from obtaining relief?*

[23] The application to set aside the judgments was not filed until 9 February 2016, about 27 months after the second judgment was entered. The defendants say that they did not receive notice of the judgments and only became aware of their existence when they were served with bankruptcy notices in January 2016.

[24] In an affidavit on behalf of Liberty Financial, it was deposed that copies of the judgments were sent by prepaid post to a Post Office Box at Robina and to an address in Burleigh Waters. The first address was said to be the defendants' "address of service" and the second "their residential address".

[25] The security documents allow for service at a number of possible addresses, but I was not directed to any evidence which established that either of the addresses used came within any of the possible types of address which might be used. The only address I could find in the material was the one used by the defendants in the guarantee and that was at Mermaid Beach. In the light of the sale of a mortgaged property by the plaintiffs in 2014, it is difficult to accept that neither defendant believed that nothing had come of the court proceedings. I do accept, though, that the material does not establish that they were served with the default judgments. There is sufficient evidence to conclude that the defendants believed that, after the sale of the mortgaged properties and the vehicles the subject of the floor plan, there might be nothing left for the plaintiffs to pursue. In

any event, the defendants' conduct is not so egregious as to shut them out on an application such as this.

*Do the defendants' have a prima facie defence on the merits?*

[26] On the morning of the hearing, the defendants provided the plaintiffs with a draft Defence and Counterclaim. This is very unsatisfactory. This tardiness is an echo of the defendants' earlier delays.

[27] What needs to be demonstrated by an applicant in this type of proceeding was considered by Applegarth J (Muir and Morrison JJA agreeing) in *Embrey v Smart*:[8]

> "[68] The third matter has been described in different ways. Lord Atkin in *Evans v Bartlam* referred to rules that guide the discretion and one of them was 'an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence'. It has been said that the affidavit 'must set out all the defences on which the defendant intends to rely and briefly set out the facts by which the defendant seeks to establish such defences'. The defendant must make more than a bare allegation: the allegation must be supported by 'some reference to evidence to suggest that the defence is plausible and not just raised for the purpose of having default judgment set aside'. It is insufficient for an applicant:
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> > '… to allege that he has a defence upon the merits and swear to such a defence generally. He must go further and disclose what such merits are, and show to the court that his application is bona fide.'
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> [69] The requirement to refer to evidence, not generalities, does not necessarily require a lengthy affidavit of merits. As *Prus-Butwilowicz v Moxey* illustrates, the contents of a fulsome draft defence may be sworn to by a short affidavit. In that case it was not necessary for the applicant to swear 'a long affidavit touching the same matters as appear in his long, detailed pleading'. …"

[28] The defences asserted by the defendants are in four parts:

(a) The amount owed by the defendants is less than the amount claimed or is nil. This arises from the defendants' claim that the plaintiff should have recovered sufficient monies from the sale or return of vehicles to extinguish the debt. The plaintiff contests this on the ground that there was not the level of stock alleged by the defendants for that recovery to occur.

(b) The plaintiffs caused their own losses by failing to properly exercise their security over the company and, thus, mitigate their loss. This is "supported" by a set of

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[8] [2014] QCA 75 at [68]-[69].

vague assumptions by Mr Dean which seem to be expressed more in hope than in certainty.

(c) The second plaintiff is estopped from resiling from representations that the floorplan facility would not be strictly enforced. These concern, among other things, whether a particular set of valuations would be used in the calculation of the amount of money to be advanced.

(d) The alleged representations constitute a contravention of s 18 of the *Australian Consumer Law*. The defendants rely on the same misrepresentations as referred to above.

[29] Until the morning of the hearing, the plaintiffs had not seen the draft defence and, in reliance on Mr Dean's affidavit, submitted that the alleged representations were vague as to date, location, parties and substance.

[30] The draft defence has remedied the vagueness to a limited extent but would, most probably, be the subject of a request for particulars.

[31] The plaintiffs raise a number of issues designed to show that the proposed defence has some shortcomings. So much may be accepted, but the defendants do not have to show an impregnable defence, only one that is plausible. This is not the time to minutely examine the defendants' case. It is enough if they show a prima facie defence, which they have done.

***What orders should be made?***

[32] Where a judgment, which was regularly entered, is set aside, it is a common consequence for there to be an order that the setting aside be conditional upon the defendant paying the judgment amount into court or otherwise providing security. The defendants have sworn that they have no ability to do that. That is not disputed. To make that a condition would mean that the defendants could not defend. I will not require security.

[33] The defendants also submit that the costs of this application should only be Liberty Financial's costs in any event. Both plaintiffs are blameless in this application. It had to be brought because of the manifest failings of the defendants in not protecting their own interests.

**Orders**

[34] The following orders are made:

(a) The default judgment contained in order 3 of the orders made by Justice Douglas on 21 October 2013 is set aside.

(b) The default judgment contained in order 3 of the orders made by Justice Margaret Wilson on 11 November 2013 is set aside.

(c) The defendants are to pay the plaintiffs' costs of the application.

[35] The defendants are directed to file and serve their Defence and Counterclaim by no later than 26 July 2017.