SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy commissioner of Taxation v Peters* [2020] QSC 113
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (Plaintiff/Respondent) V **PETERS** (Defendant/Applicant)
FILE NO/S:	BS1274/16
DIVISION:	Trial Division
PROCEEDING:	Application filed 29 January 2020
DELIVERED ON:	27 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2020
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The default judgment entered against the defendant dated 9 February 2018 is permanently stayed.**
CATCHWORDS:	PROCEDURE– CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS– JUDGMENTS AND ORDERS– AMENDING, VARYING AND SETTING ASIDE JUDGMENTS AND ORDERS– ACTIONS TO REVIEW OR SET ASIDE JUDGMENT OR ORDER–OTHER CASES–where judgment was obtained against the defendant in default of filing a notice of intention to defend– where the defendant applied to set aside the default judgment– where the defendant submits that the compromise agreement entered into with the plaintiff after the judgment was entered provides a basis for the Court to set aside the judgment and dismiss the claim– where the plaintiff neither opposes nor consents to the orders sought– whether the Court can set aside the judgment and dismiss the claim having regard to facts that occurred after the judgment was entered– where the Court held that it was not appropriate to set aside the judgment on the basis of the compromise agreement as the validity of the judgment

was not impeached– where the Court ordered that the judgment be permanently stayed.

Civil Procedure Rules 1998 (UK), Pt 40.8A

Common Law Procedure Act 1852 (UK), s 27

Common Law Process Act 1867 (Qld), s 17

General Orders to the Judicature Act 1876 (Qld), O 41 r 22

Income Tax Assessment Act 1936 (Cth)

Judicature Act 1876 (Qld), Scheduled General Orders, O 29 r 14

Rules of the Supreme Court 1900 (Qld), O 45 r 1, O 45 r 3, O 15 r 10

Supreme Court (General Civil Procedure) Rules 2014 (Vic), r 66.14

Uniform Civil Procedure Rules 1999 (Qld), r 281, r 282, r 283, r 290, r 668

Bailey v Marinoff (1971) 125 CLR 529, cited

Cusack v De Angelis [2007] QCA 313, cited

Eden v Naish (1878) 7 Ch D 781, cited

Embrey v Smart [2014] QCA 75, cited

Evans v Bartlam [1937] AC 473, cited

Gamser v The Nominal Defendant (1977) 136 CLR 145, discussed

Grimshaw v Dunbar [1953] 1 QB 408, cited

Hall v Scotson (1853) 9 Exchequer Reports (Welsby,

Hurlstone and Gordon) 238; 156 ER 102, cited

K.G.K Constructions Pty Ltd v East Coast Earthmoving Pty Ltd [1984] 2 Qd R 13, discussed

Kwong Loong & Co v Kwong Yue Loong [1907] QWN 65, cited

Lawstrane Pty Ltd and Victorian WorkCover Authority v Ruttmar [2013] VSCA 57, discussed

Lister v Mundell, 1 B & P, 427, cited

McDermott v Black (1940) 63 CLR 161, discussed

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

Permewan Wright Consolidated Pty Ltd v Attorney-General (1978) 35 NSWLR 365, discussed

Rosing v Ben Shemesh [1960] VR 173, cited

Scaffidi v Perpetual Trustees Victoria Ltd [2011] WASCA 159, cited

Welz v H.P Promotions Pty Ltd [1971] Qd R 112, cited

Woods v Sheriff of Queensland (1895) 6 QLJ 163, discussed

COUNSEL:	B Rooks, solicitor, for the applicant
	No appearance for the respondent
SOLICITORS:	MacPherson Kelly as town agent for Argent Law for the applicant
	No appearance for the respondent

Jackson J:

[1] This is an unusual application to set aside a judgment. The judgment was obtained in default of filing a notice of intention to defend[1] where service of the claim was proved[2] and the claim was for a liquidated demand.[3]

[2] On 5 February 2016, the proceeding was started by claim. The plaintiff's claim was for $1,291,536 for amounts of unpaid tax plus the general interest charge, administrative penalties plus the general interest charge and shortfall interest charges plus the general interest charge for a number of tax years, arising upon assessments and amended assessments and notices issued by the plaintiff under the *Income Tax Assessment Act* 1936 (Cth).

[3] On 5 September 2016, the defendant was served.

[4] On 9 February 2018, judgment in default of filing a notice of intention to defend was entered in the sum of $1,544,091.28 including further amounts by way of the general interest charge and costs upon the amount of the claim as filed.

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 281.

2 *Uniform Civil Procedure Rules* 1999 (Qld), r 282.

3 *Uniform Civil Procedure Rules* 1999 (Qld), r 283.

[5] On or about 10 December 2019, the plaintiff agreed with the defendant to compromise the amount payable upon the judgment debt. The plaintiff agreed to accept the sum of $418,391.86 in satisfaction of his outstanding tax liabilities, including the judgment debt.

[6] The defendant does not suggest that the judgment was irregularly obtained. Instead, the defendant applies to set aside the default judgment on the basis of the compromise agreement and relying on additional circumstances.

[7] What makes this application unusual thereby appears. The defendant does not apply to set aside the judgment in order to contest the plaintiff's claim as filed. Instead, what he proposes is that the judgment is to be set aside and the plaintiff's claim is to be dismissed because the subject of the claim was compromised after the judgment was entered.

[8] The plaintiff neither opposes nor consents to the orders sought.

[9] The reason the defendant seeks those orders is that the judgment has a detrimental effect upon the defendant's business. He wishes to have the judgment expunged from the record so that it no longer has that detrimental effect.

[10] The additional circumstances in support of the application relied upon by the defendant are as follows. Some years before the claim was filed the defendant deposited a total of $1,700,000 into his then solicitor's trust account for two purposes. One was to invest on first mortgage security. The other was to meet the amount of the defendant's tax liabilities. The solicitor was retained to negotiate with the ATO about the amounts payable under the assessments and amended assessments the subject of the claim.

[11] On 13 May 2011, the ATO made an offer of compromise of those liabilities. I infer it was for a sum less than the full amount of the claim as filed although its terms are not in evidence. The defendant says that his then solicitor did not communicate the offer to him as it was the solicitor's duty to do. The defendant says that had the offer been communicated to him he would have accepted it and there was enough in the solicitor's trust account to pay the amount of the agreed liability that would have resulted. Instead, it is alleged that the solicitor stole the plaintiff's money from trust. These circumstances are said to have prevented the defendant from being able to compromise the plaintiff's claim before judgment was entered in default of filing a notice of intention to defend.

[12] Taking these circumstances into account, it is not obvious that the orders sought should be made. Things might have been different had the plaintiff consented to the orders sought by the defendant, but I need not consider that question. The question in the present case is whether, in the absence of such consent, it is a proper exercise of the court's discretionary power to set aside the judgment and then to dismiss the claim if the judgment is set aside on the basis of the alleged circumstances.

[13] If it were proper to set aside the judgment, the second step of dismissing the claim is not necessarily difficult in principle. That step may be tested against the hypothetical circumstance had judgment in default never been entered. In that circumstance, a compromise agreement of the unpaid amounts claimed, entered into after the proceeding was started, would operate as a defence to the claim as

originally filed, where the compromise agreement is a contract that constitutes an accord executory or is one that has been performed and operates as an accord and satisfaction. As Dixon J said in *McDermott v Black*:[4]

> "The essence of accord and satisfaction is the acceptance by the plaintiff of something in place of his cause of action. What he takes is a matter depending on his own consent or agreement. It may be a promise or contract or it may be the act or thing promised. But, whatever it is, until it is provided and accepted the cause of action remains alive and unimpaired. The accord is the agreement or consent to accept the satisfaction…
>
> If the agreement is to accept the promise in satisfaction, the discharge of the liability is immediate; if the performance, then there is no discharge unless and until the promise is performed."[5]

[14] It would have been appropriate in those circumstances to dismiss the claim,[6] and it would have been appropriate in such a case to set aside a judgment entered in default of filing a notice of intention to defend after an accord and satisfaction of the claimed debt,[7] but that would have been by reason of facts occurring before the judgment was entered and which would have demonstrated that it should not have been entered in the first place.

[15] The question remains whether the default judgment should be set aside in this case, as the first step, in the circumstances as outlined, for the reasons advanced.

[16] An important point is that the defendant does not contend or prove that no amount was owing to the plaintiff either when the proceeding was started or afterwards, until the compromise agreement was made and he had paid the agreed amount, both of which occurred after the default judgment was entered.

[17] The general principle is that there is no inherent power in the court to set aside a judgment regularly made and authenticated by reason of changed circumstances, but there are exceptions. The general principle was considered in *Gamser v The Nominal Defendant*:[8]

> "As to the question of whether there was in the Court inherent jurisdiction to make the order sought, Glass J.A. took the view that the decision of this Court in *Bailey v. Marinoff* (1971) 125 CLR 529 was fatal to the argument. In that case this Court held that when an appeal has been finally disposed of in a court of appeal by an order

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4 (1940) 63 CLR 161.

5 (1940) 63 CLR 161, 183-184.

6 *Eden v Naish* (1878) 7 Ch D 781; *Scaffidi v Perpetual Trustees Victoria Ltd* [2011] WASCA 159, [59].

7 *Kwong Loong & Co v Kwong Yue Loong* [1907] QWN 65; *Cusack v De Angelis* [2007] QCA 313, [44].

8 (1977) 136 CLR 145.

duly entered it has no inherent power to reopen the case on an application made after the order has been entered. That general proposition is no doubt subject to the rule that a judgment apparently regularly obtained may be impeached upon the ground of fraud, and there would seem to be no reason why that rule should not also apply to judgments upon appeal, although it is difficult to visualize how a judgment of an appellate court could be obtained by fraud, other than in circumstances in which the original judgment which the appellate court had upheld had itself been obtained by fraud. The majority judgments in *Bailey v. Marinoff* appear to me to make it clear that there is no inherent power to set aside judgments by reason of changed circumstances on application made after the case has been finally disposed of. It is sufficient to quote what Menzies J. said (1971) 125 CLR, at pp 531-532:

> "This appeal is not concerned with the power of a court to alter orders in pending litigation. It is concerned with the power of a court to make an order in litigation which, without any error or lack of jurisdiction, has been regularly concluded and is no longer before the court. To recognize the problem is, I think, to solve it. However wide the inherent jurisdiction of a court may be to vary orders which have been made, it cannot, in my opinion, extend (to) the making of orders in litigation that has been brought regularly to an end." (at p154)

In this Court it was argued that the cases there relied upon did not cover the situation of fresh evidence and that fraud was in truth an example or category of fresh evidence, but the cases do not recognize such a principle and indeed are inconsistent with it. (at p154)

I am therefore in agreement with the reasons of Glass J.A. on the argument concerning the inherent jurisdiction of the Court."

[18] The defendant's application is made under *Uniform Civil Procedure Rules* 1999 (Qld), r 290. That rule provides:

> "**290 Setting aside judgment by default and enforcement**
>
> 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."

[19] Rule 290 operates as an exception to the general principle as to finality. There are many cases considering the operation of the rule and its predecessors and

comparators in other jurisdictions.[9] Such a provision has existed in Queensland at least since 1867[10] and has been one of the rules of court since at least 1876 on the introduction of the *Judicature Acts* in Queensland by the *Judicature Act* 1876 (Qld) with the scheduled general orders.[11] Even before then, statutory provision was made for common law courts to set aside judgments obtained in default of appearance; see, for example, the English *Common Law Procedure Act* of 1852, s 27 that was considered in 1853 in *Hall v Scotson*.[12]

[20] Rule 290 may be sourced back to equivalent provisions but it is unnecessary to go further into the history. Generally speaking, rules of court such as r 290 apply to judgments in default that are set aside because of facts arising before the judgment was entered, by reason of which the defendant has a defence to the claim that arose before judgment. That limit of their operation exists because a judgment is not usually impeachable by reason of facts that occur after the judgment.

[21] Where the facts that undermine a judgment (including a judgment in default) occur after the judgment is entered, a rule of court such as r 290 is not the basis of the court's power to set aside the judgment. Historically, the writ of *audita querela* was the proceeding at common law based on facts occurring after the judgment that would relieve against and prevent enforcement proceedings upon the judgment.[13]

[22] As to *audita querela*, in *Woods v Sheriff of Queensland*[14] Griffith CJ said:

> "At common law, if after final judgment had been given in an action new facts arose entitling the defendant to be relieved from execution upon the judgment, he could obtain that relief by a proceeding called a writ of *audita querela*….
>
> Afterwards it became the practice in the court of Common Law to interfere in a summary way on motion in all cases in which the party would be entitled to relief on a writ of *audita querela* (Per Eyre, C.J in *Lister v Mundell*, 1 B & P, 427). The proceeding by *audita querela* is now abolished, but similar relief may be obtained after judgment upon the ground of facts which have arisen… too late to be pleaded.
>
> …Thus, although the mode of procedure is altered, full power is retained to relieve a party from the effect of a judgment which, though just when pronounced, ought not to be carried into execution."

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9 For examples of leading cases, see *Embrey v Smart* [2014] QCA 75, [67]-[69]; *National Mutual Life Association of Australasia v Oasis Developments Pty Ltd* [1983] 2 Qd R 441, 449-450; *Rosing v Ben Shemesh* [1960] VR 173; *Grimshaw v Dunbar* [1953] 1 QB 408; *Evans v Bartlam* [1937] AC 473.

10 *Common Law Process Act* 1867 (Qld), s 17.

11 *Judicature Act* 1876 (Qld), Scheduled General Orders, Order 29 rule 14.

12 (1853) 9 Exchequer Reports (Welsby, Hurlstone and Gordon) 238; 156 ER 102.

13 *Blackstone's Commentaries on the Laws of England*, Book 3, Chapter 25, II.

14 (1895) 6 QLJ 163.

[23] As stated in effect, *audita querela* was replaced by a rule of court[15] that performed the same function, now found in UCPR r 668. That rule replaced *Rules of the Supreme Court* 1900 (Qld), O 45 r 1, which was considered in *K.G.K Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* :[16]

> "The rule is peculiar to the Queensland *Rules of the Supreme Court*, of which the author was of course Sir Samuel Griffith. The only reported instance of its application of which I am aware is the decision in *Welz v H.P Promotions Pty Ltd* [1971] Qd R 112, which was concerned specifically with the discharge of a judgment in relation to which the judgment creditor refused to accept satisfaction tendered by the defendant. It may well be that inspiration for O. 45 was afforded by the difficulties referred to by Griffith CJ, when presiding in this court in *Woods v Sheriff of Queensland* (1895) 6 QLJ 163, and that the Order itself, which is entitled 'Relief against judgments and orders', was intended as a statutory confirmation and perhaps enlargement of the jurisdiction that was there held to exist apart from statute. What was said by His Honour on that occasion was (6 QLJ 163, 165):
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> > 'The same principle that allows relief to be given against the continued operation of a final judgment obviously extends also to giving relief against the continued operation of an interlocutory order, if after it is made new facts come into existence or are discovered which render its enforcement unjust. Such a contingency is plainly much more likely to arise in the case of an interlocutory order than in that of a final judgment. In my opinion, it is the settled practice of the Court to exercise the power of giving relief in such cases. An application for such relief is not in the nature of an appeal or rehearing; each of these is founded on the contention that the order appealed from ought not to have been made. An application for a new order which has the effect of suspending in whole or in part the operation of a previous order starts with the assumption that that order was rightly made. There is therefore no question of reversing or varying or rehearing the original decision or order. ... If it should turn out that the application is based upon the assumption that the order, the operation of which it is desired to modify, was wrongly made, it must fail. The only question is whether the party applying is entitled under the altered circumstances to be relieved from the operation of the order.'

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15 *General Orders to the Judicature Act* 1876 (Qld), Order 41 rule 22; *Rules of the Supreme Court* 1900 (Qld), Order 45 rules 1 and 3.

16 [1984] 2 Qd R 13.

Those remarks may be said to confirm the power to make the appropriate order in the present case."

[24] Rule 668 provides:

"**668 Matters arising after order**

(1) This rule applies if—

(a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or

(b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.

(2) On application by the person mentioned in *subrule (1)*, the court may stay enforcement of the order against the person or give other appropriate relief.

(3) Without limiting *subrule (2),* the court may do one or more of the following—

(a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;

(b) set aside or vary the order;

(c) make an order directing entry of satisfaction of the judgment to be made."

[25] As appears, the rule may be engaged both in relation to facts which arise after the order (paragraph (1) (a)) and in relation to facts which occur before the order but are discovered after the order (paragraph (1) (b)). This case is only concerned with the former, which was the area that the writ of *audita querela* occupied before its abolition. As also appears, the powers of the court when the rule is engaged include a power to set aside the order.

[26] In *KGK* this court observed that O 45 r 1 was peculiar to Queensland. That was true of the part of the rule that applied to facts occurring before the order that were not discovered in time. In other jurisdictions, that category of case where there was a final judgment after trial was dealt with by rules that permitted new evidence to be considered upon an appeal by way of rehearing. Where there was a judgment by default, application to set aside the judgment could be made under the comparator rule to the present rule 290, namely O 15 r 10.

[27] Other jurisdictions also abolished *audita querela* and had comparator rules authorising an order to relief from a judgment on the basis of facts occurring after the judgment or order. For example, the current rule of court for England and Wales in the *Civil Procedure Rules* is Part 40.8A as follows:

> "Without prejudice to rule 83.7(1), a party against whom a judgment has been given or an order made may apply to the court for—
>
> (a) a stay of execution of the judgment or order; or
>
> (b) other relief,
>
> on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief, and on such terms, as it thinks just."

[28] And in Victoria, the *Supreme Court (General Civil Procedure) Rules* 2014 (Vic) currently provides:

> "**66.14 Matters occurring after judgment**
>
> The Court may stay execution of a judgment, or make such order as the nature of the case requires, on the ground of matters occurring after judgment."

[29] That rule was considered in *Lawstrane Pty Ltd and Victorian WorkCover Authority v Ruttmar*:[17]

> "The grant of a stay of execution of a judgment is not the same as a grant of a stay of a judgment. A stay of execution suspends the right of the person entitled under the judgment from immediately enforcing the judgment as distinct from suspending the judgment itself. However, the legal effect of both is to suspend enforcement of the judgment. The New South Wales Court of Appeal in *Permewan Wright Consolidated Pty Ltd v Attorney-General* did not doubt that it had power under the NSW equivalent provision to r 66.14 to grant a stay of judgment. As Reynolds JA explained (Mahoney JA agreeing, Hutley JA not deciding on this point):
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> > 'It has been held that neither this power nor the inherent power of the court extends so far as to allow the changing or dissolution of an order regularly made and entered as this order was: *Gamser v Nominal Defendant* (1977) 136 CLR 145. We can, however, stay or suspend its operation on the ground of matters occurring after its date for to stay or suspend the operation of an injunctive order is in my view analogous to staying the execution of a judgment...'
>
> The phrase 'to make such order as the nature of the case requires' when construed *ejusdem generis* amplifies the kinds of orders that the Court can make on the ground set out.

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17 [2013] VSCA 57.

> Order 66.14 replaced r 42.27 of the former rules, which by its terms abolished any proceeding by a writ of *audita querela* but which enabled a judge to stay execution of a judgment or
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> > '… give such other relief against such judgment, upon the ground of facts which have arisen too late to be pleaded; and the Court or Judge may give such relief and upon such terms as may be just.'
>
> Thus a party could seek such a writ where new facts arose after the judgment, entitling them to relief against such judgment, including relevantly where the enforcement of the judgment would make it 'oppressive'. The Court had a plenary power to grant relief in the nature of variance, suspension or discontinuation. This power was not in the nature of appeal, as it bespoke of no error in the original judgment.
>
> Under r 66.14 the court is given very broad powers. Facts such as the commencement of the statutory offer process triggered by the judgment given on 15 December 2011 and the appeal against the refusal to grant leave for pecuniary loss constitute matters 'occurring after judgment'. The appellants did not suggest otherwise.
>
> In our opinion, the trial judge was correct to hold that she had the power to order the stay of judgment under r 66.14."[18] (footnotes omitted)

Conclusion

[30] In my view, it is not necessary to further canvass the statute or case law in order to decide the present case.

[31] In the present case, it is not appropriate to make an order to set aside the judgment and to dismiss the claim on the basis of the compromise agreement because that agreement does not impeach the validity of the judgment or challenge that it was regularly entered at the time or give rise to a defence that was available at the time when the judgment was entered.

[32] However, the compromise agreement is a proper basis, as a fact arising after judgment, to make an order to stay the judgment permanently.

[33] I will, accordingly, make that order.

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18 [2013] VSCA 57, [24] - [29].