

SUPREME COURT OF QUEENSLAND

CITATION: *Aust Investment Corp (Holdings) Ltd v Markway Holdings Pty Ltd* [2002] QSC 305

PARTIES: **AUSTRALIAN INVESTMENT CORP (HOLDINGS) LTD**
(ACN 082 183 800)
(plaintiff/respondent)
v
MARK WAY HOLDINGS PTY LTD
(ACN 089 931 788)
(defendant/applicant)

FILE NO: 10158 of 2001

DIVISION: Trial Division

DELIVERED ON: 3 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2002

JUDGE: Mackenzie J

- ORDERS:
- 1. The application for a direction to the Registrar that he give judgment against the plaintiff in default of filing an answer in response to the defendant's counter-claim is refused.**
 - 2. The application for judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* for the defendant against the plaintiff in respect to the defendant's counter-claim in default of filing an answer thereto is refused.**
 - 3. I give liberty to the applicant to apply upon 7 days' notice to the plaintiff, for leave to have the application determined by a Registrar on 12 August 2002 reheard by the court constituted by a judge and for any other necessary ancillary orders.**
 - 4. I make no order as to costs.**

CATCHWORDS: PROCEDURE – PRACTICE UNDER RULES OF THE COURT – REGISTRY AND REGISTRARS – *ex parte* application by the defendant to the Registrar for default judgment – where under the repealed *Rules of the Supreme*

Court default judgment could be granted by a Registrar – where no similar rule in the *Uniform Civil Procedure Rules* – where power to review a decision of a Registrar

Supreme Court of Queensland Act 1991 (Qld), s 11, s 56(4), s 118E

The Rules of the Supreme Court (Qld) (repealed), O 87 r 28

Uniform Civil Procedure Rules 1999 (Qld) (“*UCPR*”), r 175, r 180, r 181, r 181(3), r 280, r 287, r 292, r 292, r 454, r 455, r 456, r 457, r 791

Ffrench Commercial Furniture Pty Ltd v All Queensland Removals Pty Ltd, W1194/87, 4 June 1987, unreported, Master Lee, considered

Harris v Caladine (1991) 172 CLR 84, considered

Potter v Ingwersen [1983] 2 Qd R 527, considered

Suncorp Building Society v Chen [1987] 2 Qd R 113, considered

COUNSEL: A J H Morris QC for the applicant

SOLICITORS: Saunders Downing Hely, Solicitors, for the applicant

- [1] **MACKENZIE J:** For a matter that should have been relatively uncomplicated procedurally, this one has followed a tortuous course. The defendant in these proceedings applied to a Registrar for judgment against the plaintiff in default of filing an answer in response to the defendant’s counter-claim. The plaintiff had sued the defendant for specific performance of an alleged contract for the lease of land and lodged a caveat in support of that claim. The defendant denied the existence of the contract and counter-claimed to recover possession of the land and for mesne rents.
- [2] The defendant applied to a judge for summary judgment and for an order removing the caveat. The plaintiff’s claim was summarily dismissed and an order made for removal of the caveat. However, the application for summary judgment could not be proceeded with because it was premature.
- [3] After the time had expired for filing a reply and answer, the defendant applied in the registry for a default judgment on the counterclaim. This was refused by a Registrar, who decided that there was no authority under *UCPR* 280-287 to grant judgment in the circumstance and that an application to a judge was necessary. Despite subsequent representations to the registry, judgment was not entered. The bases for the refusal to enter judgment by default were said to be:
- (a) that the *UCPR* do not expressly permit such a default judgment;
 - (b) that r 293 is a specific Rule giving a defendant a right to apply for judgment when the circumstances described in that Rule exist; and
 - (c) that it is implied by r 181(3) that a counter-claim could only be disposed of by trial.

- [4] The matter therefore raises an important practical point with regard to the *UCPR*. The same kind of question had arisen under the repealed *Rules of the Supreme Court* in *Ffrench Commercial Furniture Pty Ltd v All Queensland Removals Pty Ltd* (W1194/87, 4 June 1987, unreported, Master Lee). It was held that judgment by default might be granted by a Registrar. The disposal of the point sought to be argued would depend on whether the reasoning of Master Lee, as he then was, in that case can be adapted to the *UCPR*. Rule 175, r 180 and r 181 would appear to be the most relevant rules in this connection.
- [5] The principal application made *ex parte* before me was for a direction to the Registrar to enter judgment. The issue of the interpretation of the *UCPR* had been fully addressed in an outline of argument and in oral submissions. Further submissions in writing were invited when, upon looking for an analogue of O 87 r 28 of the repealed *Rules of the Supreme Court* which specifically empowered directions to be given to the Registrar upon an *ex parte* application, it became apparent that that rule was not repeated in the *UCPR*.
- [6] Mr Morris QC submitted that, while under s 11 of the *Supreme Court of Queensland Act* 1991 the Supreme Court consisted of judges, certain aspects of the Court's jurisdiction can be exercised by Registrars and other officers of the Court (s 56(4)). He referred to a passage in *Harris v Caladine* (1991) 172 CLR 84 where, in the context of the Commonwealth Constitution, Mason CJ and Deane J said that delegation of the judicial powers and functions of the Family Court was permissible and consistent with control and supervision of the Court's jurisdiction by the judges if two conditions were observed. The first was that the delegation must not extend to the situation where, as a practical as well as a theoretical matter, it could not be said that the judges constituted the Court. The second was that decisions of officers of the Court in the exercise of delegated functions must be subject to review or appeal by the judges on questions of fact and law.
- [7] It was submitted that, while the rigid rules as to performance of judicial functions in the Commonwealth Constitution were not replicated in Queensland constitutional law, the conferring of judicial powers on Registrars was only on the basis that they were delegates of the judges. It was submitted that it was a small step, if that were recognised, to conclude that judges constituting the court had power to supervise the exercise of jurisdiction by Registrars.
- [8] Rule 454 provides that, if a Registrar is available to hear and decide an application within his jurisdiction, an application to the court as constituted by a judge can only be made by leave of the Court.
- [9] Rule 455 provides two means of referring an application to the court constituted by a judge. The first is where the Registrar considers it would be proper for the application to be decided by the court as constituted by a judge (r 455(1)). The second is when a party asks the Registrar, before the hearing starts, to do so and the Registrar considers it is in the interests of justice to do so (r 455(2)).
- [10] Rule 456 provides that, before the end of a hearing before a Registrar, the court as constituted by a judge may order that the application or a part of it be removed to the court constituted by a judge.
- [11] Where an application is before a judge following a reference under r 455 or a removal under r 456, r 457 provides that the court as constituted by a judge may:

- “(a) hear and decide the application; or
- (b) decide a matter arising under the application or remit a matter to the court as constituted by a judicial registrar or registrar with directions that the court considers appropriate; or
- (c) remit the application to the court as constituted by a judicial registrar or registrar with directions that the court considers appropriate.”

- [12] It was conceded that neither of the procedures under r 455 or 456 had been invoked in the present case. It was submitted that the issue was whether they were the only means of supervision and control of the exercise of the court’s powers by Registrars. For reasons that are not clear, resort was not had to r 791, which permits a party who is dissatisfied with a decision of a Registrar on an application to have the application reheard by the court, with leave of a judge.
- [13] Under the repealed *Rules of the Supreme Court*, O 87 r 28 was employed in *Potter v Ingwersen* [1983] 2 Qd R 527 (Master Lee) and *Suncorp Building Society v Chen* [1987] 2 Qd R 113 (Ryan J). It was submitted that notwithstanding the absence of express reference to a similar procedure in the *UCPR*, such a process had strong practical utility. As against that there are other convenient and practical means of removing a matter from a Registrar to a judge, so arguments based on convenience or necessity are not as forceful as they might be if there were none.
- [14] Mr Morris submitted that s 118E of the *Supreme Court Act* 1991 provided the means by which the former procedure could be utilised. Section 118E provides as follows:
- “118E Directions or orders about a proceeding**
- (1) To the extent that the conduct of a proceeding is not provided for by rules of court or practice directions, the court may make the orders and give the directions it considers appropriate for the conduct of the proceeding.
- (2) In making an order or giving a direction, the court may have regard to practices and procedures of the court, including rules of the court, in force before the commencement of the *Uniform Civil Procedure Rules*.
- (3) This section does not limit any inherent or other power of a court or judge to control proceedings.”
- [15] I am not persuaded that s 118E can be extended to the creation of a means, not otherwise provided for by the *Rules* under which the Registrar’s view of a proper construction of the *Rules* in application in which he constitutes the Court may be tested. While s 118E is no doubt to be given wide operation, it is concerned with the “conduct” of a “proceeding”. Clearly, a direction may be given as to the way in which a proceeding is to be conducted but there seems to be an assumption that there is a proceeding provided for in the *Rules*, but a deficiency in the *Rules* as to the way in which some aspect of it should be conducted for the power in s 118E to operate.
- [16] I am not persuaded it was intended to permit what the present application seeks to achieve, and which would circumvent the requirement of leave. Whether, having regard to the existence in the *UCPR* of other means of having a question before a

Registrar determined by a judge, another procedure is desirable and the associated issue whether omission of the power to give a direction to the Registrar from the *UCPR* was deliberate or inadvertent, are matters for the Rules Committee to consider. It may be that r 791 was intended to provide both an easy means of reviewing a decision of a Registrar on an application and a filter to prevent hopeless applications from being pursued.

- [17] In my view as the *Rules* stand the application as framed, made *ex parte*, for a direction to the Registrar to enter judgment by default is not available to the applicant.
- [18] The application alternatively asked for judgment pursuant to r 293 of *UCPR* for the defendant against the plaintiff in default of filing an answer. If the *Rules* relating to counter-claims are to be interpreted as putting the counter-claiming defendant in the position of the plaintiff, r 293 is inappropriate. If a counter-claiming defendant is in the same position as a plaintiff, r 292 is contingent upon a defendant serving a notice of intention to defend. The fourth paragraph of the application seeks such further other orders, directions or relief as the court thinks fit. Because of the stage reached, it is not open to the applicant to seek removal of the application made to the Registrar for summary judgment to the court constituted by a judge. But in the interests of finalising the matter, I will give leave to the defendant plaintiff by counterclaim to seek leave for a rehearing, if that is considered the most convenient course. That application should, as a matter of prudence, be made on notice. The orders are as follows:
1. The application for a direction to the Registrar that he give judgement against the plaintiff in default of filing an answer in response to the defendant's counter-claim is refused.
 2. The application for judgment pursuant to r 293 of the *Uniform Civil Procedure Rules* for the defendant against the plaintiff in respect to the defendant's counter-claim in default of filing an answer thereto is refused.
 3. I give liberty to the applicant to apply upon 7 days' notice to the plaintiff, for leave to have the application determined by a Registrar on 12 August 2002 reheard by the court constituted by a judge and for any other necessary ancillary orders.
 4. I make no order as to costs.