SUPREME COURT OF QUEENSLAND

CITATION:	*Thomas v Deputy Com of Taxation* [2005] QCA 85
PARTIES:	**STEPHEN JOHN THOMAS** (appellant/applicant) **v** **DEPUTY COMMISSIONER OF TAXATION** (respondent/respondent)
FILE NO/S:	Appeal No 7536 of 2004 DC No 303 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	1 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2005
JUDGES:	McMurdo P, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – DEFAULT JUDGMENT – where default judgment entered against applicant in Magistrates Court – where magistrate refused application to have default judgement set aside on discretionary grounds after finding service to be irregular – where appeal to District Court refused – where decision of District Court based on finding that service was effected in accordance with rules – whether District Court judge's findings should be revisited – whether leave to appeal should be granted *Uniform Civil Procedure Rules* 1999 (Qld), r 112, r 283, r 290, r 371 *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, applied *Jarrett v Seymour* (1993) 119 ALR 46, applied *Luka Brewery v Grundmann* (1985) 2 Qd R 204, considered *Vosmaer v Spinks* (1964) QWN 36, considered

COUNSEL: R A Perry SC for the applicant
M A Jonsson for the respondent

SOLICITORS: Miller Harris for the applicant
Australian Tax Office for the respondent

[1] **MCMURDO P:** I agree with Jones J's reasons for concluding that the applicant has not demonstrated any grounds to warrant the granting of the application for leave to appeal. The application for leave to appeal should be dismissed with costs to be assessed.

[2] **CULLINANE J:** For the reasons given by Jones J leave should be refused.

[3] **JONES J:** The applicant seeks leave pursuant to s 118 of the *District Court Act* 1967 (Qld) to appeal against the decision of the District Court at Cairns exercising its appellate jurisdiction. By that decision of 5 August 2004 the District Court dismissed an appeal by the applicant against a refusal of the Magistrates Court to set aside a default judgment entered on 28 February 2003.

[4] The learned magistrate made a finding that the service of the originating process was irregular because it was not effected at the last known place of residence as required by r 112 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). Despite this finding he purported to uphold the judgment on discretionary grounds. On the appeal, the learned hearing judge made different findings of fact about the service leading to his conclusion that the magistrate below could not have been satisfied that the address for service "was NOT [the applicant's] last known place of business or residence".[1]

[5] The application before this Court focuses upon the correctness of the decision of the District Court. At the commencement of the hearing Mr Perry of Senior Counsel for the applicant advised the Court that the applicant has now paid the full amount of the respondent's claim and interest, effectively conceding that the applicant never had a defence on the merits. Nonetheless, the applicant sought to justify the continuation of this application for leave on the basis that bankruptcy proceedings founded upon the judgment are still on foot and there is also a significant matter of principle to be determined.

[6] The respondent's claim was for unpaid assessments of income tax for the financial years ending 30 June 1999, 30 June 2000 and 30 June 2001. With the debt fully paid one would not expect the respondent to have any interest in pursuing the bankruptcy proceedings. The respondent's counsel was not in a position to indicate this because the debt was paid only a short time prior to the hearing. Mr Perry nonetheless suggested that a manifest and substantial injustice had been done by the entry of the judgment such that he was entitled to have it removed from the record.

[7] Mr Perry sought to revisit the facts upon which the decisions in the lower courts were decided. He referred to the fact that there was contact between Ms Everingham of the respondent's office and officers of the Director of Public Prosecutions ("DPP") wherein she was told of the applicant's address at 13 Parkland Close, Rangeville ("Rangeville"). At the time the applicant was on bail

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1 Reasons para [16] at A157

for criminal charges and his bail address was shown to be the address last known to the respondent as Parkinson Avenue, Kewarra Beach. Mr Perry argues that the only conclusion that could be drawn from Ms Everingham's contact with the DPP is that she was advised of the change in the bail address to now be Rangeville. However, before the Magistrates Court and then on the appeal, Ms Everingham simply described Rangeville as "another possible address". Knowing that the applicant no longer resided at Parkinson Avenue, Ms Everingham also identified 45 Cheviot Street, Smithfield as a possible place where the applicant might be served. The respondent knew this address to be the registered address of two corporations of which the applicant was the sole director.

[8] Before both courts below, the narrative presented was of an attempted service at Parkinson Avenue – which matched the bail address. This was the address given to the process server. When the applicant was not found there, the search for other possible addresses included the two mentioned above. Evidence of the applicant at the time of the application to set aside the judgment disclosed that his true address was Rangeville. Other material also showed that the respondent served documents at Rangeville between the entry of judgment and the making of the application to set aside.

[9] The inquiry in the proceedings below was about knowledge of the applicant's address at the date of service on 30 January 2003. However the state of Ms Everingham's knowledge and the terms of her conversation with officers of the DPP were not explored by cross-examination, so these matters together with the other circumstances became part of the factual matrix upon which the learned hearing judge made findings of fact with all the reservations he expressed. His Honour determined that the affidavit evidence of the process server allowed a finding that at the relevant time the applicant was living at Smithfield with the result that the service was effected in accordance with the rules. Having so concluded his Honour then considered the proceedings before the Magistrates Court. His Honour noted that it was the applicant who bore the onus of showing that the default judgment was irregular and the only basis relied upon was that service was not effected at the last known place of address. He then concluded that upon the facts as he found them, the learned magistrate could not have been so satisfied.

[10] Essentially his Honour's decision was based on findings of fact which differed from those of the magistrate. These are not matters which attract the interest of this Court in considering the question of leave to appeal in circumstances such as presented here.

[11] Furthermore, in my view, there is little merit in the applicant's point concerning the bankruptcy proceedings. Between the service of the Statement of Claim and the entry of judgment, he had via his tax agent admitted his indebtedness but could not agree with the respondent as to the payment of the debt. Nor in either of the proceedings below was there any offer to pay the debt nor any identification of a defence.

[12] I turn then to the suggestion of there being an important matter of principle requiring determination on the appeal. The first point to be noted is that his Honour's decision did not turn on this suggested point of principle. The ground (2a)(iv) of the draft Notice of Appeal is premised upon the basis that the default judgment was irregularly entered by the respondent. That is not what his Honour

decided and it is not a finding that is likely to be made unless an appellate court was prepared to undertake a review of findings of fact. Counsel for the applicant also submitted that left uncorrected, the judgment of the District Court might be regarded by magistrates as binding upon them. However his Honour's remarks about changes wrought by the UCPR are clearly obiter dicta and as such they have no binding effect upon a magistrate's determination of a similar issue.

[13] The right of a person to have an irregularly entered default judgment set aside ex debito justitia is well explained in such cases as *Vosmaer v Spinks*[2] and *Luka Brewery v Grundmann.*[3] The question of principle which is said to arise is whether r 283, 290 and 371 of the UCPR have altered this right by the imposition of a discretion in courts considering an application to set aside such a judgment. Mr Perry on behalf of the applicant submitted that matters of discretion arise only in respect of a regularly entered judgment whereas Mr Jonsson on behalf of the respondent contended discretion arose regardless of whether the judgment was regular or irregular.

[14] This issue may well fall to be determined by this Court at some time. But here, where the appeal does not particularly turn on that issue, the case is not the appropriate vehicle for the consideration of the point. The question to be determined on this application is whether "the decision in the District Court is attended by sufficient doubt to warrant its being reconsidered and also that, supposing the decision below to be wrong, substantial injustice would result if leave were refused". *Décor Corporation Pty Ltd v Dart Industries Inc.*[4] See also *Jarrett v Seymour*.[5]

[15] I am not persuaded that the decision of the District Court is attended by sufficient doubt to warrant its reconsideration, nor am I satisfied that substantial injustice would result if leave were not granted.

[16] I would therefore refuse leave to appeal, with costs to be assessed.

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2 [1964] QWN 36
3 [1985] 2 Qd R 204
4 (1991) 33 FCR 397, 398
5 (1993) 119 ALR 46, 49