SUPREME COURT OF QUEENSLAND

CITATION:	*City Pacific Limited (in liq) & Anor v Ballandean Investments P/L* [2010] QCA 113
PARTIES:	**BALLANDEAN INVESTMENTS PTY LTD (formerly AUSSIE VINEYARDS HOLDINGS PTY LTD)** ACN 119 858 294 (appellant) **CITY PACIFIC LIMITED (IN LIQUIDATION)** ACN 079 453 955 (first respondent) **TRILOGY FUNDS MANAGEMENT LIMITED** ACN 080 383 679 (second respondent)
FILE NO/S:	Appeal No 11105 of 2009 SC No 6636 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2010
JUDGES:	McMurdo P and Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – AMENDING, VARYING AND SETTING ASIDE – ACTIONS TO REVIEW OR SET ASIDE JUDGMENT – IN GENERAL – where first respondent a responsible entity of a managed fund – where appellant registered a mortgage in favour of the first respondent – where mortgage expressed as being granted to the first respondent in its capacity as the responsible entity – where first respondent went into liquidation and replaced by second respondent – where appellant claimed that no moneys were owed under the mortgage and sought a declaration and orders to that effect – where first respondent failed to file a defence – where a default judgment was entered in favour of the appellant – where second respondent applied for the default judgment to

be set aside – where second respondent argued that rights under the mortgage were vested in it by virtue of its substitution as responsible entity – where second respondent argued that the default judgment was irregularly entered – where second respondent claimed that it had an arguable defence to the appellant's claim justifying the exercise of the Court's discretion to set aside the default judgment – where default judgment set aside under r 290 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where appellant argued on appeal that an application to set aside a contested default judgment had to be heard by the Court of Appeal – whether a contested default judgment could be set aside by a judge of the Trial Division – whether rights under the mortgage became vested in the second respondent by virtue of its substitution as the responsible entity – whether the default judgment was irregularly entered – whether second respondent had an arguable defence justifying the exercise of the Court's discretion to set aside the default judgment

Corporations Act 2001 (Cth), s 601FC(2), s 601FR(b), s 601FS(1), s 601FT(1)
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 290

Re Investa Properties Ltd & Anor (2001) 187 ALR 462; [2001] NSWSC 1089, considered

COUNSEL: P H Morrison for the appellant
B O'Donnell QC for the second respondent

SOLICITORS: WPS Law for the appellant
Gadens Lawyers for the second respondent

[1] **McMURDO P:** This appeal should be dismissed with costs for the reasons given by Holmes JA.

[2] It is an appeal from an interlocutory order concerning practice and procedure, namely, whether Mullins J properly set aside under *Uniform Civil Procedure Rules* (UCPR) r 290 a judgment by default entered by Martin J. The unsuccessful appellant can continue its claim against the second respondent in the Trial Division of this Court.

[3] The approach taken and the construction given to r 290 by Mullins J in the Trial Division and by Holmes JA in this appeal is consistent with the clear, broad and unfettered terms of r 290. It is also consistent with the philosophy and purpose of the UCPR set out in r 5(1):

> "The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."

[4] The refusal of the second respondent's application to Mullins J under r 290 may have resulted in an expeditious resolution of the appellant's claim. But the

resolution would not have been just and nor would it have been a resolution of the real issues. All the facts and circumstances relevant to the appellant's application for judgment by default were not clearly before Martin J in the confusing circumstances pertaining on 17 August 2009. These circumstances were clearly and fully disclosed before Mullins J on 10 September 2009. The real issues between the parties can now be determined in the Trial Division.

[5] I agree with the order proposed by Holmes JA.

[6] **HOLMES JA:** The appellant, Ballandean Investments Pty Ltd, appeals orders which set aside an earlier default judgment given in its favour against the first respondent, City Pacific Limited, and reversed the associated orders necessary to give the default judgment effect. The appeal raises questions of the scope of the power to set aside a default judgment contained in r 290 of the *Uniform Civil Procedure Rules* 1999 (Qld) and whether the primary judge, Mullins J, was correct in setting the judgment aside on the ground that it was irregularly entered. City Pacific (which is in liquidation) did not appear either before Mullins J or on this appeal. Trilogy Funds Management Limited, the second respondent, filed a notice of contention arguing that even if not irregularly entered, the default judgment would properly be set aside in exercise of the court's discretion under r 290.

Background

[7] City Pacific was the responsible entity for the City Pacific First Mortgage Fund. In November 2008, City Pacific registered a mortgage over land of which Ballandean Investments was the registered proprietor. The mortgage was expressed (by way of description of the liability secured) to be

> "In consideration of the amount lent to the Mortgagor by City Pacific Limited (Mortgagee) in its capacity as Responsible Entity for the City Pacific Limited First Mortgage Fund ... and/or the Secured Moneys ..."

The term "Secured Moneys" was defined in the bill of mortgage as including any moneys owing or payable to the mortgagee by the mortgagor including, among other things, any moneys with which the mortgagee had charged the mortgagor "pursuant to this Mortgage, any Agreement, Collateral Security or otherwise ...".

[8] In fact, however, Ballandean Investments had not itself borrowed from City Pacific; the liability in question was that of related entities of Ballandean Investments. On 23 June 2009, Ballandean Investments filed a claim and statement of claim alleging that there were no moneys owing or payable by it to City Pacific, nor any moneys advanced by City Pacific to or on behalf of it, so that there was no debt owed under the bill of mortgage and it was entitled to have it discharged. Its prayer for relief sought a declaration to that effect and orders that City Pacific discharge the mortgage and convey its interest in the land to Ballandean Investments and that the court appoint the registrar to sign documents necessary to effect the conveyance. City Pacific was served on 29 June 2009; it did not file or serve a notice of intention to defend.

[9] On 20 July 2009, orders were made in the Federal Court the effect of which was to replace City Pacific with Trilogy Funds as the responsible entity of the City Pacific Limited Mortgage Fund. Section 601FC(2) of the *Corporations Act* 2001 (Cth) provides:

> "The responsible entity holds scheme property on trust for scheme members."

Accordingly, if the scheme members had an interest under the mortgage, it vested in Trilogy Funds as trustee.

[10] The change in responsible entity also entailed certain consequences under Sections 601FS(1) and 601FT(1) of the Act, reproduced below:

> "**601FS Rights, obligations and liabilities of former responsible entity**
>
> (1) If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity
>
> ...
>
> **601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party**
>
> (1) If the responsible entity of a registered scheme changes, a document:
>
> (a) to which the former responsible entity is a party, in which a reference is made to the former responsible entity, or under which the former responsible entity has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the responsible entity; and
>
> (b) that is capable of having effect after the change;
>
> has effect as if the new responsible entity (and not the former responsible entity) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it."

[11] Two days after the Federal Court orders were made, City Pacific's solicitors requested a one month extension of time to file its defence, which Ballandean Investments refused, intimating its intention to "take a certain course". On 24 July 2009, City Pacific applied to the court for a one-month extension of time. That application was set down for 17 August 2009. In the meantime, solicitors for Trilogy Funds wrote to Ballandean Investments' solicitors, asserting that their client was the proper defendant, having replaced City Pacific as the responsible entity, and again seeking an extension of time for the filing of a notice of intention to defend and defence. They were advised that Ballandean Investments would apply for default judgment on the return date of City Pacific's application for an extension of time.

The default judgment

[12] On 17 August 2009, Martin J heard City Pacific's application for an extension of time and Ballandean Investments' instanter application for default judgment. There was a somewhat confusing appearance by a solicitor who began by announcing his appearance for City Pacific, and referred in his submissions to that company as his client, but ultimately acknowledged that he appeared, not for it, but for Trilogy Funds. He informed the learned judge of the change of responsible entity and explained that his firm had not received the relevant file from the solicitors for City Pacific. As responsible entity, Trilogy Funds was, the solicitor contended, the proper respondent to the application for default judgment. Although it had filed no affidavit as to a proposed defence, he outlined its position in his oral submissions. The mortgage deed misdescribed the transaction involved: the mortgage was in truth a third party mortgage; City Pacific had lent the moneys which it secured to related entities of Ballandean Investments.

[13] Martin J concluded that there was no reason to grant City Pacific's application for an extension of time for its defence. His reasons for that conclusion were that City Pacific, the registered mortgagee and the named applicant on the application for an extension of time, had not appeared. The relief sought by Ballandean Investments was available only against City Pacific, absent any change to the mortgage. Accordingly, his Honour said, the appropriate orders were those sought by Ballandean Investments. He granted it default judgment in its action against City Pacific, declared that there were no moneys owing under the bill of mortgage between Ballandean Investments and City Pacific and made the ancillary orders, requiring City Pacific to discharge the mortgage and convey its interest in the land to Ballandean Investments, and appointing the registrar to execute any document necessary to give effect to the orders.

The setting aside of the default judgment

[14] Trilogy Funds applied for orders which included the setting aside of the judgment by default. Its application was supported by an affidavit of one Stephen McCormick, who had been employed by City Pacific as an executive. He set out a history of negotiations between City Pacific as responsible entity for the City Pacific Limited First Mortgage Fund and the Atkinson Gore Group of companies in relation to the Atkinson Gore Group's default under facility arrangements between the companies within the Group and City Pacific Limited. The parties reached a settlement recorded by deed, under which the Atkinson Gore Group was to pay accrued interest of $6,000,000 in two equal instalments, the second instalment to be secured by mortgage over Ballandean Investments' property. The Atkinson Gore Group was to cause Ballandean Investments (which had directors in common with the Group companies) to grant the mortgage in the terms of a particular existing mortgage. (That mortgage was, apparently, one in the standard terms used for City Pacific's mortgages, which were appropriate to a two-party transaction.)

[15] Mullins J observed that Trilogy Funds had an arguable case that it was entitled to the benefit of the mortgage either on the existing terms of the mortgage deed or on the terms of the mortgage as rectified to reflect the parties' intentions.

Her Honour went on to consider the statutory consequences of the change in responsible entity. By virtue of s 601FS and s 601FT, the rights under the mortgage vested in Trilogy Funds, making it appropriate for it to apply to set aside the default judgment, although it was not a named party to the proceedings. Those provisions also made a nonsense of the relief sought in the statement of claim, a consequence which was not brought to the attention of the court when Ballandean Investments sought default judgment. It was not appropriate for a plaintiff to seek an order that the registrar sign a document on behalf of the defendant in the proceeding when, as a matter of law, the defendant itself could not sign the document or do the act in question. That feature amounted to an irregularity in the obtaining of the judgment.

[16] Accordingly, her Honour set aside Martin J's orders, ordered that Trilogy Funds be added as second defendant to the action, gave it leave to file and serve a defence and counter-claim, and ordered that Ballandean Investments file and serve an amended statement of claim and withdraw from registration the release of mortgage executed by a registrar pursuant to Martin J's order. Ballandean Investments has appealed against all of those orders, apart from that adding Trilogy Funds as second defendant in the action.

The jurisdiction conferred by r 290

[17] The first of Ballandean Investments' arguments turned on the nature of the power conferred by r 290 of the *Uniform Civil Procedure Rules*, which provides:

> "**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."

Ballandean Investments pointed out that r 290 appeared in Division 2 of Part 1 of Chapter 9 of the *Uniform Civil Procedure Rules*, a division which contemplated judgments given after ex parte hearings. It argued that the rule did not give a judge of the trial division jurisdiction to hear and determine an application to set aside a judgment granted by another trial division judge following a hearing which was not ex parte; it did not permit what was effectively an appeal from one trial division judge to another. While Trilogy Funds had not put any material before the judge, it had been given the opportunity to provide a synopsis of its defence. That amounted to a contested hearing on the question of whether judgment by default should be given; or, at the least, the judgment was not given ex parte. The proper avenue to test the judgment in those circumstances was by appeal, not by application to a single judge.

[18] I do not think that there is any warrant for reading down r 290 as Ballandean Investments contends, so as to limit its application to circumstances where default judgment is given uncontested. Nothing in the rule itself suggests any such qualification. It would hardly meet the philosophy of the *Uniform Civil Procedure Rules* and, in particular, the aim of expeditious resolution encapsulated in r 5, if a party who had appeared in response to an application

for default judgment could never, whatever the circumstances of that application, have that judgment set aside by any means other than appeal.

[19] The present case, in my view, illustrates why the rule should not be read down as Ballandean Investments suggests. Although Trilogy Funds did appear, and its solicitor did have the opportunity to summarise its potential defence, Martin J regarded himself as precluded from considering those matters. He confined himself to considering the position of City Pacific, which had not appeared to support its application for an extension; since its application was refused, default judgment was given. Effectively, his Honour treated the application for default judgment as uncontested.

[20] The unifying feature of the rules in Division 2 of Part 1 of Chapter 9 is that they concern judgments given where there is default in filing a notice of intention to defend or defence, as opposed to judgments given on the merits. That the former are usually given ex parte is incidental. The better view is that the fact of an appearance and an opportunity to raise a prospective defence does not preclude an application under r 290, but may properly be taken into account as a factor in exercising the discretion conferred by the rule.

The finding that the default judgment was irregularly entered

[21] Ballandean Investments referred to observations by Barrett J in *Re Investa Properties Ltd & Anor*[1] as to the effect of ss 601FS(1) and 601FT(1). His Honour suggested that the words "rights ... in relation to the scheme" used in s 601FS(1) were:

> "… perhaps intended to cover only rights vis à vis parties such as members of the scheme, being rights arising from or forming part of the matrix of legal relationships making up the scheme, including rights derived from the scheme's constitutional documents."[2]

Section 601FT(1), Barrett J said, should be read as limited to documents "concerning the scheme".[3]

[22] Ballandean Investments argued that City Pacific's rights under the mortgage were not caught by s 601FS, because they were not rights of scheme members as against each other, or, more generally, rights concerning the scheme. The mortgage was given by a party outside the scheme to the responsible entity. Nor was the mortgage a document "concerning the scheme" so as to attract the operation of s 601FT(1).

[23] But the description of the consideration in the mortgage gives rise to an obvious inference that City Pacific was acting in its capacity as responsible entity not only in lending the moneys but in taking the mortgage; that it held the interest under the mortgage as scheme property on trust for the scheme members; and that upon appointment of Trilogy Funds as responsible entity, that interest vested in it as trustee pursuant to s 601FC(2). City Pacific's rights and

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1 (2001) 187 ALR 462.
2 At 465.
3 At 463.

obligations in relation to the mortgage as scheme property were, in my view, properly to be regarded as rights and obligations "in relation to the scheme", and pursuant to s 601FS became the rights and obligations of Trinity Funds. The mortgage, as a document to which City Pacific was a party and under which it acquired those rights and obligations, took effect, by virtue of s 601FT(1), as if Trilogy Funds and not City Pacific were the mortgagee. Section 601FR(b) enabled Trilogy Funds to seek City Pacific's "reasonable assistance … to facilitate the change of responsible entity"; which could include the formal transfer of the mortgage to it.

[24] However, Ballandean Investments contended, the default judgment was not irregularly entered. It was not incumbent on Ballandean Investments to bring the existence of the relevant *Corporations Act* provisions to the court's attention when Trilogy Funds had appeared and handed up written submissions. In any event, Martin J was aware that City Pacific had been replaced by Trilogy Funds as the responsible entity for the mortgage fund. There was nothing improper in Ballandean Investments obtaining judgment against City Pacific when the latter was the entity on the title as the registered mortgagee at the relevant time, remained as trustee (albeit as a bare trustee), and was capable of discharging the mortgage.

[25] Trilogy Funds advanced an argument that by the virtue of s 601FT, the register of titles should in fact be read as recording it as the mortgagee. Section 184 of the *Land Title Act* 1994, conferring indefeasible title, referred to the "registered proprietor of an interest"; which, in turn, in the dictionary in schedule 2 of that Act, meant "the person recorded in the freehold land register as a proprietor of the lot". Section 31 of the Act made an instrument registered in the freehold land register part of the register. In this case the relevant instrument was the mortgage, which was to be read as showing Trilogy Funds as the mortgagee.

[26] One would be hesitant to embrace a view of s 601FT which meant that the register of title could not be relied on as reflecting the real state of ownership of any given interest. However, I do not find it necessary to reach a conclusion on that question. The effect of s 601FS was to deprive City Pacific of the power to release the mortgage or to convey the interest in the land other than at the direction of Trilogy Funds, given by the latter in accordance with its duties to the scheme members. Accordingly, it was not, as Mullins J observed, appropriate for an order to be sought that City Pacific do those things, or an order requiring the registrar to execute the necessary documents on its behalf. Similarly, a declaration that there were no moneys owing under the bill of mortgage between City Pacific and Ballandean Investments was not properly sought in circumstances in which any rights to moneys owed had, by virtue of s 601FC(2), vested in Trilogy Funds. None of those statutory consequences of the change of responsible entity was brought to Martin J's attention.

[27] A judgment entered in favour of a party who has no entitlement to it is irregular.[4] In circumstances where Ballandean Investments was not entitled to the orders made against City Pacific, Mullins J properly regarded the judgment as irregular.

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[4] *Anlaby v Praetorius* (1888) 20 QBD 764 at 769; *Hughes v Justin* [1894] 1 QB 667 at 669, at 670.

Whether, even if regularly entered, the judgment should have been set aside

[28] It remains to mention Trilogy Funds' argument advanced by notice of contention. Trilogy Funds argued that it had a reasonable defence; there was an explanation for City Pacific's inaction; and there had been no material delay in Trilogy Funds' application to set the default judgment aside. As to the prospective defence, it should be inferred that Ballandean Investments had asked City Pacific to extend the date for payment of the $3 million due to City Pacific in return for the provision of the mortgage. The proper construction of the mortgage, giving effect to the commercial purpose of the transaction, was that it secured the performance of the obligation to pay the $3 million.

[29] Alternatively, if Ballandean Investments' construction of the mortgage were right, the proper course was to rectify the mortgage to make it clear that the promise under it was to pay the $3 million and to mortgage the land as security for the performance of that obligation. Or it was a case of estoppel by convention, each party having entered the mortgage on the common assumption that it secured payment of the $3 million due under the settlement deed. City Pacific and, in its place, Trilogy Funds, would suffer a loss if Ballandean Investments Pty Ltd were permitted to depart from that assumption, in that they would have lost security for the payment of the $3 million and would have lost the opportunity to exercise their rights to recover the money.

[30] Ballandean Investments disputed that Trilogy Funds could make out a good defence against it. It was not one of the Atkinson Gore group of companies as that group was defined in the settlement deed giving rise to the mortgage. The mortgage itself complied with the requirement in the settlement deed that a mortgage in terms of a particular existing mortgage be provided; that mortgage secured only advances made to Ballandean Investments, not any other party; and of those, there were none.

[31] It is not necessary to reach a concluded view on any of these matters; it is sufficient to say that in my view Trilogy Funds raised defences capable of argument in circumstances where the delay, such as it was, is properly explained. Even if the judgment were regularly entered, I would regard it as properly set aside in the unusual circumstances of the case.

[32] I would dismiss the appeal with costs.

[33] **CHESTERMAN JA:** I agree with Holmes JA that the appeal should be dismissed with costs, for the reasons given by her Honour.