SUPREME COURT OF QUEENSLAND

CITATION:	*Embrey v Smart & Anor* [2013] QSC 241
PARTIES:	**ADRIAN JAMES EMBREY** (plaintiff) **v** **PHILLIP JOHN SMART** (first defendant) and **THE GREATEST SALES COMPANY PTY LTD (ACN 122 572 169)** (second defendant)
FILE NO:	7490 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2013
JUDGE:	Daubney J
ORDERS:	**1. the application filed on 24 April 2013 in Proceeding No. 7490 of 2010 is dismissed with the costs of that application being reserved in Proceeding No. 9104;** **2. in Proceeding No. 9104 of 2010:** **(a) the judgment entered on 4 November 2010, and the orders of Fryberg J of 20 June 2011 and Clare SC DCJ of 29 August 2011 are set aside;** **(b) the costs thrown away by reason of that judgment and those orders being set aside are reserved;** **(c) the costs of and incidental to the application filed 24 April 2013 are reserved.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the applicant has applied for default judgment to be set aside – where the default judgment was irregularly entered– whether the judgment by default which was entered against the first defendant in Supreme Court Proceeding no. 9104/10 should be set aside pursuant to UCPR r 290 – whether the consequential orders should be set aside.

Corporations Act 2001 (Cth), s205B, s205C
Personal Injuries Proceedings Act 2002
Uniform Civil Procedure Rules 1999 (Qld), rr 8, 105, 116, 290

Laurie v Carroll (1958) 98 CLR 310, cited.
National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd [1983] 2 Qd R 441, cited.
Kendall v Sweeney & Ors [2002] QSC 404, considered.
Thomas Bishop Ltd v Helmville Ltd [1972] 2 WLR 149, cited.

COUNSEL: RAI Myers for the plaintiff
RS Ashton for the first defendant

SOLICITORS: Shine Lawyers for the plaintiff
Minter Ellison for the first defendant

[1] To put this application to set aside a judgment entered against the first defendant in its proper context, it is necessary to set out the unfortunate history of the proceedings between the parties.

Background

[2] As at 5 October 2007, the first defendant, Phillip John Smart ("Smart"), was the sole director and shareholder of the second defendant, The Greatest Sales Co Pty Ltd ("TGSC"). At that time, TGSC conducted a business from premises at 43 Ipswich Road, Woolloongabba ("43 Ipswich Road"). The plaintiff was at that time working as a subcontracted sales representative for a business known as "Walken Marketing", which was a business competitor of TGSC. The plaintiff claims that on 5 October 2007 he was assaulted by Smart, as a consequence of which he suffered serious physical and psychological injuries.

[3] On 16 December 2008, the plaintiff served on Smart a Form 1 Notice of Claim under the *Personal Injuries Proceedings Act* 2002 ("PIPA"). Smart did not respond to that notice.

[4] On 9 March 2009, no response having been received from Smart, the plaintiff's solicitors wrote to Smart demanding disclosure in accordance with his PIPA obligations, and foreshadowing the necessity for an application being made to the Court if disclosure was not made.

[5] On 17 March 2009, Irish Bentley, Smart's then solicitors, wrote to the plaintiff's solicitors saying that they had "recently obtained instructions from [Smart] to vigorously defend this personal injury claim". Smart's solicitors referred to, *inter alia*, the fact that Smart was then facing criminal charges in connection with the alleged assault on the plaintiff, and sought that further civil proceedings by the plaintiff against Smart await the outcome of the criminal proceeding.

[6] The plaintiff's solicitors responded on 17 March 2009, rejecting the proposal of the moratorium, and again calling for Smart to make the necessary disclosure.

[7] On 20 March 2009, Smart's solicitors wrote to the plaintiff's solicitors making what can only be described as the most perfunctory attempt to comply with Smart's disclosure obligations under PIPA.

[8] In June 2009, Smart stood trial in the District Court on the criminal charges he was facing.

[9] On 3 September 2009, the plaintiff's solicitors wrote to Smart's solicitors giving further particulars of the allegations made against Smart in the PIPA Notice of Claim. They wrote a separate letter complaining about the inadequacy of Smart's disclosure and again threatened an application.

[10] On 9 September 2009, Smart's solicitors responded, saying that they were "presently unable to contact [their] client to obtain instructions", and said that they would respond as soon as they had instructions.

[11] On 18 September 2009, the plaintiff's solicitors wrote again to Smart's solicitors, saying that their response was not adequate, and giving Smart a further seven days within which to make the necessary disclosure. On 12 October 2009, the plaintiff's solicitors yet again wrote to Smart's solicitors demanding that Smart comply with his PIPA disclosure obligations, and threatening an application.

[12] On 11 October 2009, the plaintiff's solicitors then filed in the District Court an application seeking, in effect, orders for Smart to comply with his disclosure obligations under PIPA. One of the affidavits filed in support of that application was an affidavit of attempted service by the process server retained by the plaintiff's solicitors to effect service of the originating application on Smart. This affidavit detailed numerous attempts which had been made between 16 November 2009 and 2 December 2009 to effect personal service on Smart at two addresses, namely 43 Ipswich Road and Unit 2, 76 Sackville Street, Greenslopes. Also filed was an affidavit by the plaintiff's solicitor in which there was evidence:

(a) that an ASIC search of TGSC conducted on 3 September 2009 disclosed the defendant's address as 43 Ipswich Road, and

(b) an electoral roll search conducted on 30 November 2009 recorded a residential address for "Phillip John Smart" as Unit 2, 76 Sackville Street, Greenslopes.

[13] On 15 December 2009, the plaintiff's solicitors sent copies of the originating application and supporting affidavits to Irish Bentley.

[14] On 14 January 2010, the plaintiff's solicitor had a telephone discussion with the solicitor at Irish Bentley who had been acting for Smart. He told the plaintiff's solicitor that he did not really have any position in relation to the originating application, confirmed that he still currently held instructions to act for Smart and TGSC, but said that he was uncertain whether he would be continuing to act for Smart and TGSC because he was waiting to be put in funds.

[15] On 3 February 2010, consequent upon the filing of a form of consent order which had been signed by the plaintiff's solicitor and Smart's solicitor on 2 February 2010, Devereaux SC DCJ made orders, including an order for Smart to provide the requisite PIPA disclosure within seven days.

[16] On 3 March 2010, Dorney QC DCJ made a costs order against Smart in respect of the disclosure application.

[17] As it transpired, Smart failed to make disclosure in accordance with the order to which he had consented. The plaintiff's solicitors wrote to Smart's solicitors demanding that he comply with the order, but there was no response.

[18] On 5 March 2010, the plaintiff's solicitors filed a further application in the District Court against Smart. Again, personal service was sought to be effected on Smart. An affidavit of service by a process server retained by the plaintiff's solicitors deposed to service on Smart having been effected by leaving the application and other supporting documents with a adult male identified in the affidavit only as "Luke" at 43 Ipswich Road. The process server deposed that he asked Luke whether the defendant was at the premises, to which Luke replied, "No, he is out of the country". The process server left the documents with Luke, with a request that they be passed on to Smart.

[19] The plaintiff's solicitor subsequently swore an affidavit in support of the application in which she deposed to conversations that she had with Luke on 16 March 2010:

> "5. On 16 March 2010 I received a telephone call from Luke Farrell of Love Springs Pty Ltd during which we had a conversation to the following effect:
>
> He said: 'I work for Love Springs at 43 Ipswich Road, Woolloongabba. Some guy has delivered documents from you here to our address but they don't belong to us. The Greatest Sales Company has left this address and no longer operates from here.'
>
> I said: 'But a recent company search suggests that the company's registered address and principal place of business is 43 Ipswich Road, Woolloongabba.'
>
> He said: 'Well maybe they haven't updated their details yet because they are definitely no longer at this address. We have been receiving a lot of mail for them but we forward it all on and I have a new office address for them.'
>
> I said: 'What is that address?'
>
> He said: 'Unit 7, 176 Grey Street in South Brisbane. So what would you like me to do with these documents?'
>
> I said: 'I am going to make some inquiries and will call you back about what to do with the document.'
>
> He said: 'Okay'
>
> 6. On 16 March 2010 I had a further telephone conversation with Luke Farrell of Love Springs Pty Ltd during which we had a conversation to the following effect:
>
> I said: 'I am sorry for any inconvenience caused Luke, I will arrange for a courier to come and collect the documents from you first thing tomorrow morning.'
>
> He said: 'That would be great, thanks very much.'

The plaintiff's solicitor then said that on 17 March 2010, she attended at the premises of 176 Grey Street, but found that there was no "Unit 7" there. The plaintiff's solicitor then conducted an ASIC search of Love Springs Pty Ltd. This

search disclosed that Smart was also a director of that company. A copy of that ASIC search was exhibited to the solicitor's affidavit. The search of Love Springs Pty Ltd disclosed Smart's address as "Unit 146, 35 Harbour Road, Hamilton, Qld 4007".

[20] The plaintiff's solicitor then had a further conversation with Luke Farrell on 17 March 2010. She described that conversation as follows:

> "13. On 17 March 2010 I telephone Luke Farrell of Love Springs Pty Ltd and we had a conversation to the following effect:
>
> I said: 'You saw the documents that were delivered to your address and who they were addressed to and being served upon, is that right Luke?'
>
> He said: 'I didn't really look at the documents themselves but I saw the letters and who they were addressed to.'
>
> I said: I have conducted a company search which reveals that Phillip John Smart, the director of The Greatest Sales Company, is also a director of Love Springs Pty Ltd. Were you aware of that at the time that we spoke yesterday?'
>
> He said: 'I wasn't aware of that at all, I don't deal with him.'
>
> I said: 'Okay.'

[21] On 17 March 2010, the plaintiff's solicitor also telephoned the solicitor at Irish Bentley who had been acting for Smart and TGSC. He told the plaintiff's solicitor that he did not "currently hold instructions in relation to the originating application".

[22] This further application by the plaintiff came on before Searles DCJ on 22 March 2010, on which occasion it was ordered that the orders of Devereaux SC DCJ of 3 February 2010 be varied so as to require Smart to complete the PIPA disclosure within 21 days of service of the current application and order.

[23] In June 2010, a process server retained by the plaintiff's solicitors attempted to effect service on Smart. An affidavit of attempted service by the process server sworn on 6 July 2010 stated:

> "I attempted to serve PHILIP JOHN SMART with;
>
> (i) Sealed Order of the District Court of Queensland dated 3 February 2010;
>
> (ii) Originating Application filed 5 March 2010; and
>
> (iii) Sealed Order of the District Court of Queensland dated 22 March 2010;
>
> 1. On 15 June 2010 I attended the Registered Office of the Second Respondent at 43 Ipswich Road, Woolloongabba Qld. I there met a young New Zealand male whom said that 'no-one by that name has worked here for a while'. I believe this person to be deliberately lying. A black BMW vehicle registration 688LXE was parked in the car park at the rear of the premises.

2. On 27 June 2010 I attended unit 146 / 35 Harbour Road Hamilton Qld to find there was no number 35. I rang the bell for unit 146 / 33 Harbour Road, Hamilton Qld there was no-one home.

3. On 30 June 2010 I attended 162 Boundary Road, West End, Qld to find this is an empty commercial shop currently for lease.

4. I attended 2 / 76 Sackville Street, Greenslopes Qld on three occasions during June 2010, at not time did anyone ever answer the door."

[24] Prior to the process server attempting to effect service at those addresses, the plaintiff's solicitor had, between March and May 2010, conducted a series of searches in an attempt to identify a current residential address for Smart. The plaintiff's solicitor conducted an electoral roll search, a land title search, a Department of Transport search and various internet searches. Relevantly, these searches disclosed that a "Phillip John Smart" lived at 2/76 Sackville Street, Greenslopes.

[25] On 19 July 2010, the plaintiff's solicitors filed in the Supreme Court an originating application ("Proceeding 7490/10") seeking the following relief:

"1. Pursuant to rule 116 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the Rules"), service upon the First Respondent of the subject Originating Application and the supporting documents relied upon by the Applicant be substituted by causing the said documents to be personally delivered to the registered address of the Second Respondent being 43 Ipswich Road, Woolloongabba in the State of Queensland;

2. Pursuant to paragraph 36(5)(b) of the *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act"), the requirement for the parties to attend a compulsory conference pursuant to subsection 36(1) of the Act is dispensed with;

3. Pursuant to subsection 39(1) of the Act, the requirement for the parties to exchange written final offers is dispensed with;

4. Pursuant to rule 116 of the Rules, service of the Applicant's Claim and Statement of Claim annexed hereto and marked with the letter "A" upon the First Respondent in these proceedings (and First Defendant in the Claim and Statement of Claim) be substituted by causing the said documents and a copy of the subject order to be personally delivered to the registered address of the Second Respondent being 43 Ipswich Road, Woolloongabba in the state of Queensland;

5. The First Respondent and the Second Respondent pay the Applicant's costs of and incidental to the Originating Application as agreed or, failing agreement, as assess on the standard basis;

6. Such further or other order as this Honourable Court may deem appropriate."

The plaintiff's solicitor swore an affidavit in support of the originating application which detailed the history of the dealings with Smart, which I have summarised above, including the history of attempted service of the District Court proceedings.

[26] On 3 August 2010, the plaintiff applied for, and was granted by Atkinson J, an order for substituted service in the following terms:

> "1. Pursuant to rule 116 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("the Rules"), service upon the First Respondent of the subject Originating Application and the supporting documents relied upon by the Applicant be substituted by causing the said documents to be personally delivered to the registered address of the Second Respondent being 43 Ipswich Road, Woolloongabba in the state of Queensland;
>
> 2. Originating Application otherwise adjourned to 17 August 2010;
>
> 3. Costs reserved."

[27] Service of the Supreme Court originating application in Proceeding 7490/10 and supporting material was then effected in accordance with that order made by Atkinson J.

[28] On 17 August 2010, the originating application in Proceeding 7490/10 came on for hearing by Martin J. There was no appearance for Smart. His Honour made the following orders:

> "1. Pursuant to paragraph 36(5)(b) of the *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act"), the requirement for the parties to attend a compulsory conference pursuant to subsection 36(1) of the Act is dispensed with;
>
> 2. Pursuant to subsection 39(1) of the Act, the requirement for the parties to exchange written final offers is dispensed with;
>
> 3. Pursuant to rule 116 of the Rules, service of the Applicant's Claim and Statement of Claim annexed hereto and marked with the letter "A" upon the First Respondent in these proceedings (and First Defendant in the Claim and Statement of Claim) be substituted by causing the said documents and a copy of the subject order to be personally delivered to the registered address of the Second Respondent being 43 Ipswich Road, Woolloongabba in the state of Queensland;
>
> 4. The First Respondent and the Second Respondent pay the Applicant's costs of and incidental to the Originating Application as agreed or, failing agreement, as assessed on the standard basis."

[29] On 24 August 2010, then, the plaintiff issued his claim and statement of claim in Proceeding 9104/10. The claim and statement of claim were in conformity with those referred to in the order which had been made by Martin J on 17 August 2010.

[30] Service of those documents was effected in accordance with the order for substituted service which had been made in Proceeding 7490/10 by Martin J. Smart did not file a notice of intention to defend. Not surprisingly, the plaintiff then sought default judgment. The application for default judgment was accompanied by an affidavit deposing to service in compliance with the order which had been made by Martin J on 17 August 2010.

[31] On 4 November 2010, judgment was entered in Proceeding 9104/10 against Smart and TGSC in the following terms:

> "The judgment of the Court is that the defendants pay to the plaintiff damages to be assessed upon the plaintiff's statement of claim together with costs to be assessed, and that the damages be assessed by the District Court."

[32] In March 2011, the plaintiff applied for an order for dispensation with signatures on a request for trial date and for the matter to be placed on the call over list of the Brisbane Registry of the District Court. On 20 June 2011, Fryberg J ordered:

> "1. Pursuant to rule 469 of the *Uniform Civil Procedure Rules* 1999, the signatures of the First Defendant and the Second Defendant on the request for trial date signed on behalf of the Plaintiff and dated 19 May 2011 be dispensed with;
>
> 2. The First Defendant and the Second Defendant pay the Plaintiff's costs of and incidental to the Application as agreed or, failing agreement, as assessed on the standard basis on the Supreme Court scale."

[33] The hearing for the assessment of damages came on before Clare SC DCJ on 29 August 2011. On 6 September 2011, her Honour made the following orders:

> "1. There be judgment for the plaintiff against the first defendant in the sum of $581,689.03;
>
> 2. There be judgment for the plaintiff against the second defendant in the sum of $581,689.03;
>
> 3. The defendants pay the plaintiff's costs of and incidental to the proceeding to be assessed on the standard basis."

[34] After the order assessing damages was made, the plaintiff's solicitors then sought to serve Smart. In an affidavit filed before me, the plaintiff's solicitor said:

> "120. During the (sic) from 1 September 2011 to on or about 24 December 2011 I conducted a series of searches seeking to identify a current residential address for the first defendant. Those searches included a variety of internet based searches include searches on Myspace, Facebook and other social media sites. Whilst inconclusive, those searches suggested that the first defendant may be spending periods of time in New Zealand and could be carrying on a business in New Zealand.
>
> 121. Accordingly, I instructed an investigator in New Zealand to conduct inquiries in an effort to ascertain if the first defendant could be located in New Zealand.
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> 122. I am informed by the investigators based in New Zealand and verily believe that extensive searches and inquiries were conducted during 2012 to locate the first defendant and then to serve the Order of the Court dated 29 August 2011 upon him.
>
> 123. I am informed and verily believe that those attempts proved fruitless until the Order was ultimately served upon the first defendant on or about 13 November 2012."

[35] The plaintiff's solicitor also said that in October 2011, it came to her attention that ASIC had started deregistration action against TGSC. After representations by the plaintiff's solicitor, ASIC initially agreed to defer that deregistration. More recently, however, ASIC proceeded to deregister TGSC.

[36] It is against that background that Smart has now applied for relief.

[37] In respect of Proceeding 9104/10, Smart has applied for orders that:

(a) the judgment by default on 4 November 2010 be set aside, and that

(b) the orders of Fryberg J on 20 June 2011 and Clare SC DCJ on 29 August 2011 be set aside.

[38] In respect of the originating application brought in respect of Smart's PIPA obligations, i.e. Proceeding 7490/10, Smart has also applied for orders that the order of Atkinson J made on 3 August 2010 and the order of Martin J made on 17 August 2010 be set aside.

Should judgment be set aside?

[39] Against that background, the central issue is whether the judgment by default which was entered against Smart in Proceeding 9104/10 ought be set aside, pursuant to UCPR r 290. If that judgment is set aside, it is clear that the consequential orders, including the assessment of damages under that judgment, should also be set aside.

Was the judgment regularly entered?

[40] The first question is whether the judgment by default, which was entered on 4 November 2010, and in consequence of which the orders of Fryberg J and Clare SC DCJ were subsequently made, was regularly entered.

[41] The long-held general rule is that a defendant may have an irregularly entered judgment set aside *ex debito justitiae*, regardless of the defence of the merits.[1] A defect in service of originating process is sufficient to render irregular any judgment subsequently entered in default of appearance.[2]

[42] Before me, the defendant Smart complained about the adequacy of the material put before both Atkinson J and Martin J when their Honours respectively made orders for substituted service. It was said, for example, that there was no evidence before either of those judges to prove attempts to serve the originating application and the only evidence relied on related to attempts to effect service in other proceedings (i.e. the previous District Court applications).

[43] Even more fundamentally, however, it was argued that the purported service of the claim and statement of claim in Proceeding 9104/10, in which default judgment was subsequently entered, was ineffective because the order for substituted service of the claim and statement of claim had improperly been made in other proceedings, i.e. in Proceeding 7490/10 which ultimately came before Martin J on 17 August 2010.

[44] The relevant order, Order 3, made by Martin J is set out above at [28], and was expressed to be an order made "pursuant to r 116 of the Rules" (i.e. the *Uniform Civil Procedure Rules*).

[45] Rule 116(1) provides:

> "(1) If, for any reason, it is impracticable to serve a document in a way required under this chapter, the court may make an order substituting another way of serving the document."

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1 See Cairns "Australian Civil Procedure" (9th ed) at 12.290, and the authorities there cited.

2 *Thomas Bishop Ltd v Helmville Ltd* [1972] 2 WLR 149.

[46] The claim in Proceeding 9104/10, being the originating process for that proceeding,[3] was required under r 105 to be served personally on the defendants to that claim; that is, the starting point is that there was a requirement for personal service of the claim in Proceeding 9104/10 on Smart.

[47] Counsel for Smart argued that the order for substituted service made by Martin J was ineffective because, at the time that order was made, the claim in Proceeding 9104/10 had not been filed and the requirements for the making of an order under r 116 were not, and could not be, satisfied.

[48] In my view, r 116(1) properly construed, requires that the proceeding in respect of which an order for substituted service is sought must have been commenced before the order can be made; in other words, it is not possible to make an order under r 116 for substituted service of an originating process in anticipation of the relevant originating process having been issued by the Court under r 8(1). The precondition for the exercise of the discretion under r 116(1) is that "it is impracticable to serve a document in a way required" under *UCPR* Chapter 4. The document in question here (the claim in Proceeding 9104/10) only became an "originating process" when it was issued by the Court. It was that originating process document to which the requirement of personal service under r 105 attached. In my view, r 116 does not contemplate a party demonstrating that, if an originating process is issued in the future, it would be, or might be, impracticable to serve it personally. The scheme of the rule is, relevantly, that the originating process exists and it needs to be shown that it is impracticable to effect personal service.

[49] In *Kendell v Sweeney & Ors*[4], Margaret Wilson J had to consider, *inter alia*, an application for substituted service of an originating application relating to issues arising in a company liquidation. Her Honour listed the various modes of substituted service which had been proposed by the applicant, and then said:[5]

> "It may well be that the method of service proposed would be effective in bringing the proceeding to the attention of those respondents. However, that it [sic] not enough to justify the making of an order for substituted service. It must first be shown that it is impracticable to serve the documents in a way required by chapter 4 of the *UCPR*. This has not been shown – indeed, there does not appear to have been any attempt to serve the respondents in the usual way. In these circumstances I refuse to make orders for substituted service."

[50] Her Honour's application of the rule in that case is completely consistent with the interpretation which I adopt.

[51] My view of the proper construction of r 116(1) is fortified by reference to r 116(4) which provides:

> "(4) The court may make an order under this rule even though the person to be served is not in Queensland or was not in Queensland when the proceeding started."

[52] Rule 116(4) overcomes difficulties previously encountered as a consequence of cases decided under the old rules of court, where issues arose as to whether a writ of

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3 *UCPR*, r 8.
4 [2002] QSC 404.
5 [2002] QSC 404, 15,

summons in the form prescribed for service within the jurisdiction, but issued at a time when the defendant was not in the jurisdiction, could be the subject of an order for substituted service.[6] It is notable for present purposes, however, that r 116(4) is clearly drawn on the assumption that the relevant proceeding has already started when the order for substituted service is made.

[53] It follows from this construction of r 116 that I am bound to hold that the Order 3 made in Proceeding 7490/10 on 17 August 2010 was ineffective to permit substituted service of the claim later issued in Proceeding 9104/10. Having reviewed the material put before the Court on the application which came before Martin J on 17 August 2010, it is clear that his Honour was led into making the order for substituted service as a consequence of the submissions made to him on that day by the applicant. Those submissions asserted, without reference to authority, that it was appropriate for an order to be made in the form as made by his Honour. The applicant on that application does not appear to have raised with his Honour any question as to whether the Court on that occasion had jurisdiction to make the order which was sought.

[54] Having found, as I consider I must, that the order made on 17 August 2010 was ineffective for the purposes of authorising substituted service of the claim in Proceeding 9104/10, it follows that there was no service on Smart of the originating process in Proceeding 9104/10. The ineluctable consequence is that the judgment in that proceeding was irregularly entered on 4 November 2010. That judgment, and the subsequent orders made in consequence of that judgment, ought be set aside *ex debito justitiae*.

[55] In the event that my interpretation of r 116 is incorrect, I should express my view as to the outcome which would have obtained if, contrary to the conclusion I am constrained to reach, it were held that the judgment on 4 November 2010 was regularly entered.

Outcome if the judgment were regularly entered

[56] The relevant considerations for a court on an application to set aside a regularly entered judgment are well settled, and were summarised by McPherson J (as he then was) in *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd:*[7]

> "The principal question remaining is whether the judgments obtained in default of appearance in actions 5053/1982 and 5054/1982 should be set aside. In *Aboyne Pty. Ltd. v. Dixon Homes Pty. Ltd.* [1980] Qd.R. 142, Kelly J. regarded an application to set aside such a judgment, when regularly entered, as requiring the court to consider whether the defendant had given a satisfactory explanation of its failure to appear; any delay in making the application; and whether the applicant defendant had a *prima facie* defence on the merits. Speaking generally, it may be said that it is the last of these considerations that it is the most cogent. It is not often that a defendant who has an apparently good ground of defence would be refused the opportunity of defending, even though a lengthy interval of time had elapsed provided that no irreparable prejudice is thereby done to the

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6 See, for example, *Laurie v Carroll* (1958) 98 CLR 310.

7 [1983] 2 Qd R 441 at 449-450.

> plaintiff: *Attwood v. Chichester* (1878) 3 Q.B.D. 722; *Rosing v. Ben Shemesh* [1960] V.R. 173."

[57] It is therefore necessary to look at the material filed by Smart to determine whether:

(a) he has given a satisfactory explanation for his failure to appear;

(b) he has delayed in bringing this application;

(c) he has disclosed a *prima facie* defence on the merits.

Explanation for failure to appear

[58] Smart's explanation for his failure to appear to this proceeding is that, until he received in New Zealand on 13 November 2012 a letter from the plaintiff's solicitors dated 30 August 2012 with which was enclosed a copy of the order made on 29 August 2012, he was not aware of this proceeding.

[59] The plaintiff had effected service of the claim and statement of claim in this proceeding in accordance with the order for substituted service which had been made by Martin J on 17 August 2012. (For present purposes, of course, I proceed on the basis that the order for substituted service on 17 August 2012 was effectual.) But, for the reasons set out in an affidavit by Smart, he says that service in accordance with his Honour's order at the premises at 43 Ipswich Road did not have the effect of bringing the proceedings to Smart's notice.

[60] In an affidavit filed before me, Smart said that he has residences in Brisbane and Auckland, and that he splits his time between his residences. He has had a number of residences in Brisbane over the last few years. He swore that his Brisbane residences have been as follows:

- March 2008 – March 2009 – Unit 146, 35 Harbour Road, Hamilton ("Harbour Road")
- March 2009 – July 2010 – Unit 5, 212 Vulture Street, South Brisbane ("Vulture Street")
- July 2010 – September 2011 – Unit 109, 1 O'Connell Street, Kangaroo Point ("O'Connell Street")
- September 2011 to date – 46 Dilkera Street, Balmoral ("Dilkera Street")

[61] Smart then referred to ASIC searches of a number of companies other than TGSC of which he has been director:

(a) You'll Love This Pty Ltd – Smart was this company's sole director from 10 August 2010 to 3 November 2010, and the ASIC search of that company recorded his address as O'Connell Street;

(b) Love Springs Pty Ltd – Smart was a director of this company from 29 January 2009 to 16 December 2012. The ASIC search of this company recorded:

(i) his address as Harbour Road from 25 February 2009 (when ASIC processed his notice of appointment) to 17 January 2012 (when ASIC processed his change of address);

(ii) his address from 17 January 2012 (when ASIC processed a notice of change of address) as O'Connell Street;

(c) CDU Australia Pty Ltd – Smart is, and has since 16 February 2009 been, the sole director of this company. The only address listed for Smart on the ASIC search for this company is Harbour Road.

[62] Smart referred in his affidavit to a New Zealand registered company, Love Springs NZ, of which he has been a director since 2009. Further detail in relation to this company is set out in an affidavit by Smart's solicitor, to which I will refer shortly.

[63] Smart also referred to TGSC, saying it operated a business at 43 Ipswich Road from about 15 August 2007 to 15 August 2010. Smart deposed:

> "34. I did not, at any time, receive at the Ipswich Road Address any correspondence or other documents from Shine Lawyers. During the period that TGSC operated from the Ipswich Road Address, I attended approximately every 2-3 weeks and was otherwise in New Zealand."

[64] Notably, Smart said nothing in his affidavit about the fact that his residential address recorded with ASIC for TGSC was, at all times, 43 Vulture Street.

[65] Smart referred to the process server's attempts to locate the Harbour Road address, and says:

> "37. I do not know why Mr Heydt was unable to locate number 35. It is a large, residential building complex in the Portside precinct of Hamilton. As referred to at paragraph 9 above, between March 2008 and March 2009 I lived at the Harbour Road Address."

[66] Smart said that, during the times he lived at Harbour Road, Vulture Street and O'Connell Street respectively, he was available to be personally served.

[67] In respect of the "Phillip John Smart" located by electoral roll search at the Greenslopes address, Smart said this is another person entirely and that he has never lived at that address, nor had the email address attributed to the person who lived at that address.

[68] Smart exhibited to his affidavit a draft of the defence which, if judgment be set aside, he would file and serve, and deposed to the substance of his defence in the following terms:

> "48. I believe I have a good defence to the whole of the plaintiff's claim on the following grounds:
>
> (a) I did not unlawfully assault the plaintiff as alleged, or at all;
>
> (b) any trespass to the person of the plaintiff (including any battery) was justified at law on the grounds of self defence;
>
> (c) I did not owe the plaintiff a duty of care 'to prevent [other persons] from perpetrating an assault upon the plaintiff' as alleged;
>
> (d) I therefore did not breach any duty of care to the plaintiff;

(e) I did not actively encourage other persons 'to perpetrate the assaults'; and

(f) I was acquitted after trial of a criminal charge of unlawful assault against the plaintiff arising out of the same circumstances."

[69] Smart's solicitor, Mr Stephen O'Grady, swore two affidavits in support of the application. In his first affidavit, Mr O'Grady rehearsed the correspondence which passed between him and the plaintiff's solicitors after Mr O'Grady's firm received instructions on 15 November 2012.

[70] Mr O'Grady exhibited to his affidavit copies of the ASIC searches of the various companies of which Smart has been a director. Mr O'Grady was able to ascertain these details by conducting a personal name search of Smart with ASIC. Mr O'Grady described that as follows:

"20. On 23 January 2013, I caused a search to be conducted of the records maintained by the Australian Securities and Investments Commission (**ASIC**) in respect of the first defendant (**ASIC Personal Name Search**). A true copy of the ASIC Personal Name Search is contained in a bundle marked **Exhibit 'SOG1'** at pages 49 – 54 (as an enclosure to the letter from Minter Ellison to Shine Lawyers dated 1 March 2013, referred to at paragraph 17 above).

21. The ASIC Personal Name Search reveals that, inter alia:

(a) from 16 February 2009 to 8 July 2012 the first defendant was a director and secretary of CDU Australia Pty Ltd ACN 135 400 663, and his address was Unit 146, 35 Harbour Road, Hamilton, QLD, 4007;

(b) from 29 January 2009 to 16 December 2012 the first defendant was a director of Love Springs Pty Ltd ACN 127 808 968, and his address was Unit 109, 1 O'Connell Street, Kangaroo Point, QLD, 4169; and

(c) from 10 August 2010 to 3 November 2010 the first defendant was a director and secretary of You'll Love This Pty Ltd ACN 145 704 525, and his address was Unit 109, 1 O'Connell Street, Kangaroo Point, QLD, 4169."

Mr O'Grady's narrative is patently deficient in respect of Love Springs Pty Ltd; the full extent of Smart's address disclosures in that company's ASIC search are as set out in Smart's affidavit.

[71] Mr O'Grady also refers to conducting a Google search of "Love Springs" and finding the website www.lovesprings.co.nz." He describes other particular internet searches that he undertook in respect of this New Zealand website, including one which disclosed the "admin contact name" and the "technical contact name" as "Phil Smart". Mr O'Grady also exhibited a copy of a New Zealand companies office search in respect of Love Springs NZ which gives both a registered office and an address for service of that company as particular addresses in Auckland.

[72] Notably, the New Zealand Companies' Office search of Love Springs NZ discloses that Smart has, since 7 July 2009, been the sole director of that company, and discloses his residential address as 43 Ipswich Road, Woolloongabba.

[73] Mr O'Grady's second affidavit disclosed internet searches that he had done of the address at 146/35 Harbour Road, Hamilton. Mr O'Grady's affidavit exhibits copies of various web pages depicting the apartment situated at that address.

[74] The relevant timeframe for present consideration is August 2010 – that is when Atkinson J and Martin J made the relevant orders for substituted service. It appears from Smart's own material that his actual address at that time was O'Connell Street. Had the plaintiff's solicitors conducted searches of all of the companies to which Smart and his solicitor refer in their affidavits at that time, however, a grab bag of addresses for Smart at that time would have been disclosed:

(a) For TGSC, his address was 43 Ipswich Road;

(b) For You'll Love This Pty Ltd, his address was O'Connell Street;

(c) For Love Springs Pty Ltd, his address was Harbour Road;

(d) For CDU, his address was Harbour Road;

(e) For Love Springs NZ, his address was 43 Ipswich Road, Woolloongabba.

[75] In other words at the time the orders for substituted service were made, the only company search which would have revealed Smart's actual address at the time was a search for You'll Love This Pty Ltd, a company which had no connection whatsoever with this proceeding, and the association with which would only have been discovered by performing a personal name search of Smart with ASIC.

[76] For completeness, I note also that in March 2010, when the plaintiff's solicitors were seeking to effect service at 43 Ipswich Road and discussions were held with Luke (as referred to in [19] above), the address disclosed for Smart in the ASIC search of Love Springs Pty Ltd was Harbour Road, but Smart was actually living at Vulture Street. Even if the process server had found the Harbour Road unit in June 2010 (see [23] above), Smart would not have been able to be served there. He was at Vulture Street.

[77] Smart's contention that he failed to appear to the proceeding because the documents served at 43 Ipswich Road did not come to this attention is a bare explanation. Whether it is a satisfactory explanation is an entirely different question.

[78] It seems to me that there are two relevant aspects in respect of which no explanation has been provided by Smart.

[79] First, Smart has given no explanation at all for the fact that, apart from You'll Love This Pty Ltd, searches of companies with which he was associated in August 2010, particularly TGSC, would not have revealed his actual residential address at the time. Indeed, the address given for TGSC (and, for that matter, the New Zealand company, on which Smart and his solicitor placed so much store in their affidavit material), was 43 Ipswich Road, which was never his residential address. The other company trading from 43 Ipswich Road with which he was associated was Love Springs Pty Ltd. As is demonstrated above, the ASIC records of Smart's address for that company were also inaccurate.

[80] Smart was under a statutory obligation to ensure the accuracy of the ASIC records for those companies. By s 205B(4) of the *Corporations Act*, a company is required to lodge with ASIC notice of change in any of the personal details of a director

within 28 days after the change. "Personal details" includes the director's address – s 205B(3). Section 205C(2) relevantly provides:

> "A director ... must give the company any information the company needs to comply with subsection 205B(4) within 7 days after any change in their personal details."

[81] For completeness, given that the address for Smart notified for TGSC was obviously completely wrong, I note also the initial notification requirements on the company imposed by s 205B(1) and the requirement on the director to provide that information in s 205C(1).

[82] It is clear that Smart personally, and the companies with which he was associated, comprehensively failed to observe these *Corporations Act* requirements. A search of TGSC revealed an address which was never Smart's residential address. The extent of his failure to comply with the *Corporations Act* requirements is otherwise apparent from the narrative above. Yet Smart has given no explanation at all for the inaccuracy of those records. In particular, he has given no explanation for the fact that the ASIC records of TGSC disclosed an address which was never his residential address.

[83] Secondly, Smart's bald assertion that documents delivered to 43 Ipswich Road did not come to his attention does not at all sit with his deposition that during the period that TGSC operated from the Ipswich Road address, he attended there every two – three weeks. He has not explained the administrative processes he had in place at those premises, the relationship and degree of control of the personnel who were actually at the premises, and what processes he had in place for the receipt of correspondence delivered to him at that address. Nor has he explained how it is that the documents did not come to his attention when another of his companies was trading from the same address.

[84] It is easy enough for a defendant simply to assert that they did not receive court documents. It is quite another thing for the defendant to provide a satisfactory explanation for the failure to appear.

[85] Were the matter to have been decided on the basis that the judgment of 4 November 2010 had been regularly entered, I would have held that Smart has not given a satisfactory explanation for his failure to appear to the proceeding.

Delay in bringing the application

[86] There has been no relevant delay in bringing the application.

***Prima facie* defence on the merits**

[87] Smart has disclosed a *prima facie* defence on the merits, and has, relevantly, sworn to his denial of having assaulted the plaintiff.

[88] Despite having shown a *prima facie* defence on the merits, and always acknowledging, as is apparent from the authorities, that this is the most cogent of the considerations to be taken into account when assessing whether to set aside a regularly entered judgment, the failure by Smart to provide a satisfactory explanation for his failure to appear would, in my assessment, have weighed heavily

against the exercise of the discretion to set aside the judgment. Had it been necessary to decide the application on the basis of the judgment of 4 November 2010 having been regularly entered, I would have refused that application.

Conclusion

[89] For the reasons I have given, however, the application must be resolved on the basis that the judgment of 4 November 2010 was irregularly entered. That judgment, and the orders consequent upon that judgment, will be set aside. I do not, however, consider it appropriate to set aside the orders made by Atkinson J and Martin J. The appropriate approach is for Smart now to defend the proceeding brought against him by the plaintiff, and for the matter to proceed to appropriate resolution as quickly as possible.

[90] Given the circumstances in which the applications have been made, the costs of the applications ought be reserved. Otherwise, the costs thrown away by reason of the judgment and consequential orders being set aside ought be reserved. It is appropriate for all of these costs to abide the trial of the proceeding.

[91] There will be the following orders:

1. the application filed on 24 April 2013 in Proceeding No. 7490 of 2010 is dismissed with the costs of that application being reserved in Proceeding No. 9104;

2. in Proceeding No. 9104 of 2010:

   (a) the judgment entered on 4 November 2010, and the orders of Fryberg J of 20 June 2011 and Clare SC DCJ of 29 August 2011 are set aside;

   (b) the costs thrown away by reason of that judgment and those orders being set aside are reserved;

   (c) the costs of and incidental to the application filed 24 April 2013 are reserved.