[2002] QCA 281

COURT OF APPEAL

McPHERSON JA
WHITE J
WILSON J

Appeal No 9560 of 2001

SANTE TROIANI First Appellant

and

RITA CESARINA TROIANI Second Appellant

and

ALFOST PROPERTIES PTY LTD (CAN 010 560 639) Respondent

BRISBANE

..DATE 02/08/2002

JUDGMENT

McPHERSON JA: This is an appeal by defendants in an action in the District Court from a decision refusing to set aside a judgment entered on 9 June 2000 in default of the defendants filing notice of intention to defend the claim.

The claim was based on a written agreement of 30 April 1996 for the loan of a sum of $230,000 but the claim in the action itself was limited to interest totalling $99,475.02, which by the time judgment was entered on 9 June 2000 had increased to $100,617.52. It was not suggested that the judgment was not regularly obtained and the application to set it aside rested on the defendants' assertion that they had a defence on merits.

Their principal defence is that there was another agreement between the parties by which the defendants' obligation to pay principal and interest under the loan agreement was varied so as to be discharged if the defendants arranged for Wide Bay Brickworks Pty Ltd to provide discounted bricks and paving stock to ABC Brick Sales. By way of explanation, Wide Bay Brickworks Pty Ltd was a company of which the first defendant was then a director, and ABC Brick Sales was the business name of a company Thandwalla Holdings Pty Ltd of which a Mr Ivan Parker was a director. That company, in turn, owned 25 per cent of the issued share capital of the plaintiff, which is now the respondent to this appeal.

In material filed by the plaintiff in opposition to the application to set aside the judgment it is deposed on behalf

of the plaintiff that there was no such agreement for variation or discharge of the loan, as alleged by the defendant. It was also deposed that a weighbridge document purporting to record consignments of bricks from the brick work yard of Wide Bay Brickworks Pty Ltd did not, as the defendants asserted it did, bear the handwriting of a Mr Taylor, the yard manager of Wide Bay Brickworks.

Confronted with this conflict of evidence the learned Judge, in my opinion correctly, concluded that the matter was one that could not be resolved on the affidavit evidence in the application before him. In the result he found that the applicant/defendants had succeeded in showing a defence on the merits. His Honour then turned to the question of delay in making the application to set aside the judgment, considered with the explanation advanced by the defendants for their failure to appear and defend.

In substance the defendants asserted that the delay between the date on which they were served with the claim, on 30 March 2000, and the date on which the application to set aside the judgment was filed, was partly due to the failure of the plaintiff to provide them with a copy of the loan agreement and partly to the fault of their own former solicitor in failing to follow their instructions or to advise them of communications he had received from the plaintiff or its solicitors.

On 22 June 2001 they instructed another firm to act on their behalf. His Honour's conclusion on this aspect of the matter was that,

> "There was a satisfactory explanation of the failure to file a notice of intention to defend."

That left for consideration the defendants' failure to explain the delay between 22 June and the filing of the application to set aside the judgment. In his reasons his Honour said that the application was filed on 6 September 2001. In fact, that date, 6 September 2001, was the hearing date for which the application was originally set down and not its filing date which, according to the record, was 2 August 2001. It is not clear whether the interval of a month or so between those two dates resulted from deliberate choice on the part of the defendants, or was due to the exigencies of the Court calendar in Bundaberg or elsewhere and to his Honour's other judicial commitments at the time.

Given, however, the fact that the period between 22 June 2001 when the defendants first instructed their present solicitors, and 2 August 2001 when the application was filed is little more than five weeks, I would not have considered that the delay in question was sufficient to justify dismissal of their application on that ground alone.

On behalf of the respondent/plaintiff on appeal, Mr Anderson of counsel submitted that there must be an error in, or in the transcription of, his Honour's reasons, and that when, in the

passage quoted above, he said, "there is a satisfactory explanation" of the failure to file a notice of intention to defend, his Honour must have said or meant to say, "there is no satisfactory explanation". The context, to my mind, tends to suggest that this may be the case but the record is prima facie evidence of the proceedings: compare Savanoff v. Recar Pty Ltd [1983] 2 QdR 219, 230. Without any firm indication to the contrary, I am not prepared to assume that there has been a clerical error in the reasons, as has been suggested.

In order, however, to avoid any suggestion that the appeal is being determined in that respect on what may be a defective version of the reasons, I consider that this Court should reconsider that aspect of the application afresh. Accepting, as I do, that there is a defence on the merits, or that one has been shown for the purpose of letting the defendants in to defend, the question is whether decisive weight should be attached to the defendants' explanation, or the absence of it, for the delay in failing to file their application before 2 August 2001.

In my view, the delay from 22 June 2001 until that date is sufficiently explained by the fact that it was only on the first of those dates that they engaged new solicitors. Some time would then have been occupied in instructing them and in preparing the defendants' affidavits.

When it is borne in mind that Wide Bay Brickworks Pty Ltd was subject to a receiver and that in circumstances like those it

is often difficult to have ready access to relevant documents records, it seems to me that a period of some five weeks' delay does not call for much, if any, further detailed explanation by the defendants. It is the period before 22 June 2001 that is so much longer, running as it does from 27 April 2000, when the first defendant gave instructions to his erstwhile solicitor to defend the action, until 22 June 2001 when the new solicitors were engaged.

The first defendant says he was not informed by his previous solicitor that judgment had been entered until he received a letter from him on 11 July 2000. On 12 July 2000 the defendants (or one of them) were served with a bankruptcy notice, whereupon they contacted their former solicitor on the following day and instructed him to apply to set aside the judgment. Correspondence then ensued between the solicitors for the parties, culminating in a letter dated 2 August 2000 from the defendants' solicitor to the plaintiff's solicitors requesting a copy of the loan agreement to enable a defence to be properly prepared and pleaded to the plaintiff's claim.

The plaintiff's solicitors replied, but did not supply the copy requested. A follow-up letter was sent by the defendants' solicitor on 19 September 2000 reiterating this request. That letter described the alleged variation in the loan agreement that would be and is now raised as a defence. The plaintiff's solicitor's response was that copies of the mortgage and loan documents had been supplied some time previously. There the matter stood until a creditor's

petition in bankruptcy issued against the second defendant on 18 May 2001.

It was a month or so after that that the defendants instructed their present solicitors on 22 June 2001. The delay between September 2000 and May 2001 is not explained except to the extent that the defendants say it was the fault of their solicitor, and that the plaintiff had not received the loan documents which had been requested from the plaintiff's solicitors. English is, it may be added, not the natural language of the first defendant although the second defendant does not suffer from any disability of that kind.

Unimpressive though some of this may be, I regard it as enough to provide a sufficient explanation of the delay for the purpose of letting the defendants in to defend the action, given that they were found by the Judge below to have a defence on the merits. The Queensland authorities on setting aside judgments entered in default are fairly numerous, and were recently connected in the decision of Justice Atkinson in Yankee Doodles Pty Ltd v. Blemvale Pty Ltd BC9903401. Nothing will be gained from repeating on this occasion the principles that those authorities lay down. Suffice to say that much less significance is now ascribed to delay than may have been the case at some times of the past.

It is right however to point out that shortly after the introduction of the Judicature Act, when the procedure was still relatively new the Court of Appeal in England in Attwood

v. Chichester (1878) 3 QBD 722, 723, considered that "irreparable mischief" must be shown before the objection of lateness would be listened to. By irreparable mischief, Lord Justice Bramwell in that case meant injury that could not be compensated by an award of costs.

It should always be borne in mind in matters of this kind that a refusal to set aside a judgment has the consequence that a plaintiff succeeds in obtaining and retaining a judgment, sometimes for a substantial sum of money, in an action in which the defendants may, as in this case, have been found to have a plausible defence on the merits which is never tried. That is an unusually heavy sanction for delay and one that, in the context of the finding here that there is a defence on the merits, should not be imposed in the present case.

Envisaging, as he did, that the problem confronting him in this case is the finding that there was a defence on the merits, Mr Anderson of counsel for the respondent sought on this appeal to challenge that finding and have it overturned. When it became apparent that this submission was being presented, it became necessary for the Court to point out that it was not foreshadowed either by a notice of cross-appeal or a notice of contention or in the written outlines presented by the respondent. The defendant-appellants, who are litigants in person, would therefore be placed in a position of some disadvantage if they were obliged to argue that question without any prior notice that it was about to be raised.

They had, as they in any event now assert before us, not had sufficient notice, perhaps through their own fault, of the date of this hearing, and were therefore not in a position even to argue the appeal as it stood. It would therefore almost certainly have been necessary to allow an adjournment of the appeal in order to enable them to prepare for the argument today. As it is, however, I am satisfied that, on the material that we have seen and the reasons given by the learned primary Judge, there is a defence on the merits sufficient to enable the defendants at least to be given an opportunity of defending this action, it is desirable for us not to grant an adjournment but rather to decide the question on the material and the submissions as they stood before any attempt was made to re-open that question.

In consequence and for the reasons I have given here, I consider that the appeal should be allowed and the default judgment set aside on terms that the defendants file a defence within 21 days, if they have not already done so, and that they pay the plaintiff's costs of and incidental to their application to set aside the judgment.

They are required to pay those costs because that is the usual order in a case like this where, having been granted the indulgence that they sought at first instance of having a regular judgment set aside, they should as defendants be required to pay the plaintiff's costs of so having it set aside as it should have been in the first place.

So far as the costs of the appeal are concerned, I would accede to Mr Anderson's submission that they should be made the plaintiff's (that is, here the respondent's) costs in the cause. What is meant by that, of course, is that if in the end the plaintiff succeeds in the action, it should recover the costs of this appeal but not otherwise. Those are the orders I would make in this case.

WHITE J: I agree with the orders proposed by the learned presiding Judge for the reasons which he has expressed.

WILSON J: I also agree.

McPHERSON JA: Well, the order of the Court will be in the form I have stated.
