SUPREME COURT OF QUEENSLAND

CITATION:	*Cook v D A Manufacturing Co P/L & Anor* [2004] QCA 52
PARTIES:	**GRAHAM CLIFFORD COOK** (plaintiff/respondent) **v** **D A MANUFACTURING CO PTY LTD** ACN 010 219 717 (first defendant/appellant) **WES MACKNEY** (second defendant)
FILE NO/S:	Appeal No 8106 of 2003 Appeal No 8844 of 2003 SC No 10226 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 February 2004
JUDGES:	de Jersey CJ and McPherson and Williams JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In Appeal No 8106 of 2003 – appeal dismissed with costs to be assessed** **2. In Appeal No 8844 of 2003:** **(i) Appeal allowed** **(ii) The order appealed from is varied to the extent only of setting aside that part thereof which ordered that the application be dismissed** **(iii) The default judgment dated 6 July 2000 is to be set aside and the appellant given unconditional leave to defend** **(iv) The appellant is to file and serve a defence in the proceeding within 28 days of this order** **(v) The respondent is to pay the appellant's costs of the appeal to be assessed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – DEFAULT OF APPEARANCE – where respondent obtained judgment against appellant in default of pleading –

where appellant not made aware of default judgment until three years later – where respondent granted leave to proceed after three year period – where appellant's application to have default judgment set aside was refused – whether the granting of leave to proceed should have been made conditional on the default judgment being set aside

Uniform Civil Procedure Rules 1999 (Qld), r 290, r 389

Aboyne Pty Ltd v Dixon Homes Pty Ltd [1980] Qd R 142, referred to
Evans v Bartlam [1937] AC 473, followed
National Australia Bank Ltd v Singh [1995] 1 Qd R 377; [1993] QCA 469; Appeal No 97 of 1993, 22 October 1993, cited
National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd [1983] 2 Qd R 441, followed
Taylor v Taylor (1978) 143 CLR 1, cited
W R Carpenter Australia Ltd v Ogle [1999] 2 Qd R 327; [1997] QCA 383; Appeal No 5023 of 1996, 28 October 1997, cited

COUNSEL: K A Barlow for the appellant
R J Clutterbuck for the respondent

SOLICITORS: Gadens Lawyers for the appellant
Schultz Toomey O'Brien for the respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with the orders proposed by Williams JA, and with his reasons.

[2] **McPHERSON JA:** I have read and agree with the reasons of Williams JA. In my opinion, the orders, including those relating to costs, should be those proposed in his Honour's judgment on this appeal.

[3] **WILLIAMS JA:** The court is concerned with two appeals. In circumstances hereinafter outlined the respondent, the plaintiff in the action, had to seek leave to proceed pursuant to r 389 of the UCPR. That leave was granted at first instance and the appellant, the defendant in the action, has appealed from that decision. Shortly after that decision was given the appellant applied pursuant to r 290 of the UCPR to have the judgment in default of appearance against it set aside. At first instance the learned judge declined to make the order sought, and there is also an appeal from that decision.

[4] The relevant chronology is as follows:

- 20 November 1995 – Respondent (plaintiff) allegedly sustained personal injuries in an accident at a workplace.
- November 1996 – Respondent instructs solicitors.
- January 1997 – Respondent's solicitors write to appellant alleging its negligence caused respondent's injuries.

- 16 January 1997 – Appellant completes insurance claim form with respect to incident.

- 20 January 1997 – Appellant submits all relevant material to its insurance broker. Appellant also advises respondent that the matter has been placed in the hands of its insurance broker.

- 3 February 1997 – Appellant's insurer writes to respondent seeking details of accident, injuries and loss

- 3 March 1997 – Respondent's solicitors write to appellant's insurer providing brief details of alleged incident.

- 4 November 1998 – Writ and statement of claim filed.

- 3 November 1999 – Writ and statement of claim served on receptionist employed by appellant.

- 19 January 2000 – Appellant sends copy of writ of summons and statement of claim to its insurance broker.

- 21 January 2000 – Insurance broker submits material to appellant's insurer.

- 30 March 2000 – Appellant's insurer notes on its file that claim has been compromised.

- 5 May 2000 – Appellant's insurance broker seeks update from insurer – response indicates matter finalised on 30 March 2000 with no payment.

- 6 June 2000 – Appellant receives notification from its insurer. Matter settled on 30 March 2000 and file closed.

- 6 July 2000 – Respondent obtains judgment in default of pleading with damages to be assessed.

- 9 February 2001 – Respondent's assessment of damages is adjourned to abeyance list.

- 16 March 2001 – Appellant's insurer placed in provisional liquidation.

- 27 August 2001 – Appellant's insurer placed in liquidation.

- 3 September 2002 - Respondent changes solicitors.

- 9 July 2003 – Respondent filed notice of change of solicitors.

- 11 July 2003 – Application filed by respondent seeking leave to take step in proceedings.

- 23 July 2003 – Appellant served with application for leave to proceed and supporting material – first notification to appellant that judgment in default had been obtained.

- 29 July 2003 – Solicitors instructed to act on behalf of appellant.

- 15 August 2003 – Hearing of respondent's application for leave to proceed – for reasons given application granted.

- 19 August 2003 – Appellant files application to set aside the judgment in default – dismissed 8 September.

[5] The appellant, because its legal advisers thought there was some forensic advantage in so doing, did not have the application to set aside the judgment heard contemporaneously with the respondent's application for leave to proceed; it was thought that if leave to proceed was refused there was no need to make an application to set aside the default judgment and disclose material relevant thereto.

[6] The learned judge dealing with the application for leave to proceed noted that the entry of the default judgment was the last step taken in the action. On the material before him he noted in his reasons that the explanation for the delay on the part of the respondent was "that his former solicitors did not proceed with the prosecution of the claim with adequate diligence." He then recorded that the appellant submitted that that was not an adequate explanation for the delay. The learned judge also stated that on that occasion there was a submission that the appellant had "a reasonable prospect" of having the default judgment set aside, and that "the plaintiff's claim for damages is not a strong one."

[7] The learned judge at first instance held, correctly, that the default judgment had been regularly obtained.

[8] The observation was made that any difficulties the respondent had on the subject of damages could be relied on by the appellant when the assessment was undertaken. Importantly the learned judge at first instance then said:

> "On behalf of the first defendant it is said also that it will suffer prejudice because it has now lost the opportunity to claim contribution from other possible tortfeasors. The reason for that is the expiration of the relevant limitation periods. That too I think is not a consideration of great moment in this case since the first defendant failed to enter an appearance or to defend the proceeding brought against it by the plaintiff, so that it may properly be said that it is primarily responsible for that prejudice."

[9] Against all that background the learned judge at first instance granted leave to proceed.

[10] As indicated above that precipitated the appellant bringing on the application to set aside the default judgment; that application was heard by the same judge who dealt with the application for leave to proceed.

[11] In the reasons for judgment on that application reference was made to the service of the writ and statement of claim on the appellant, to the fact that those documents were sent to the appellant's insurance broker and to the fact that the appellant ignored the clear notice in those documents to the effect that an appearance had to be entered within a short period of time. The reasons noted that the appellant first became aware of the judgment when it was served with the application for leave to proceed. The reasons went on:

> "In order to succeed on this application, the first defendant must satisfy the Court first that it has given a satisfactory explanation for

> its failure to appear in the proceeding; secondly, that there has been no unreasonable delay by it in making this application; and thirdly, that it has a prima facie defence on the merits of the claim on which the judgment is founded."

[12] Counsel for the respondent at first instance did not contend that there was any delay in making the application after the appellant became aware of the default judgment. On the third point the learned judge at first instance said:

> "I am not persuaded that the defendant has an illusory defence on the merits. It appears to me that the first defendant could establish a defence on the merits to the effect that it had no relevant duty to the plaintiff at the time of the alleged incident, and, in addition it would appear to me there could be a substantial issue of contributory negligence if it were to be determined that the first defendant did owe a relevant duty to the plaintiff."

[13] Counsel for the respondent at first instance submitted that his client would be prejudiced if the application was granted. Reference was made to the lack of documents, the fading of recollection, the lack of opportunity to pursue other defendants, and the expiration of limitation periods. The learned judge observed "that many of those prejudices, if they exist in this case, are as much the fault of the plaintiff, arising from his delay in pursuing the action, as they are the fault of the first defendant." The learned judge then noted in his reasons that the appellant was served initially with the writ and statement of claim after the limitation period had expired.

[14] The reasoning of the learned judge at first instance included:

> "That brings me back to the first matter upon which the first defendant must satisfy me, i.e., whether it has given a satisfactory explanation for its failure to appear in the plaintiff's action. There is before me no satisfactory explanation for the delay from the day when service was effected, 3 November 1999 to 19 January 2000 when the first defendant notified its insurance broker of the plaintiff's claim. …
>
> There is no proper explanation as to why there was a delay from the time when the documents were sent by the first defendant to its broker. …
>
> In those circumstances, I conclude that the application should be dismissed."

[15] It is a clear inference from the stated reasoning of the learned judge at first instance on the application to set aside the default judgment that he considered that in order to succeed the appellant had to satisfy him on each of the three matters he identified; namely, give a satisfactory explanation for the failure to appear, establish no unreasonable delay in making the application, and demonstrate that it had a prima facie defence on the merits. As noted above the respondent conceded there was no delay in making the application after the appellant became aware of the default judgment, and the learned judge found the appellant had a prima facie defence on the merits. It was because he was not satisfied that a satisfactory explanation had been given for the failure to enter an appearance that the appellant failed on its application.

[16] It is not the law that an applicant seeking to have a default judgment set aside must establish each of those three matters before the discretion to set aside the judgment can be exercised. The leading authority is *Evans v Bartlam* [1937] AC 473. It is instructive to quote from the reasoning of Lord Atkin at 480:

> "The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. . . . But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist."

[17] To similar effect was the reasoning of Lord Russell of Killowen at 481; he went on at 482:

> "The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (*a*) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (*b*) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance."

[18] The wide discretionary nature of the power to set aside a judgment in default of appearance is also highlighted by the reasoning of the High Court in *Taylor v Taylor* (1979) 143 CLR 1, recently applied by this court in *W R Carpenter Australia Ltd v Ogle* [1999] 2 Qd R 327.

[19] Of more importance for present purposes is the significance which courts in recent times have placed on the fact that the applicant is able to demonstrate an arguable defence on the merits. McPherson J in *National Mutual Life Association of Australasia Ltd v Oasis Developments Pty Ltd* [1983] 2 Qd R 441 at 449-50, citing *Attwood v Chichester* (1878) 3 QBD 722 and *Rosing v Ben Shemesh* [1960] VR 173, said that the issue whether the applicant defendant had a prima facie case on

the merits "is the most cogent" of the three matters referred to by Kelly J in *Aboyne Pty Ltd v Dixon Homes Pty Ltd* [1980] Qd R 142. In *Aboyne* Kelly J had referred to the three relevant considerations being whether the defendant had given a satisfactory explanation for failure to appear, any delay in making the application, and whether the defendant had a prima facie defence on the merits. McPherson J went on to say: "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 plaintiff". That passage has received the express approval of this court (Davies, McPherson and Pincus JJA) in *National Australia Bank Ltd v Singh* [1995] 1 Qd R 377 at 380. (See also *Troiani v Alfost Properties Pty Ltd* [2002] QCA 281.)

[20] When considerations relevant to each of the applications now the subject of appeals are weighed up the following position emerges:

(i) the writ and statement of claim were filed about two weeks before the three year limitation period expired;

(ii) the writ and statement of claim were not served on the appellant until almost 12 months after the three year limitation period had expired;

(iii) there was unexplained delay on the part of the appellant in not passing on the writ and statement of claim to its insurer from 3 November 1999 to 19 January 2000;

(iv) in June 2000 the appellant received notification from its insurer to the effect that the matter had been settled on 30 March 2000;

(v) the default judgment was entered on 6 July 2000 without notice of the intention to do so being given either to the appellant or the appellant's insurer, though the solicitors for the respondent had been in written communication with the insurer in March 1997 prior to the writ being filed;

(vi) the respondent did not give the appellant notice of the default judgment until 23 July 2003 when it sought leave to proceed with respect to the assessment of damages;

(vii) there was no finding by the learned judge at first instance that the respondent had a reasonable explanation for its delay from 6 July 2000 to 11 July 2003. The learned judge did no more than note the assertion that former solicitors did not proceed with adequate diligence. There was material before the court which suggested that the respondent personally was to a significant extent largely to blame for the delay. It is not for this court to make any final adjudication on that;

(viii) the appellant has prima facie a good arguable defence on the merits;

(ix) the delay by the respondent from July 2000 to July 2003 in prosecuting the matter has deprived the appellant of the right to claim contribution from other tortfeasors. That is of some significance particularly given that the initial three year limitation period had expired before proceedings were served. Otherwise prejudice naturally flowing from the passage of time,

(dimming of recollections and absence of documents) would apply equally to the appellant and respondent.

[21] Given all of those considerations, and in particular the finding that the appellant has a prima facie defence on the merits, if the two applications had been heard at the one time it seems clear that the granting of leave to the respondent to proceed would have been made conditional upon the default judgment being set aside. On the hearing of the appeal counsel for the respondent had difficulty in answering that proposition. The persistent and unexplained dilatoriness of a plaintiff in prosecuting his claim, necessitating an application for leave to proceed under r 389, would ordinarily result in the setting aside of a default judgment where the defendant was able to establish an arguable defence on the merits.

[22] Because the applications were heard separately the learned trial judge erred in fettering his discretion by over-rigidly applying tests generally relevant to applications pursuant to r 389 and r 290 of the UCPR.

[23] If the two applications had initially been heard together the appropriate order would have been to make the granting of leave to proceed conditional upon the setting aside of the default judgment. As the matters were heard separately, and as two appeals to this court have resulted, the position which would have been achieved by making such an order can now effectively be reached by dismissing the appeal against the granting of leave to proceed and allowing the appeal with respect to the application to set aside the default judgment.

[24] Counsel have furnished written submissions dealing with costs on a number of bases, including that indicated in the preceding paragraph hereof. At first instance the respondent (plaintiff) was ordered to pay the costs of the application for leave to proceed, and the appellant (defendant) was ordered to pay the costs of the application to set aside the default judgment. Neither side seeks a variation of either of those orders as to costs; they should stand. Given this court's conclusion as to the appropriate outcome, counsel for the respondent seeks an order that the appellant pay the respondent's costs of each appeal, whereas counsel for the appellant submits that his client should pay the costs of the appeal relating to leave to proceed, but get costs of the appeal relating to the setting aside of the default judgment. Having considered the submissions presented on the issue for costs I have come to the conclusion that the appropriate order is that contended for by counsel for the appellant.

[25] The orders of the court should therefore be:

(1) In Appeal No 8106 of 2003 – appeal dismissed with costs to be assessed.

(2) In Appeal No 8844 of 2003:

  (i) Appeal allowed;

  (ii) Vary the order appealed from to the extent only of setting aside that part thereof which ordered that the application be dismissed;

  (iii) Order that the default judgment dated 6 July 2000 be set aside and the appellant given unconditional leave to defend;

(iv) Direct that the appellant file and serve a defence in the proceeding within 28 days of this order;

(v) Order that the respondent pay the appellant's costs of the appeal to be assessed.