MAGISTRATES COURT OF QUEENSLAND

CITATION:	*Shreeve & Anor v Scott* [2020] QMC 10
PARTIES:	**RALPH EDWARD SHREEVE** (First Plaintiff) **SAMANTHA KATHRYN SHREEVE** (Second Plaintiff) v **RHYS DAVID ANDREW SCOTT** (Defendant)
FILE NO/S:	M2181 of 2018
DIVISION:	Civil
PROCEEDING:	Interlocutory Applications filed 31 March 2020
ORIGINATING COURT:	Brisbane
DELIVERED ON:	24 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
MAGISTRATE:	Magistrate Hay
ORDER:	[1] The defendant's application filed 31 March 2020 to set aside the default judgement entered on 18 January 2019 is dismissed. [2] Within 21 days of the delivery of these reasons, the parties are to file and serve any written submissions on the issue of costs, if not agreed, together with draft orders.
COUNSEL:	P A Beehre of counsel for the Defendant
SOLICITORS:	Carter Newell Lawyers for the Plaintiffs/Respondents Defendant – self represented (direct brief to counsel)

[1] The defendant applies to set aside a default judgment entered by an acting Registrar on 18 January 2019 ('**Application to Set Aside**'). This is the second time the defendant has brought such an application, having failed to appear on his first application.

[2] The defendant asserts that he was unaware of these proceedings until 19 October 2019, when a party sought to join him to Federal Magistrates Court proceedings.[1]

Relevant Factual Background and Findings

[3] On 18 September 2018 an unknown agent engaged by KR & S Risk and Security Management is purported to have had a telephone conversation with the defendant in which the defendant *"advised that he resides in Brisbane, however he refused to provide his exact address… confirmed that he had contact details for Cater* [sic] *Newell Lawyers and will make direct contact with them regarding this matter."*[2]

[4] On 3 October 2018 orders for substituted service upon the defendant were made (the '**Substituted Service Order**').[3] As a consequence of these orders, the plaintiff was entitled to serve the defendant:

1. By post at:
   (a) 110 Basnett St, Chermside West;
   (b) Lot 2, 9 Valente Close, Chermside;
   (c) 110 Haynes Kite Miller Rd, Blackbutt South.
2. Email to rds@burnettmeatco.com.au.

[5] On 19 October 2018 the defendant says he became aware of these proceedings. [4] This is inconsistent with the hearsay evidence adduced in the affidavit of the plaintiffs' solicitor, although I am not inclined to give the hearsay evidence any weight because:

1. it is not only hearsay, but second hand;
2. the source of the information is not disclosed.[5]

[6] On 26 October 2018 the plaintiffs' solicitors effected service by post and email in accordance with the Substituted Service Order.[6]

[7] I accept that the defendant was not the owner of Lot 2, 9 Valente Close, Chermside at the time the Substituted Service Order was made.[7]

[8] The defendant accepts that his parents reside between the 110 Basnet St, Chermside West address and their farm at Blackbutt South.[8] There is no evidence from the defendant's parents concerning receipt or otherwise of the correspondence at either address. The plaintiff speculates as to what might have become of the correspondence. [9] I place no weight upon that speculative evidence.

---

[1] Affidavit of the defendant filed 31 March 2020 at [19]. See also Submissions of the Applicant/Defendant filed by email on 15 May 2020 and Further Submissions of the Applicant/Defendant filed by email on 21 May 2020.
[2] Affidavit of L J Preston filed 28 September 2018, Exhibit LJP 3.
[3] Order of Magistrate Cull dated 3 October 2018.
[4] Affidavit of the defendant filed 31 March 2020 at [19].
[5] Affidavit of L J Preston filed 28 September 2018, Exhibit LJP 3.
[6] Affidavits of L J Preston and O Berens both filed 3 December 2018.
[7] Affidavit of L J Preston filed 28 September 2018, Exhibit LJP 1, p. 2 (entry for 08 August 2018).
[8] Affidavit of the defendant filed 31 March 2020 at [7], [8], [15] and [16].
[9] Affidavit of the defendant filed 31 March 2020 at [8], [15] and [16].

[9] The defendant says that the email address *"was not, at the time of service, actively used by me, or being monitored. I therefore was not aware that Mr Preston had sent me an email attaching the subject documents."*[10]

[10] On 29 November 2018[11] the defendant says he made a partial payment in the sum of $15,454.[12] The defendant does not evidence proof of this partial payment, nor does he state what caused him to make this partial payment. The plaintiffs dispute this assertion and say that a sum of $15,545.42 was in fact paid by Towerhill Pastoral for "*THP Agistment"* (sic).[13] The defendant has put on no further evidence to support his original assertion nor to dispute this direct evidence from the plaintiff.

[11] On 5 December 2018 the plaintiffs applied for default judgment.[14]

[12] On 18 January 2019 a deputy registrar granted default judgment on the plaintiffs' liquidated debt claim and entered judgment against the defendant in the sum of $40,043.04, broken down as follows:

1. Claim: $35,000.00;
2. Interest: $2,627.39;
3. Costs: $2,415.65.[15]

[13] On 10 December 2019 the defendant filed an application to set aside the default judgment (the '**Earlier Application to Set Aside**'). The defendant did not file any material in support of that application, nor did he file any material responding to the plaintiff's material filed in relation to the Earlier Application to Set Aside.

[14] On 2 March 2020 the court heard and determined the Earlier Application to Set Aside. The defendant failed to appear at that application and the court proceeded to hear and determine the matter *ex parte* based on the material filed. An *ex tempore* decision was given by her Honour Magistrate Bradford-Morgan and the Earlier Application to Set Aside was dismissed.

[15] On 31 March 2020 the defendant filed this Application to Set Aside.

[16] Due to Covid-19, the matter was listed to be heard on the papers on 22 May 2020. As a consequence of the need to prioritise a back log of criminal matters resulting from Covid-19, the determination of this civil matter has been delayed until now.

Preliminary Issue

[17] Before considering the substance of the Application to Set Aside, it is necessary to consider whether the defendant can bring the same application back before the court. The defendant has failed to file any evidence to support his contention that he did not appear on the Earlier Application to Set Aside due to ill health. Despite this, I am satisfied that I can hear the Application to Set Aside now before the court. There is no

---

[10] Affidavit of the defendant filed 31 March 2020 at [17] and [18].
[11] The draft defence and counterclaim says 2019, but appears to be a typographical error: Affidavit of the defendant filed 31 March 2020 at [22] & Affidavit of R E Shreeve filed 15 May 2020 at [14].
[12] Affidavit of the defendant filed 31 March 2020 at [22].
[13] Affidavit of R E Shreeve filed 15 May 2020 at [11] – [14].
[14] Request for Default Judgment and affidavit of R E Shreeve both filed 5 December 2018.
[15] Judgment entered 18 January 2020.

risk of competing decisions on the same issues being delivered given the further material filed by the defendant, that was not before the court on the Earlier Application to Set Aside.

The Law

[18] In considering the Application to Set Aside it is necessary to determine whether the default judgment was regularly or irregularly entered. Because the entry of default judgment is an administrative act, rather than a judicial decision, if the default judgment is irregularly entered the defendant is entitled to have it set aside as of right.[16]

[19] Despite the concerns raised by the defendant regarding the addresses used for substituted service, the judgment cannot be said to have been irregularly entered. The defendant concedes:

1. that the email address used for substituted service is his, although says he'd elected to stop monitoring it in mid-September 2018;
2. that two of the postal addresses used for substituted service were his parents. He says nothing about whether he has spoken to them concerning receipt of the documents at either address and adduces no evidence from them in support of his speculation that the documents may not have been received at either address.

[20] As such, there is nothing to impugn the validity of the Substituted Service Order so far as it pertains to the email address or the addresses at 110 Basnett St, Chermside West or 110 Haynes Kite Miller Rd, Blackbutt South.

[21] I find that the plaintiff has complied with the *Uniform Civil Procedure Rules 1999* ('**rules**') in applying for the default judgment and the acting registrar was empowered under the rules to enter judgment against the defendant being satisfied that the service was appropriately effected in accordance with the Substituted Service Order. As such I find that the judgment was regularly entered.

[22] Accordingly, in order for the court to set aside the regularly entered default judgment the court must consider whether:

1. the defendant has given a satisfactory explanation for his failure to appear;
2. there has been delay in applying to set aside the default judgment;
3. the defendant has a *prima facie* defence on the merits.

Failure to appear

[23] The defendant gives sworn evidence that he was unaware of these proceedings until their existence was raised in Federal Circuit Court proceedings on 19 October 2019. He has not addressed in evidence whether he has made enquiries with his parents concerning their receipt of the proceedings by post under the Substituted Service Order. Nor has the defendant adduced evidence from his parents on this issue. The defendant does not explain, on oath or otherwise, why this has not been done.

[16] Cusack v De Angelis [2007] QCA 313, Muir JA at [36] – [37]. Authorised version [2008] 1 Qd R 344

[24] I find the level to which the defendant has descended into evidence on the issue of failure to appear to be wholly insufficient. But that does not, in and of itself, render his application hopeless.[17]

Delay

[25] There is no question that the defendant has delayed bringing this application after he became aware of the proceedings.

[26] The defendant's evidence is that he did nothing about the proceedings until some 2 months after becoming aware of them because his farm was both drought and fire affected.[18] There is no doubt that prolonged drought and extreme fire events were occurring throughout the east coast of Australia during the relevant period. It has been well publicised. However, that does not explain the defendant's failure to, at the very least, contact the plaintiffs' solicitors to seek an extension of time within which to file and serve a defence. The application for default judgment was made after he became aware of the proceedings. If the defendant had contacted the plaintiff's solicitor, he may have averted the default judgment being entered at all.

[27] However there is no evidence from the plaintiffs of a relevant type of prejudice that might be suffered by them as a consequence of the defendant's delay. For example there is nothing to suggest evidence is either no longer available or eroded due to the elapse of time.

[28] Aside from having the benefit of a judgment now, the prejudice that may be suffered if the Application to Set Aside is successful would be the costs thrown away on the application for the default judgment. However this type of prejudice is largely capable of being remedied by way of an appropriate costs order.

[29] Delay, in the absence of relevant prejudice to a plaintiff, will not often be the basis upon which a default judgment will be set aside by a court.[19]

***Prima facie* defence**

[30] The defendant relies upon two key assertions in support of the defence he proposes to file, namely:

1. He made a partial payment *"of $14, 545 to be precise"*[20] on 29 November 2018;
2. There was an oral agreement between the parties to delay settlement and payment of the deposit;
3. He is otherwise entitled to rely upon clauses 26.2 to 26.8 of the contract for sale such that time was no longer of the essence and the deposit balance is not payable.

---

[17] *National Mutual Life Association of Australia Limited v Oasis Development Pty Ltd* [1983] 2 Qd R 441 at 449.
[18] Affidavit of the defendant filed 31 March 2020 at [20].
[19] *Aboyne Pty Ltd v Dixon Homes Pty Ltd* [1980] Qd R 142 per McPherson J. See also *Yankee Doodles P/L v Blemvale P/L [1999] QSC 134*.
[20] Affidavit of the defendant filed 31 March 2020 at [22].

[31] Where a defendant raises a dispute on the facts and/or law courts will be very reluctant to refuse them the right to fully argue those matters at a trial. However the defendant has not adduced sufficient evidence, other than his affidavit which is unsupported by appropriate documentary or corroborating evidence, to establish a *prima facie* defence **on its merits**. [my emphasis]

The Partial Payment

[32] The defendant gives sworn evidence that he paid precisely $14,545 by way of partial payment of the deposit balance on 29 November 2018. The plaintiffs' respond to this by both sworn[21] and documentary[22] evidence establishing that no such payment has been received from the defendant. The bank statements do show a similar payment from a corporate entity[23] for 'agistment' [sic]. The defendant has not adduced any financial evidence of the alleged partial payment of the deposit balance such as his own bank statements. Nor has he sworn responsive evidence addressing the entries in the plaintiffs' bank statement recording a payment for unrelated services by the corporate entity.

[33] Further, the defendant's draft defence, settled by counsel and attached to his counsel's submissions, pleads positive admissions concerning the failure to pay the $35,000.00 claimed.[24] Instead, the defendant brings a counterclaim concerning the payment made in 2019. [25] Whilst I note that the pleading in the counterclaim says 2019 rather than 2018, the year pleaded appears to be a typographical error based on the evidence before me, including that of defendant himself.[26] As such I have proceeded on the basis that the counterclaim intended to refer to a payment made on 29 November 2018. However not much turns on the year for the purposes of this application, particularly given that the defendant's bare assertions are in direct conflict with collateral documentary evidence adduced by the plaintiffs.

[34] Given the paucity of evidence to support the defendant's assertions, pleaded and otherwise, and the compelling sworn and, most relevantly, documentary evidence disproving those assertions, I find that the defendant has not made out a *prima facie* defence of partial payment of the deposit balance.

The oral agreement

[35] The defendant gives sworn evidence that:

"When entering into the contract I had made it clear to Mr Shreeve that I would require a long settlement period, 12 to 24 months, to settle. Mr Shreeve agreed that would not be an issue."[27]

[36] The defendant counsel's submissions also make this contention.[28]

---

[21] Affidavit of R E Shreeve filed 15 May 2020 at [10] – [12].
[22] Affidavit of R E Shreeve filed 15 May 2020 at [13] – [14] and Exhibits RES 8 and RES 9.
[23] In which the defendant held an interest.
[24] Exhibit 1: draft defence and counterclaim at [4] of the defence. See also [5(a)] of the defence – the reference to $30,000 appears to be a typographical error.
[25] Exhibit 1: draft defence and counterclaim at [11] – [13] of the counterclaim.
[26] Affidavit of the defendant filed 31 March 2020 at [22] & Affidavit of R E Shreeve filed 15 May 2020 at [14].
[27] Affidavit of the defendant filed 31 March 2020 at [23]. See also [24].
[28] Submissions of the Defendant/Applicant filed by email sent on 15 May 2020 at [28].

[37] However, the defendant's draft defence and counterclaim, settled by counsel and attached to the same submissions, is silent on this issue.[29] It relies entirely upon the natural disaster provisions under clause 26 of the contact as the basis for the defence. Further, the defendant gives no evidence particularising the oral agreement. Finally it appears to be inconsistent with the emails he exchanged with the plaintiff, Mr Shreeve in August 2018, [30] and the matters pleaded in the draft defence and counterclaim.[31]

[38] All agreements with respect to land must be in writing.[32] Where there has been a parol agreement to vary the terms as to the deposit and settlement date, and those variations are not evidenced in writing, the parol agreement is unable to prevent the contract being enforced in its unaltered form.[33]

[39] Put simply, although the defendant now raises an oral agreement to vary the terms of the written contract, there is no written evidence of that variation and therefore the plaintiffs are entitle to uphold the written terms for the purpose of their claim against the defendant.

[40] The defendant's contention concerning an oral agreement, therefore, does not give rise to a *prima facie* defence to the claim.

Time no longer of the essence

[41] Clauses 26.2 to 26.8 of the contract only pertain to the Settlement Date i.e. the date payment of **the balance of the Purchase Price** is payable, not the date payment of the balance of the deposit is due under the special conditions of the contract.[34] [my emphasis].

[42] The defendant may have been entitled to rely upon clause 26 of the contract to vary the settlement date of 4 May 2018 found in Item Q of the contract, but he was not entitled to rely upon those provisions to delay payment of the deposit balance on the date set out in Clause 19.1(b) of the Special Conditions of the contract. As such I find that the defendant has not established a *prima facie* defence of the claim on this basis.

Conclusion

[43] Accordingly I find that whilst the defendant has to some extent explained his failure to appear and his delay, he has not raised a *prima facie* defence of the claim on its merits. Accordingly his Application to Set Aside is refused.

ORDERS

[44] The defendant's application filed 31 March 2020 to set aside the default judgement entered on 18 January 2019 is dismissed.

---

[29] Exhibit 1: draft defence and counterclaim.
[30] Affidavit of R E Shreeve filed 15 May 2020 at [4], [5] and [10] and Exhibit RES 1.
[31] Exhibit 1: draft defence and counterclaim at [3] of the counterclaim.
[32] Section 59 *Property Law Act* 1974 *(Qld)*.
[33] *Burnitt & Anor v Pacific Paradise Resort Pty Ltd* [2006] QCA 309.
[34] Affidavit of R E Shreeve filed 15 May 2020; Exhibit RES 4 - See clause 26.9 - *"Settlement Obligations"*; clause 4.1 - *"The **balance of the** Purchase Price…"*; clause 1.1 - *"Purchase Price"*; Item N - Purchase Price $1,100,000.00; clause 1.1(cc) - "Settlement Date' [my emphasis in bold].

[45] Within 21 days of the delivery of these reasons, the parties are to file and serve any written submissions on the issue of costs, if not agreed, together with draft orders.