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Transcript of Proceedings

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Date: 30 April, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Claim No 9 of 2002
File No 54 of 2003

JOSEPH PICKERING, NOEL JAMES PICKERING and TREVOR JOSEPH PICKERING — Plaintiffs

and

SPINIFEX SPORTS MANAGEMENT AND PROMOTION PTY LTD — First Defendant

and

CRAIG STEPHEN BAX — Second Defendant

and

JEFFREY MARTIN DILLON — Third Defendant

CAIRNS

..DATE 22/04/2003

JUDGMENT

4th Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: This is an application by the first and second defendants to set aside a judgment by default which was entered against all defendants by the Registrar at Mount Isa on the 29th of January 2003. The third defendant successfully applied to have the judgment against him set aside in February 2003.

The plaintiffs' claims are in broad terms for a declaration that a contract of sale for a hotel business is void, alternatively that it ought to be enforced at a reduced price, a declaration that a lease agreement is void and further claims that there should be a refund of the purchase price and also damages.

The agreement for sale and the agreement for lease are both dated the 21st of November 2000. The claim and statement of claim was served on the first defendant on the 5th of November 2002 and on the second defendant on the 6th of December 2002 and the third defendant on the 6th of November 2002. The first and second defendant are represented by one firm of solicitors and the third defendant by another.

The issue before me is, firstly, whether the judgment was regularly entered and if so whether I should in the exercise of my discretion set it aside on the basis that there is a claim which ought to be properly litigated.

The request for judgment was made to the Registrar pursuant to rule 284 of the Uniform Civil Procedure Rules. That rule

provides simply that the rules relating to service must be proved and that, as I have indicated, was done in the circumstances of this case, and it seems very little else is specified in that rule that has to be considered.

I raise this point here because prior to the plaintiffs making their request for judgment by default a great deal had happened between the parties, none of which was disclosed to the Registrar when the judgment was first applied for. Going back in time, the defendants had themselves instituted proceedings in relation to the lease in Brisbane in the first part of year 2002 (action 2646 year 2002). The present plaintiffs filed a defence to that claim on the 20th of May 2002, but it raised no counterclaim in which there could, at least against the then plaintiffs which did not include all the parties against whom the plaintiffs here now bring a claim, alleging that the lease was null and void.

More particularly relating to these present proceedings, the solicitors for the defendants had made contact with the solicitors for the plaintiffs, requesting extensions of time for delivery of defences and more specifically made a formal request for particulars and for the provision of documents on the 19th of December 2002. That request in relation to documents was made pursuant to rule 222 of the UCPR.

That rule is of general application. It is in a chapter of the UCPR which deals with disclosure and such disclosure is often provided for after the close of pleadings, but it is not

to say that a disclosure of documents referred to in a claim should not be made upon a request made before a defence is filed.

The documents about which the request was made go to the question of the representation which is alleged to have been made. See statement of claim, paragraphs 30 and 36. That request for particulars made by the defendants did not set any time limit for the provision of the particulars, but given that it was a reference to documents referred to in the statement of claim, one would have expected, applying a reasonable time limit, that the request could have been complied with quickly.

No application was made by the defendants to Court for an order that particulars be provided and documents disclosed as could have been done in the time available. So the question arises whether there has been a breach of rule 222 by the plaintiffs, such as would allow finding that the judgment is irregularly entered.

In all the circumstances I am not satisfied that a breach has occurred. An argument might have been made for such a breach had a time limit been put on the request for the disclosure of documents or had an application perhaps been made for the provision of particulars and disclosure of documents in advance of the defence having to be filed and served. But in all the circumstances where those events have not occurred the plaintiffs was entitled to refuse to disclose the documents,

although it is a matter to be taken into account in the exercise of my discretion as to whether the judgment should be set aside and whether costs ought to be ordered in respect of that step.

What is more significant now that I have come to that conclusion is the conduct of the parties in relation to the entering of this judgment. That request for particulars and for the disclosure of documents followed two clear statements by the solicitors for the plaintiffs that his instructions were to enter judgment by default. Those letters were dated respectively the 12th of November and the 6th of December 2002.

By the 12th of November the first and third defendants had only just been served and the second defendant had not been. The second intimation that judgment by default would be entered was given on the very same day that the second defendant was served with the statement of claim. Those notices in those circumstances are therefore somewhat premature. They were premature also because on the 7th of November 2002 the first request by letter for particulars and for disclosure of documents was made, the request in a formal document then being repeated on the 19th of December 2002.

It seemed to me, in those circumstances, that a better response needed to be given by the solicitors for the plaintiffs to those two requests. If they objected to making it, as appears to be the case, then perhaps a time limit could

have been set and a date given upon which the application would have been made to the Registrar for the entry of judgment by default.

As it turned out, matters continued with that procedural stand-off into January of 2003, a time of course which is notoriously difficult for practitioners to obtain the advice of counsel during the Court vacation. That difficulty was manifested in this case.

The third defendant, for example, attempted to forward a draft defence to the plaintiffs' solicitors in late December 2002, but they were unable to do so because the plaintiffs' solicitors' fax facility was closed. Those solicitors later informed the plaintiffs' solicitors of a wish to have the defence in any event settled by senior counsel. Attempts were made by the third defendant's solicitors to do that. The plaintiffs' solicitors were advised of those attempts.

In relation to the first and second defendants, after sending the formal request for particulars on the 19th of December 2002 there was only one other contact between the solicitors for the first and second defendants and the plaintiffs' solicitors, that being a letter dated the 8th of January 2003 in which the first and second defendants' solicitors raised the prospect of pursuing the proceedings in Brisbane.

The previous letter on the 19th of December 2002 which accompanied the request for particulars also indicated that

those solicitors intended to withhold any further attack on the plaintiffs' pleading, pending receipt of particulars the subject of this request. This in effect gave rise to the procedural stand-off to which I have made reference.

The first and second defendants' solicitors ought at least to have provided a time limit within which they would wait for particulars before seeking the Court's order. However, by the 8th of January 2003 it was made clear that they wished to proceed with the Brisbane proceedings which would, it seems to me on the very brief perusal I have made of those proceedings, have determined some of the issues that are raised in the Mount Isa matter. There was a clear position at least for considering the situation that these proceedings be heard at the same time as the Brisbane proceedings.

The events of the 29th of January 2003, the date on which judgment was entered, are also significant. At 8.59 a.m. a letter was sent by the plaintiffs' solicitors, saying that the request for particulars does not extend time for the defence to be filed. That same day the applicants' solicitors sent to the plaintiffs' solicitors a lengthy letter setting out the reasons for not filing a defence and requesting seven days notice before judgment was applied for. In fact, judgment was entered that very day without any notice of that intention being given to the other parties.

That precipitated action on the part of the plaintiffs' solicitors failed to give sufficient time for the defendants

to adjust their position. Such action was simply not in keeping with the philosophy of the rules, nor indeed with the traditional conduct that should exist between practitioners.

It was that conduct really which has led to the problems which have now occasioned each of the parties an extraordinary amount of expense.

I am satisfied on the affidavits before me which annex the draft defence which was indeed sent to the Mount Isa registry on the 29th of January 2003 but returned because of this judgment that a real dispute has been demonstrated. I would therefore exercise my discretion to set aside the judgment by default and to allow a reasonable time for a defence to be filed and served.

The question of costs then is a matter that is significant. There has been unreasonableness on both sides. On the side of the defendants, the taking for granted that the judgment by default would not be entered when it was made clear that the request for particulars were not going to be provided prior to the time for the defence to be filed was unfortunate. The fact that in the beginning of January 2003 the applicants' solicitors were aware of the plaintiffs' attitude and did not take the steps to protect the defendants' position against the threatened judgment by default was unfortunate.

I regard, as I have indicated in the remarks that I have just made, that the conduct of the solicitors for the plaintiffs in

the circumstances by their precipitated behaviour of entering judgment by default without giving proper notice was also most unfortunate. In all the circumstances I propose to make no order for costs in relation to this application.

...

HIS HONOUR: My orders will be:

1. that the judgment entered against the first and second defendants on the 29th of January 2003 be set aside;
2. that the plaintiffs provide particulars and disclose documents pursuant to the request of the first and second defendants dated the 19th of December 2002 within 14 days of the date hereof; and
3. that first and second defendants file and serve their defence within 21 days from the date hereof.

I make no order as to costs.
