SUPREME COURT OF QUEENSLAND

CITATION:	*Tobin & Tobin as trustees for the Tobin Superannuation Fund v Gray & Anor* [2021] QSC 27
PARTIES:	**GRAHAME MORRIS TOBIN AND JANICE MARY TOBIN AS TRUSTEES FOR THE TOBIN SUPERANNUATION FUND** (plaintiffs) **v** **ANTHONY DAVID GRAY** (first defendant) AND **PAULINE SHEILA JOHNS** (second defendant)
FILE NO/S:	BS 11643 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application filed 9 November 2020
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 February 2021
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2020
JUDGE:	Jackson J
ORDERS:	**1. The application is dismissed.** **2. The applicant pay the respondents' costs of the application.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – DEFAULT JUDGMENT – SETTING ASIDE – GENERALLY – where the plaintiffs allege they came to know the second defendant as a solicitor on the Gold Coast – where the second defendant has never been a qualified solicitor but worked as an administrative staff member or practice manager employed by solicitors, including the first defendant – where the plaintiffs instructed the defendants to act in relation to 13 separate loans to be fully secured by first mortgage against real property – where the plaintiffs allege that either no first mortgage security was obtained or retained and the second defendant failed to inform them that it had not been obtained or retained – where the plaintiffs as applicants filed an originating application in the proceeding on 7 November 2017 – where the second defendant was personally

served on 9 November 2017 with the originating application, inter alia - where judgment was obtained in default of appearance and defence on 24 January 2018 – where damages were assessed on 9 March 2018 - where the second defendant as applicant filed an application to set aside the default judgment on 9 November 2020 – where the second defendant was outside the jurisdiction prior to filing the application – whether the default judgment should be set aside

Uniform Civil Procedure Rules 1999 (Qld), r 290

Cook v DA Manufacturing Co Pty Ltd & Anor [2004] QCA 52, cited
Embrey v Smart [2014] QCA 75, cited
Rosing v Ben Shemesh [1960] VR 173, cited
Shigaeva v Schafer (1984) 5 NSWLR 502, cited
Xiao Hui Ying (aka Hui Ying Xiao) v Perpetual Trustees Victoria Ltd [2012] VSCA 316, cited

COUNSEL: N Shaw for the applicant/second defendant
L Bowden for the respondents/plaintiffs

SOLICITORS: Tara Jain Solicitors for the applicant/second defendant
Provest Law for the respondents/plaintiffs

Jackson J:

[1] This is an application under r 290 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") to set aside a judgment obtained in default of appearance and defence and after a hearing as to proof of the damages claimed.

Chronology of the proceeding

[2] On 7 November 2017, the plaintiffs as applicants filed an originating application in the proceeding supported by two affidavits made by the female plaintiff in relation to the plaintiffs' dealings with their former solicitor, the first defendant through the second defendant, who they understood to be a solicitor but who was, in fact, a clerk. At that time, the male and female plaintiffs were aged 79 and 77 years, respectively.

[3] On 8 November 2017, Lyons SJA made a freezing order in relation to both respondents' assets.

[4] On 9 November 2017, the plaintiffs' solicitor personally served the second defendant with copies of the originating application, the affidavits of the female plaintiff and, more likely than not, Lyons SJA's order.

[5] On or about 12 November 2017, the second defendant departed Australia for Fiji. No arrangement was made for her to appear at or defend the proceeding or comply with the positive requirements of the freezing order.

[6] On 20 November 2017, Atkinson J varied and extended the freezing order and made orders for substituted service of a statement of claim in the proceeding, inter alia.

[7] On 1 December 2017, Burns J extended the freezing order until trial and directed the proceeding continue as if started by claim.

[8] On 13 December 2017, the statement of claim was filed.

[9] On 17 January 2018, the plaintiffs' lawyers filed an affidavit in support of an application for judgment in default of appearance and defence.

[10] On 24 January 2018, the second defendant not having filed a notice of appearance or defence, the deputy registrar gave judgment that the second defendant pay the plaintiffs' damages to be assessed upon the plaintiffs' statement of claim together with costs to be assessed and ordered that the damages be assessed by the District Court.

[11] On 9 March 2018, McGill DCJ assessed the damages and ordered that the second defendant pay the plaintiffs the amount of $4,515,000. That amount represented the principal advances made by the plaintiffs as loans to or for borrowers introduced by the defendants acting as the plaintiffs' lawyers.

[12] In March 2018, the second defendant travelled from Fiji to New Zealand. At some unstated later point in time, the second defendant returned to Queensland.

[13] On 31 August 2018, Lyons SJA made orders reinstating some of the provisions of the freezing order and restraining the second defendant from dealing with the value of any monies banked to the credited identified accounts, in aid of execution of the judgment.

[14] On 21 September 2018, Dalton J made orders extending and varying some paragraphs of the injunctions granted by Lyons SJA on 31 August 2018.

[15] On 3 October 2018, Mullins J made orders extending the freezing orders and making further orders in relation to some of the bank accounts.

[16] On 10 September 2020, at a hearing before Boddice J relating to a stay, the second defendant was granted leave to read and file an affidavit setting out claimed defences to the plaintiffs' claim and containing a purported explanation for her delay in defending the proceeding.

[17] On 9 November 2020, the second defendant filed this application under r 290 of the UCPR for an order that the judgment of 9 March 2018 and the judgment in default of appearance and defence of 24 January 2018 be set aside. The application was supported by a second affidavit by the second defendant.

[18] There was also filed an affidavit by her solicitor exhibiting a report by a medical practitioner that on 9 November 2020, the second defendant was not medically fit to give evidence over the phone, by video link or in person at court. That was the position when the application came on for hearing before me on 12 November 2020 and it precluded the plaintiffs' application to cross-examine the second defendant on her two affidavits.

The basis of the judgments

[19] The statement of claim is narrative in form. It alleged the plaintiffs came to know the second defendant as a solicitor employed by a firm of solicitors at Paradise Point on the Gold Coast. It alleged the plaintiffs initially dealt with the second defendant in relation to the purchase of a residential property at Paradise Point and by lending money on first and second mortgage security to persons or entities recommended to them by the second defendant from time to time on behalf of that firm.

[20] In or about 2003 or 2004, the prior firm ceased to practise and the first defendant trading as Grays Lawyers commenced to practise from the same premises. Subsequently, the firm merged with another practice, but it remained the first defendant's firm to the extent that is relevant on this application. The second defendant became an employee of the first defendant's firm. Thereafter, the plaintiffs instructed the defendants to act in relation to a number of lending transactions to be fully secured by a first mortgage against real property. When the plaintiffs made loans introduced to them by the defendants, the second defendant personally acted on their behalf in respect of each transaction.

[21] The plaintiffs allege 13 separate loans were made to different individuals or entities under these arrangements, as follows:

No	**Date**	**Borrower**	**Amount**
1	21 July 2003, 12 January 2005 and 30 June 2007	Anthony David Gray	$950,000
2	13 December 2007 and June 2012	Ismail Bin Hassan	$550,000
3	14 March 2008	Amos Immanuel Dolphin	$350,000
4	30 January 2009 and 1 July 2009	Rosie Lyn Stephens	$200,000
5	30 July 2010	Robert Horgan	$100,000
6	5 March 2012 and 14 November 2013	Matthew Trevor Taylor	$650,000
7	6 February 2013, 17 July 2013 and 18 July 2013	Tamaree Developments Pty Ltd	$400,000
8	18 July 2013	Ricardo Viana	$50,000
9	19 July 2013	Gorazd Fraz	$330,000
10	14 February 2014	Ipswich Developments (Qld) Pty Ltd	$250,000

11	18 February 2015	Laurenston Pty Ltd	$360,000
12	1 April 2016	Healtheasy Pty Ltd	$200,000
13	23 May 2016	Douglas Jack Mason	$125,000

[22] Some loans were made to the first defendant personally. Others were made to borrowers introduced to the plaintiffs by the second defendant. In every case, the plaintiffs allege that either no first mortgage security over land was obtained or retained and the second defendant failed to inform them that it had not been obtained or retained. The plaintiffs recovered nothing in respect of the principal amounts of the loans from the borrowers. They claimed as damages against the second defendant the total of the principal amounts of the loans, being $4,515,000.

[23] The statement of claim alleged causes of action against the second defendant for damages or compensation for negligence, deceit and breach of fiduciary obligation.

Second defendant's role and duty

[24] There were three sources of evidence at the hearing of the application as to the second defendant's role in the making of the loans.

[25] First, the female plaintiff swore three affidavits. The first affidavit set out the dealings between the plaintiffs and the second defendant in terms of their prior relationship and the transactions comprising the loans. The pattern may be explained without summarising all the evidence. In 2000, the second defendant approached the plaintiffs about making short term loans at attractive rates of interest secured by first or second mortgage over real property to borrowers introduced by her on behalf of her employer's firm. The plaintiffs made a number of loans on first and second mortgage but after a second mortgage loan was not repaid thereafter made such loans only on first mortgage security.

[26] This pattern of dealing continued after the first defendant purchased the practice of the second defendant's earlier employer. The plaintiffs continued to deal with the second defendant as before. The staff and premises in the office appeared to remain the same and the first defendant was rarely in attendance, as far as the plaintiffs were aware. The second defendant would telephone the plaintiffs to introduce a proposed transaction.

[27] The plaintiffs acted on the basis, and the loan documents provided to them recorded in every instance, that their advances were to be secured by first mortgage over real property. In almost every instance, the loan agreement recording that fact bore the second defendant's signature, either as a witness or as attorney for the plaintiffs.

[28] In relation to loan no 1 made to the first defendant, there is a chain of email correspondence in 2007 between the female plaintiff and the second defendant exhibited to the female plaintiff's first affidavit dealing with variations to the terms of the loan and substitution of the security properties, showing the second defendant's involvement in the first mortgage security arrangements.

[29] In relation to loan no 2 made to Ismail Bin Hassan, the loan was made in the sum of $400,000 in 2007 and a further $150,000 in 2012, to be secured by first mortgage

over real properties that included Lot 1167 on Survey Plan 155609. A mortgage in favour of the plaintiffs over that land was lodged on 18 December 2007 but cancelled by a release of mortgage lodged on 3 March 2008. The release was witnessed by the second defendant, but not in fact executed by the plaintiffs. Six subsequent deeds of variation of the loan agreement, dated between 13 June 2009 and 1 April 2016, referred to Lot 1167 as first mortgage security for the loan when there was no mortgage in favour of the plaintiffs over that land. Every one of those deeds of variation was executed by the second defendant as attorney for the plaintiffs.

[30] It is unnecessary to detail further the extent of the second defendant's involvement in each of the other transactions. None of the documents suggests that the second defendant was not aware that each of the loans was to be made on the condition of first mortgage security.

[31] Second, the second defendant deposed that for approximately 22 years she worked as an administrative staff member or practice manager employed by solicitors, including the first defendant. She has never been a qualified solicitor or financial adviser and says that she never worked in the capacity of a qualified solicitor or financial adviser or held herself out to any person that she was a qualified solicitor or financial adviser.

[32] She says that at all material times and in her dealings with the plaintiffs, she was an employee and worked in the role of an administrative staff member or practice manager and did not provide the plaintiffs with legal or financial advice. Some of the emails from the second defendant to the plaintiffs contradict that position. The second defendant says that a number of them were either not written by her or dictated to her by the first defendant.

[33] She says further that she was not held out and did not hold herself out to the plaintiffs to be a qualified solicitor, but held herself out to be an administrative staff member or practice manager employed by the first defendant. She describes her involvement in dealings with the plaintiffs generally as sending clerical or administrative letters in accordance with instructions from the first defendant. She says her role never involved the settlement of loans or the registration of security as those parts of the process were undertaken by the first defendant or his other staff. Some of the documents exhibited to the female plaintiff's affidavit contradict that.

[34] In response to the specific allegations made in the female plaintiff's affidavit as to the dealings between the second defendant and the plaintiffs in respect of the 13 loans, the second defendant, generally speaking, adopts a broad formulation of:

(a) not admitting many allegations about whether, when and by what transactions the loans were made;

(b) denying her involvement where it would inculpate her without giving specifics of the denials, except that she was not purporting to act as a solicitor or financial advisor;

(c) saying that the first defendant was the party responsible for communications sent in her name, including denying knowledge of emails that were sent from her email account on the basis that the first defendant was accessing that account pretending to be her.

[35] In passing, I observe that the last explanation strains credulity when cognisance is given to the fact that many of the loans remained outstanding and were varied over many years and were in default for a long time before matters came to a head, according to the documents, during 2016 and 2017, yet the second defendant does not appear to have been aware of the first defendant acting fraudulently in relation to her email account at any relevant time or at least failed to inform the plaintiffs about that if she was aware of it.

[36] The third source of evidence about the second defendant's role at the relevant times is deposed to by Mark Blomkamp, a solicitor employed by the first defendant's firm between October 2006 and February 2007, a time before all of the loans in question were made, except the initial advances made upon loan no 1 to the first defendant. However, that transaction was rolled over in June 2007, which was after Mr Blomkamp's employment by the first defendant.

[37] Mr Blomkamp says that the second defendant worked at the Paradise Point office of the first defendant's firm as a senior conveyancing paralegal. She oversaw the opening of the mail by the receptionist and worked independently and autonomously on her matters, although she might on occasion ask for guidance on a legal point. She dealt directly with her clients. She had an existing referral base (presumably for mortgage lending transactions) from real estate agents, mortgage brokers, other professionals and clients with whom she dealt with directly. Clients attended the Paradise Point office and met with the second defendant. One other relevant piece of evidence as to the second defendant's role is a business card for the first defendant's firm that described the second defendant as "Practice Manager Paradise Point".

[38] On the uncontested facts, there is no serious question that the second defendant's role was that of a practice manager, or as it was described in earlier times, a managing clerk. She dealt with the plaintiffs without any overt intervention of a solicitor. It is uncontroversial in law, in circumstances like that, that the second defendant owed a duty of care in negligence to exercise the skill and care appropriate to a person in the position of a managing clerk dealing with clients in that manner.[1]

[39] In that role, her task was to exercise reasonable skill and care to ensure that the client had the benefit of the legal expertise of the firm or of some solicitor of the firm which she would normally be able to do by facilitating supervision of the work by a solicitor by informing the solicitor of the matter and consulting with the solicitor and seeking advice where necessary.[2]

Awareness of the proceeding

[40] One of the relevant factors on an application to set aside a judgment obtained in default of appearance and defence is why the party failed to appear when the case was heard.[3] There are often two potential aspects of this question:

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1 *Shigaeva v Schafer* (1984) 5 NSWLR 502, 513D.

2 *Shigaeva v Schafer* (1984) 5 NSWLR 502, 513.

3 *Embrey v Smart* [2014] QCA 75, [42]; *Xiao Hui Ying (aka Hui Ying Xiao) v Perpetual Trustees Victoria Ltd* [2012] VSCA 316, [39]; *Cook v DA Manufacturing Co Pty Ltd & Anor* [2004] QCA 52, [16] – [19]; *Rosing v Ben Shemesh* [1960] VR 173, 176.

(a) Did the party know about the proceeding?

(b) If so, what was the reason for not defending?

[41] The second defendant certainly knew about the proceeding. She was personally served on 9 November 2017 with the originating application, two affidavits of the female plaintiff and, more likely than not, the order of Lyons SJA made on 8 November 2017. She was served at work in the solicitors' offices. She was a person with more than 20 years' experience acting as a conveyancing clerk and practice manager.

[42] It cannot be doubted that she was aware that a respondent or defendant to a legal proceeding must take steps to defend the proceeding.

Reason for not defending

[43] The second defendant's explanation for not defending the proceeding is limited, at best. She says she spoke that day to the first defendant, who was in Fiji, by telephone and he told her that he would sort it out. She said she was worried and he assured her that she had nothing to worry about. Within an hour, he contacted her and told her he had arranged a flight for her to go to Fiji. She flew to Fiji on 12 November 2017 and stayed there. She worked from Fiji on her conveyancing files. She does not say that the first defendant told her at any time that the proceeding was being defended.

[44] The second defendant says that in early March 2018, the first defendant asked her to go to New Zealand. She said she told him that she wanted to go home and that he replied: "It's not safe right now". That must have indicated to her that she was exposed in some way if she returned to Queensland. He assured her he had a solution to settle matters and that it would be fine. Again, that must have referred to the legal proceeding in Queensland against both of them.

[45] On or about 10 March 2018, she went to New Zealand and remained there until 28 April 2018. Again, the second defendant does not say that she was told by the first defendant at any time that he had arranged to defend the proceeding.

[46] The second defendant's explanation for delay glosses over her whereabouts between 28 April 2018 and 31 January 2019. On 31 January 2019, she was arrested by police on charges of fraud. I infer that was in Queensland and she had returned to this jurisdiction before that date.

[47] In March 2019, the second defendant was referred to Paladin Legal, who acted for her in relation to the present proceeding. She gave instructions to Paladin Legal to correspond with the plaintiffs' solicitors between March 2019 and February 2020. In February 2020, she withdrew Paladin Legal's instructions as she was unable to continue to pay their fees.

[48] On 3 September 2020, she prepared submissions in relation to a stay of enforcement orders sought by the plaintiffs against her in respect of the balance owing under the judgment debt.

[49] On or about 4 September 2020, she instructed Tara Jain Lawyers who acted pro bono in this application.

[50] On 6 September 2020, she was advised that it was necessary to make an application to set aside the default judgment.

[51] In my view, this is not a satisfactory explanation for the delay in defending the proceeding for approximately two years and ten months and in not making an application to set aside the judgment for approximately two years and seven months.

[52] On the contrary, it seems perfectly clear that the second defendant's response to the proceeding being brought against her was to take flight from the jurisdiction for Fiji on 12 November 2017, and to remain there because it was not safe to return until some time after March 2018.

[53] Even after her arrest in January 2019, from the time when solicitors started to act for her in March 2019 until this application was ultimately filed in November 2020, there is no adequate explanation for the delay.

Arguable defence on the merits

[54] Another relevant factor on an application to set aside a judgment obtained in default of appearance and defence is whether the party is able to demonstrate an arguable defence on the merits.[4]

[55] The importance of this factor is obvious. If a defendant has no real prospect of successfully defending the proceeding, no useful purpose is served by setting the judgment aside. On the other hand, a defendant who can show a prima facie ground of defence may be disproportionately prejudiced if the judgment is not set aside, particularly where the plaintiff is not severely prejudiced and can be compensated in costs. It should be kept in mind that the question for consideration is whether there is a prima facie ground of defence, not whether the defence is likely to succeed on the material filed on the application, but nevertheless the strength or weakness of the suggested ground of defence may be relevant in itself to the overall discretion, in some cases. In my view, it is relevant in the present case.

[56] In my view, there is no serious question raised by the evidence tendered on the application that the second defendant did not owe a duty of care in negligence to the plaintiffs in the dealings with them in respect of the 13 loans.

[57] Second, taking the plaintiffs' case at its simplest, there is no serious question that the second defendant failed to inform the plaintiffs at any stage that a first mortgage security had not been obtained or retained for any of the 13 loans. The second defendant does not suggest the contrary. Accordingly, the question is whether the second defendant has a prima facie ground of defence that it was not a breach of her duty of care to fail to inform the plaintiffs that no first mortgage security had been obtained or retained for any of the 13 loans.

[58] It is difficult to gauge the answer to this question, because the second defendant has adduced no evidence that deals with it squarely. The basis of her proposed defence is that she was not acting as a qualified solicitor or financial adviser, or giving

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4 *Embrey v Smart* [2014] QCA 75, [42]; *Xiao Hui Ying (aka Hui Ying Xiao) v Perpetual Trustees Victoria Ltd* [2012] VSCA 316, [39]; *Cook v DA Manufacturing Co Pty Ltd & Anor* [2004] QCA 52, [19]; *Rosing v Ben Shemesh* [1960] VR 173, 176.

advice as a solicitor or financial adviser, and was acting as instructed by the first defendant. As to the security to be obtained, she says no more than it was the responsibility of others in the office to see that it was obtained and there was registration of the security.

[59] In my view, this does not go far enough to raise a real prospect of defending the proceeding. Accepting that the evidence shows the second defendant was the point of contact between her and the plaintiffs and that she had responsibility for the management of the plaintiffs' files, generally speaking in an autonomous way, there is not really an arguable basis, in my view, for a conclusion that the second defendant was not aware or should not have made herself aware whether there was first mortgage security in place before or while the plaintiffs' funds were advanced to the borrowers. In my view, the suggested prima facie defence to this aspect of the plaintiffs' claim is shadowy, at best.

Prejudice

[60] Prejudice to either the plaintiffs of setting the judgment aside on the one hand or to the second defendant on the other hand of not doing so, is another relevant factor.

[61] In some cases, it is an important factor and may be even determinative, particularly where there has either been a long delay, in considering prejudice to a plaintiff if the judgment is set aside or, on the other hand, hardly any delay, in considering prejudice to the defendant, if the judgment is not set aside.

[62] There is no doubt that the prejudice to the second defendant is high if the judgment is not set aside, if the second defendant would have been successful in her defence. The amount of the judgment and her lack of means to meet the balance owing in excess of $3 million make that so.

[63] However, if the judgment is set aside, the prejudice to the plaintiffs will also be great. First, they have already recovered over $941,000 in execution proceedings under the judgment, although the legal costs of obtaining those recoveries to date have been approximately $110,000 as well as $40,000 in other costs of the proceeding. If the judgment is set aside, the recovered monies will be repayable by the plaintiffs to the second defendant, although they may be secured by an order under r 290 against dissipation pending the determination of the proceeding. However, the question no doubt will arise as to the second defendant's access to those funds in order to defend the proceeding. As well, there is no possibility of the second defendant otherwise securing the amount owing under the judgment, if it is set aside. The evidence shows she is impecunious.

[64] This proceeding was started in November 2017 and judgment was obtained in March 2018. To set aside the judgment now would restore the parties to the position that the proceeding has just been started, with the necessary consequential delay before it can be finalised, all to be added to the delay of the last three years. None of that delay is the plaintiffs' fault. All of it, or almost all of it, is directly the second defendant's fault. The qualification is that the second defendant has had some health problems in that period.

[65] As well, the plaintiffs are aged and suffer ill health. They are both over 80 years of age. The female plaintiff had heart surgery in 2014 and emergency heart treatment

in August 2020. The male plaintiff has a long history of heart issues and was diagnosed with bowel cancer in February 2015. On 17 March 2016, two hernias were surgically repaired. In March 2018, he was diagnosed with cancer on the ball of his left eye.

Conclusion

[66] Many factors can inform the exercise of the unfettered discretion to set aside a regularly obtained judgment under r 290 of the UCPR. Although the relevant factors considered above may all arise in most cases, the weight to be given to them in an individual case will vary according to the circumstances.

[67] For example, a relatively weak defence may sustain an order to set aside a judgment where there is a relatively good explanation for why the party failed to appear when the case was heard and where there is no undue delay by the party bringing the application to set aside the judgment. But more may be required when the explanation for the failure to appear is inadequate and the delay in bringing the application is inordinate. That is the situation in this case.

[68] Taking all the relevant considerations into account, in my view, in the present case the second defendant has not shown a sufficient basis for a prima facie ground of defence on the merits to warrant an order that the judgment be set aside, particularly having regard to the relative prejudice that will be suffered by the plaintiffs if the judgment is set aside after such a long period of time.

[69] For those reasons, the application must be dismissed.