

**IN THE DISTRICT COURT
AT GISBORNE**

**CIV-2014-016-000224
[2016] NZDC 4348**

BETWEEN JOSEPH JOHN MARTIN AND
 JACQUELINE JULIA BLAKE
 (Trading as BURNARD BULL & CO)
 Plaintiffs

AND ROLAND JOHAN WIMMERS
 MARIA DESPINA DESTOUNIS
 WIMMERS
 Defendants

Hearing: 29 January 2016

Appearances: A Bendall for the Plaintiffs
 Defendants appear in Person

Judgment: 16 March 2016

JUDGMENT OF JUDGE W P CATHCART

Introduction

[1] The plaintiff is a law firm based in Gisborne. On 7 November 2013 the plaintiff was purportedly engaged by the defendants to carry out legal work. According to the plaintiff's statement of claim, the plaintiff entered into a contract for services whereby the plaintiff would perform legal services for the defendants who would be liable to the plaintiff for those services.

[2] By way of invoices dated 19 November 2013 and 19 March 2014, the plaintiff billed the defendants personally for services performed. The invoices were not paid by the defendants. Reminders that the payments were outstanding were sent on multiple occasions between 10 December 2013 and 12 August 2014.

[3] By way of letter, dated 5 September 2014, a final notice was sent by the plaintiff to the defendants. In response, the defendant Mrs Maria Wimmers, confirmed that weekly payments for the outstanding legal fees would commence. The plaintiff rejected that offer and insisted on payment in full.

[4] The defendant, Mr Ronald Wimmers was served with the statement of claim, notice of proceedings and list of documents on 10 October 2014. The defendant Maria Wimmers was served with the same documents on 10 December 2014.

[5] At no stage prior to the filing of the statement of claim did either defendant assert positively their current defence that they are not personally liable for the legal fees. Both defendants now assert that the company The Works Ltd was the person who is liable for the fees. Mrs Wimmers was a director and shareholder of that company. It is now in liquidation. The defendants say that the legal work performed by the plaintiff related to the interests of that company and that they did not assume any personal liability for the legal fees. To date, no statement of defence has been filed by either defendant.

[6] The plaintiff obtained a judgment by default against both defendants on 23 January 2015. The basis for that judgment rested on the premise that neither defendant had taken steps to defend the claim.

[7] The defendants now apply to set aside the default judgment.

Relevant legal principles

[8] Under r 15.10 District Court Rules (DCR) 2014 a judgment obtained by default may be set aside or varied by the Court on such terms if it appears to the Court that there has been or may have been a miscarriage of justice.

[9] With respect to the defendant Mrs Wimmers, the difficulty for the plaintiff is that the default judgment was entered prior to the expiry of the 30-day time period during which she was entitled to file a notice of defence. That judgment therefore was irregularly obtained.

[10] There is an established line of authority to the effect that an irregularly obtained judgment will usually be set aside *ex debito justitiae*.¹

[11] As observed by Greig J in *O'Shannessy* at [654]:

The authorities are plain that where a default judgment is irregularly obtained the defendant is entitled *ex debito justitiae* to a setting aside. It is to be noted further that it is an irregularity in obtaining the judgment rather than the irregularity in the judgment itself.

[12] However, like all general legal principles, their relevance depends upon their application to particular facts. Not unsurprisingly therefore, there is a further principle that the Court has a residual discretion to decline an application to set aside a judgment even if it was obtained irregularly.²

[13] Given the general principle that an irregularly obtained judgment will usually be set aside, the exercise of the residual discretion to decline such an application must be exercised with circumspection.³ At the interface of these two principles, the Courts have reasoned that the setting aside of an irregularly obtained judgment will usually depend on whether the degree of irregularity in the process, or resulting judgment, was substantial.⁴

[14] An illustration of the exercise of the discretionary power to decline setting aside an irregularly obtained judgment is the High Court decision in *Fetherston v Bank of New Zealand*.⁵ In *Fetherston*, the plaintiffs had not effected proper service of the proceedings on the defendant. Lang J observed that service of a proceeding is self-evidently a fundamental requirement because it is the only real means of ensuring that a defendant has an opportunity to defend the claim. At [37], Lang J held that the failure to comply strictly with service requirements will generally lead

¹ *O'Shannessy v Dasun Hair Designers Ltd* [1980] 2 NZLR 652; *Baker v State Insurance Office General Manager*, HC Wellington, CP 282/88, 31 August 1988, McGechan J; *Fetherston v Bank of New Zealand*, HC Auckland, CIV-2007-404-004780, 1 April 2008, Lang J at [29]

² *Baker v State Insurance Office General Manager*, HC Wellington, CP282/88, 31 August 1988 at 3; *Schriek v Blackler*, HC Christchurch, CP 303/92, 1 May 1996, Master Venning (as he then was); *Fetherston v Bank of New Zealand*, HC Auckland at [31] – [35]

³ *Korochine 15 Ltd v Charans Investments Ltd*, HC Hamilton M338/94, 13 December 1994, Hammond J

⁴ *Arnott v Artisan Holdings Limited* (1998) 12 PRNZ 205 at 211; *Mehta v Grimshaw & Co*, HC Auckland, CIV-2007-404-4855, 10 March 2008, Duffy YJ at [23]

⁵ HC Auckland, CIV-2007-404-4780, 1 April 2008, Lang J at [29]

to a judgment being set aside *ex debito justitiae*. This will occur without any enquiry into the merits of the case because a defendant is entitled to the opportunity to put the plaintiff to proof regardless of the strength or weakness of the competing cases.

[15] Lang J observed that if the plaintiff had sought to support its judgment based on the manner in which it purported to serve the defendant, there could be no justification for exercising the discretion against the defendant.⁶

[16] In that case, there was a further dimension to the service issue. Lang J observed that Mr Fetherston discovered at least some of the documents relating to the proceedings attached to the gate of his home on about the same date they had been left here. Lang J agreed with the lower Court Judge that the nature of those documents would have been obvious to Mr Fetherston. Also relevant, was the fact that Mr Fetherston took action once he discovered these documents. This further dimension justified the Court entertaining the use of the residual discretion.

[17] Lang J reiterated at [41] that an irregularly obtained judgment does not generally lead to an examination of the merits of the claim and the defence. However, given that the overarching principle is whether the interests of justice require the judgment to be set aside, Lang J considered that at least some enquiry into the merits may be warranted, particularly where the litigant does not have the benefit of legal representation.⁷ Lang J thus looked at the issue as to whether Mr Fetherston had a defence to the Bank's claim.

[18] Relying on the well-known decision in *Russell v Cox*⁸ the learned Judge then addressed the three factors Courts are required to take into account in deciding whether a regularly obtained judgment should be set aside, namely:

- (a) Whether the delay by a defendant in responding to proceedings could be reasonably explained.

⁶ *Fetherston v Bank of New Zealand*, HC Auckland, CIV-2007-404-4780, 1 April 2008 at [39]

⁷ *Fetherston v Bank of New Zealand*, HC Auckland, CIV-2007-404-4780, 1 April 2008 at [41]

⁸ [1983] NZLR 654 at [659]

- (b) Whether the plaintiff will suffer irreparable injury if the judgment is set aside.
- (c) Whether a defendant has a substantial ground of defence.

[19] Having addressed the *Russell* principles, Lang J found on the facts that Mr Fetherston's defence that the debts were not incurred by him personally but rather by his company, lacked merit. The Judge held that the Bank's case was "virtually unanswerable."⁹

[20] Here, for the plaintiff, Ms Bendall concedes that judgment against Mrs Wimmers was irregularly obtained. However, Ms Bendall submits that no miscarriage of justice has occurred to either defendant by that irregularity. She points out that the defendants are married and that they live together. According to Ms Bendall, Mrs Wimmers must have been aware of the claim against her husband.

[21] On the key issue, Ms Bendall submits that the lack of opportunity for Mrs Wimmers to file a statement of defence has not deprived the defendants of the opportunity of defending the claim.

[22] With respect to the *Russell* principles, Ms Bendall points out that the defendants still have not filed a statement of defence against the claim but rely upon assertions made during the enforcement stage of the proceedings. Ms Bendall submits that there has been substantial delay between when the judgment was obtained on 23 January 2015 and the filing of the application to set aside the judgment, which equates to an 8 month delay.

[23] With respect to the merits of the defence, Ms Bendall contends that the plaintiff had a contract for services with the defendants personally and not with The Works Ltd. Moreover, at no time during that alleged contract did either defendant dispute that position. In fact, on or about 16 September 2014, Mrs Wimmers purportedly admitted liability for the debt and confirmed payments

⁹ *Fetherston v Bank of New Zealand*, HC Auckland, CIV-2007-404-4780, 1 April 2008 at [54]

for the invoice would be made by her without ever asserting that she was not personally liable.

Application of legal principles

Mrs Wimmers

[24] Any application to set aside a judgment must be approached on a principled basis. It is clear that the judgment obtained against Mrs Wimmers was irregularly obtained. Putting aside issues relating to the strengths and/or weaknesses of the respective cases, Mrs Wimmers was denied the opportunity to file a statement of defence within the time period granted to her by law. This denial of opportunity occurred because the plaintiff moved too quickly to obtain judgment by default against her.

[25] Relying on the general legal principle noted earlier, the judgment against Mrs Wimmers should be set aside because of that irregularity unless there is a proper justification for the Court to entertain its residual discretion in favour of the plaintiff. The residual discretionary power would otherwise swallow up the general principle that an irregularly obtained judgment will usually be set aside *ex debito justitiae* in cases of substantial irregularity.

[26] The denial of an opportunity to a defendant to file a statement of defence within the requisite 30-day time period is a substantial irregularity. A defendant is entitled to file a defence and to put a plaintiff to proof regardless of the strength of a plaintiff's case or the weakness of any possible defence.

[27] In my view, there is no justification for exercising the discretion in favour of the plaintiff. Unlike *Fetherston*, there is no further dimension to this issue that would justify the consideration of the residual discretion in the plaintiff's favour. The lack of merit in the defence thus does not enter the equation. She was entitled to file the statement of defence within that 30 day period and to put the plaintiff to proof. The plaintiff has denied her that opportunity.

[28] With respect to Mrs Wimmers, I therefore set aside the judgment on the ground that she has been denied the opportunity to present her defence.

[29] Having reached that view, it is unnecessary for me to comment on the merits of her defence. However, I have serious doubts about the merits of Mrs Wimmers' defence.

[30] In her affidavit dated 19 August 2015 filed in support of the application to set aside judgment, she asserts that the legal fees were incurred by her company, The Works Limited, and not by her personally. She asserts that the legal fees should have been directed to the liquidators for that company.

[31] This belated assertion is in stark contrast to the invoices submitted by the plaintiff to the defendants. Those invoices were issued to both defendants personally. There is no documentation that supports Mrs Wimmers' new defence. Also, her defence appears to be contrary to an exchange of emails between her and the plaintiff in which she acknowledged liability.

[32] However, the lack of merit in the defence cannot be entertained as a factor in this application because there was a substantial irregularity in obtaining the judgment. The plaintiff wrongly denied her the opportunity to file the statement of defence by moving too quickly to obtaining judgment by default.

Mr Wimmers

[33] The above analysis does not apply to Mr Wimmers. He was served with the proceedings on 10 October 2014. Judgment was obtained by default against him on 23 January 2015 because he failed to file a statement of defence. To date, he has still not served that statement of defence.

[34] His application is governed by the principles in *Russell v Cox*.¹⁰ As noted earlier, the overarching test is “whether it is just in all the circumstances to set aside

¹⁰ [1983] NZLR 645

judgment.”¹¹ In applying the *Russell* principles, there is little doubt there has been an inordinate delay in filing the application to set aside the judgment. The failure to take steps within that eight-month period was inexcusable.

[35] On the issue as to whether he has a substantial ground of defence, Mr Wimmers relies on the same belated assertion that he was not personally liable for the legal fees.

[36] On 26 January 2016, he told the Court that he was not financially involved in The Works Limited. He said he just assisted his wife with duties at the establishment including such things as washing dishes. He said that he had only been at the plaintiff’s law firm three times with his wife. He said that the plaintiff never discussed with him that he would be personally liable for the legal fees. No affidavit evidence was adduced to support these assertions.

[37] On the issue of service, he said he never saw the documents in the mail. He claimed that the documents went to a post office box number. Also, he said he was not told by Mrs Wimmers that proceedings had been served upon him. Mr Wimmers’ assertion that he had never seen the documents was inconsistent with the affidavit of service. That affidavit shows that he personally received the relevant documents on 10 October 2014.

[38] In my view, Mr Wimmers’ belated claim that he is not personally liable for the legal fees contradicts the overwhelming documentary evidence. He does not have any substantial ground of defence to the claim.

[39] Accordingly, Mr Wimmers’ application to set aside the default judgment is declined.

W P Cathcart
District Court Judge

¹¹ *Russell v Cox* [1983] NZLR 645 at [43]