

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT DUNEDIN**

**I TE KŌTI-Ā-ROHE
KI ŌTEPOTI**

**CIV-2018-012-000318
[2020] NZDC 7211**

BETWEEN

BAYCORP PDL (NEW ZEALAND)
LIMITED AS ASSIGNEE OF CONSUMER
FINANCE LIMITED
Plaintiff

AND

BRIAN SAMUEL BATES
Defendant

Judgment: 30 April 2020

**RESERVED JUDGMENT OF JUDGE K J PHILLIPS
Judgment by default incorrectly entered**

Introduction

[1] On 18 June 2018, the above intitled proceedings were commenced in the Dunedin District Court by the filing of a Notice of Proceeding and Statement of Claim. The Claim was for a sum of money claimed to be owing under the terms of a credit card known as a Q Card.

[2] On the 14 May 2019 an Order for the Substituted Service of the Proceedings was made allowing for service of the Proceedings by way of serving an adult occupant or affixing the proceedings to the door of the property at [address deleted], Abbotsford, Dunedin. Service was effected in the terms of that Order by affixing the Statement of Claim to the said property on the 20th June 2019.

[3] The Plaintiff had not applied for any extension of time within which to have service of the Proceedings effected. The service described above was effected some

12 months and two days after the date on which the Proceedings were filed. This was in breach of Rule 5.68(2) of the District Court Rules (DCRs) which states:

(2) Unless service is effected within 12 months after the day on which the statement of claim and notice of proceeding are filed or within such further time as the court may allow, the proceeding must be treated as having been discontinued by the plaintiff against any defendant or other person directed to be served who has not been served

[4] On 24 October 2019 upon the application of the Plaintiff, judgment by default was sealed in the proceedings by a deputy Registrar of the District Court. Following the entry of judgement on the 19 December 2019, a Charging Order was made in favour of the Plaintiff over land owned by the defendant.

[5] In the meantime, on the 10 July 2019, following an inquiry by the defendant as to the status of the proceedings, a deputy Registrar of the District Court at Dunedin informed the defendant by email that the proceedings had been discontinued on the 18 June 2019. This advice was patently incorrect as in the terms of the above stated Rule the Proceedings were deemed to be discontinued unless service had been effected within twelve months from the day of filing.

Current situation

[6] The Registry contacted the defendant to “ascertain his position” (whatever that might mean). The defendant’s response to this was:

had he not been advised the proceeding was discontinued by Deputy Registrar Brian Sceats, he would have filed a defence.

Setting aside – Rule 15.10

[7] The judgment by default was entered pursuant to r 15.7(1) District Court Rules, following the defective service. The affidavit of service filed by the Plaintiff did not specify the year in which the proceeding had been served! The Registry staff entirely failed to check this fact before entering judgment. Service had been effected in breach of r 5.68(2) of the DCR.

[8] Rule 15.10 DCRs states:

Any judgment obtained by default under rule 15.7, 15.8, or 15.9 may be set aside or varied by the court on such terms as it thinks just, if it appears to the court that there has been, or may have been, a miscarriage of justice.

I consider this rule is sufficiently wide to allow the Court to set aside a judgment of its own motion. Greig J observed in *O'Shannessy v Dasun Hair Designers Ltd*:¹

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.

[9] The factors that I have considered as important in deciding whether to exercise my discretion are:²

- (a) whether the delay has been reasonably explained;
- (b) whether a substantial ground of defence has been disclosed; and
- (c) whether the plaintiffs will suffer irreparable injury if the judgment is set aside.

[10] In the current case the delay between judgment being entered and now is approximately six months; this period is fully explained by the actions of the Registry notifying the defendant that the proceeding was discontinued and yet proceeding to enter judgment; the only injury to the Plaintiff would be legal fees and perhaps interest. In the defendant's correspondence with the Registry he outlines a prima facie defence for the claim.

[11] The test on an application to set aside a default judgment is whether it is just in all the circumstances to set the judgment aside. The overriding consideration is whether if the judgment is not set aside there will be a failure to attain the ends of justice.³

¹ *O'Shannessy v Dasun Hair Designers Ltd* [1980] 2 NZLR 652 (HC) at 654.

² *Russell v Cox* [1983] NZLR 654, 659 (CA).

³ *O'Shannessy v Dasun Hair Designers Ltd* [1980] 2 NZLR 652 (HC)

[12] I consider the judgment should be set aside on the grounds there was a miscarriage of justice in the process that has occurred, namely: judgment being incorrectly entered without the defendant having the opportunity to exercise his right of defending the proceeding. I consider if the judgment is not set aside the ends of justice will not be met.

Charging order

[13] A charging order was granted in respect to the defendant's land.

[14] Rule 19.37 states:

19.37 Discharge of land or mining privilege from charging order

The land or mining privilege subject to a charging order is discharged from the charging order on registration with the Registrar-General of Land of—

- (a) a memorandum of satisfaction of the judgment in the proceeding in which the charging order has been issued, or other sufficient evidence of satisfaction; or
- (b) **an order of the court to the effect that the land or mining privilege is discharged from the charging order; or**
- (c) the consent of the person who registered the charging order to the discharge of the land or mining privilege from the charging order. (Emphasis added)

[15] I consider it is appropriate for the Court to make an order discharging the charging order over the defendant's land pursuant to r 19.37(b).

Future of the proceeding

[16] By operation of r 5.68(2) the proceeding "must be treated as having been discontinued".

[17] Rule 15.18 outlines the formal effect of a discontinuance:

15.18 Effect of discontinuance

- (1) A proceeding ends against a defendant or defendants on—

- (a) the filing and service of a notice of discontinuance under rule 15.16(1)(a); or
 - (b) the giving of oral advice of the discontinuance at the hearing under rule 15.16(1)(b); or
 - (c) the making of an order under rule 15.17.
- (2) The discontinuance of a proceeding does not affect the determination of costs.
- (3) Rule 15.19 overrides this rule.

[18] Rule 1.8 provides that a failure to comply with the requirements of the Rules must be treated as an irregularity and does not nullify the proceeding or any step taken in the proceeding.

[19] However, I believe the specific must overrule the general in this situation, i.e. r 5.68(2) overrules r 1.8; the proceeding is deemed discontinued and in line with r 15.18 the proceeding ends.

[20] I consider this outcome is appropriate particularly given the lack of any submissions to the contrary from the plaintiff. I note according to the information given to me by the Court Registry, the plaintiff was given an opportunity to comment on the issues and has not.

Conclusion

- (a) The judgment in this proceeding is to be set aside (r 15.10);
- (b) The charging order is to be set aside (r 19.37(b));
- (c) The proceeding is deemed to be discontinued (r 5.68(2)); and
- (d) If the proceeding is re-commenced the plaintiff must pay any costs that have been incurred. (r 15.20 – r 15.21)

Judge PJ Phillips
District Court Judge

Date of authentication: 30/04/2020

In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.