IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

S CI 2012 03666

DUNCAN PENDRIGH — Plaintiff

v

AUSTRALIAN BIGHT ABALONE LIMITED (ACN 110 026 483) AND OTHERS — Defendants

---

JUDGE:	Zammit AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	1 August 2014
DATE OF JUDGMENT:	13 August 2014
CASE MAY BE CITED AS:	Pendrigh v Australian Bight Abalone Limited and Ors

---

REASONS

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M. Albert	M+K Lawyers
For the Defendant	Mr A. Blair	Oliver Lane Lawyers

HER HONOUR:

1 On 11 February 2014 the plaintiff, Duncan Pendrigh, obtained a default judgment in default of defence, in this Court against the second defendant, Andrew James William Ferguson, ("the defendant").

2 The defendant has applied to set aside the judgment, by summons filed on 5 May 2014. The application is supported by two affidavits of Andrew Bryce, affirmed 2 May and 29 May 2014 and written submissions.

3 The plaintiff has not filed any affidavit but relies on written submissions.

4 The plaintiff is the lead plaintiff in a group proceeding. The defendant is the chief executive officer and secretary of the first defendant, Australian Bight Abalone Limited ("**ABAL**"). The plaintiff alleges that the defendants engaged in misleading and deceptive conduct in relation to a product disclosure statement, which it is said the plaintiff relied upon to invest in schemes associated with ABAL.

5 The chronology of this claim can be summarised as follows:

- the plaintiff filed a writ and statement of claim on 27 June 2012;
- an amended statement of claim was filed on 18 June 2013;
- the defendant filed an appearance on 16 August 2013;
- on 18 September 2013 the defendants' solicitors, Oliver Lane Lawyers ("**OLL**") wrote to the plaintiff's solicitors, M+K Lawyers, informing them that their client did not have documents in relation to ABAL, as the documents had been provided to ASIC. Accordingly, the defendant could not properly assess the allegations made in the statement of claim. OLL sought documents from M+K Lawyers and six weeks to assess any documents to prepare a draft defence;[1]
- by letter dated 14 November 2013, M+K Lawyers responded and offered to provide any documents they had in their possession and required the

[1] Affidavit of Andrew Bryce affirmed 2 May 2014, exhibit "AZB05".

defendant to file and serve a defence by 28 November 2013;[2]

- by letter dated 27 November 2013, OLL wrote to M+K Lawyers and stated that the defendant proposed to file a defence and that counsel was instructed. OLL reiterated the difficulty they had in the absence of the documents and requested a copy of the various documents. OLL indicated that they would provide an updated timetable in relation to filing a defence once they had received and reviewed any documents M+K Lawyers forwarded;[3]

- on 10 December 2014, Markus Salins from M+K Lawyers, sent an email to Andrew Bryce of OLL stating:

> Andrew
>
> I note your client has not served a defence, despite further extensions to do. We reserve the right to enter default judgment, without further notice to you …

On the same day Mr Bryce responded as follows:

> Hello Markus
>
> I'm not sure what you are asking here, either your client is seeking to work collaboratively whilst we formulate a defence to your client's amended statement of claim, or you're instructed to file for default judgment? We'd appreciate your client making their position clear. Further, we note your correspondence of 27 November, whereby you offered to propose a timetable. We have not yet received any such proposal (unless your earlier email qualifies).
>
> As previously discussed, we are instructed to file a defence and we are working on doing that without access to the documents that form the basis of your client's complaint. We have previously raised this issue with you.
>
> Our client is currently overseas and will not be available until 18 December. Once your client has clarified their position on their intended actions, we will seek instructions regarding the insurance policy … [4]

- On 20 January 2014, Ron Willemsen of M+K Lawyers sent an email to Mr Bryce stating:

> Hi Andrew,
>
> Confirming from our discussion this morning that your client is

---

2 Ibid.
3 Ibid, exhibit "AZB06".
4 Ibid, exhibit "AZB07".

> expected back from leave today or tomorrow and you have said you will seek his immediate instructions as to whether the previous requested copy of the insurance policy is now going to be provided to us.
>
> We confirm our client requires that your client provides such copy policy to our office by no later than the end of this week.
>
> Our instructions are to allow no further time beyond the end of this week.
>
> Failure to comply will result in our client progressing to procure default judgment against your client without further notice. ...

6 On 24 January 2014, Mr Bryce forwarded by email a number of investment manager insurance policies.[5]

Submissions

7 The defendant seeks pursuant to order 21.07 of the Supreme Court (General Civil Procedure) Rules (Vic) 2005 ("**Rules**") to have the default judgment set aside on two bases:

1. That the default judgment was irregularly obtained against good faith or unreasonably or inappropriately and therefore the default judgment should not be allowed to stand; and/or

2. The Court should exercise its discretion to set aside the default judgment pursuant to Order 21.07 of the Rules.

Irregular judgment

8 The defendant submits that the default judgment was irregularly entered in that by the email message dated 20 January 2014, the plaintiff, through its lawyers, made a further threat to seek default judgment which was conditional and represented, expressly or impliedly, that the default judgment would not be sought in the event that the documents be provided without further recourse to OLL. The defendant submits, the condition, that is the provision of documents, was complied with in the time frame demanded, and that it was reasonable for Mr Bryce to believe that in

---

5 Ibid,, exhibit "AZB09".

meeting the plaintiff's demand for delivery of documents, the plaintiff would not seek default judgment without further notice to the defendant's solicitors.

9 The defendant submits that the failure by M+K Lawyers to notify Mr Bryce in the circumstances was wrong and against good faith.

10 While the email correspondence dated 20 January 2014, referred to the provision of documents and timelines for compliance, it must be read in the context of all the exchanges between the solicitors. The defence was due on or about 17 September 2013. There had been a demand for the defence by the plaintiff's solicitors on 10 December 2013 and a warning that default judgment would be entered without further notice. The email dated 20 January 2014, again refers to default judgment but in the context of documents being provided. It is surprising that given the seriousness of the failure to file a further defence and the extensions of time given for the filing of the defence by the plaintiff, that neither of the parties' legal representatives sought to clarify what steps were to be taken. I do not consider it was open to the defendants' solicitors to interpret the email message as meaning that if the documents were provided, default judgment would not be entered without further notice. Equally, it is regrettable that the plaintiff's solicitors did not more clearly articulate their position in the email dated 20 January 2014 as to what they would do in relation to obtaining default judgment.

11 In essence, while the plaintiff's solicitors' conduct to proceed to file for default judgment in the circumstances can be described as high handed, it was not improper.[6]

12 The authorities are clear that there is no obligation on a solicitor for a plaintiff to warn the defendant that the plaintiff will seek judgment.[7] What is important is that the circumstances in which default judgment is entered may be relevant to the exercise of discretion to set aside. I do not consider that the facts of this case are such

---

6 *Perpetual Trustees Victoria Ltd v Pilcher* [2005] VSC 244 at [14].

7 *Sargent v Veneris*, an unreported decision of Beach J, 20 December 1995, BC 9507179; *Starrs v Retravision (WA) Ltd* [2012] WASCA 67 (S) at [43]; *Janaco Pty Ltd v Comande*[2013] VSC 4 at [16]-[18].

as to conclude that the plaintiff's solicitors acted in bad faith or that the circumstances of this case, looked at holistically, are such so as to conclude that the judgment was obtained irregularly.[8]

13 The plaintiff's solicitors squarely put the defendant's solicitors on notice by 10 December 2013 that they would seek default judgment without further notice. The defence was due in mid-September 2013. Even if the defendant's solicitors thought the provision of the documents would defer any steps by the plaintiff seeking default judgment, there was no attempt to seek an extension of time from the Court or to confirm a timetable for the provision of a defence.

14 In summary, I do not consider that the default judgment was irregularly obtained.

Default judgment regularly obtained

15 Where judgment in default of defence is regularly obtained, the circumstances relevant to the exercise of the discretion of the Court to set aside judgment under Rule 21.07 include:[9]

(a) whether the defendant has a defence on the merits;

(b) the reason for the default of the defendant in consequence of which the judgment was obtained;

(c) whether the application to set aside judgment was made promptly after the judgment came to the notice of the defendant; and

(d) whether, if judgment is set aside, the plaintiff would be prejudiced in a way which could not be adequately compensated by an award of costs or the giving of security.

16 If the defence has merits to which the Court should consider, the Court will not

---

8 *Perpetual Trustees Victoria Ltd v Pilcher* [2005] VSC 244 at [14]-[15].

9 *Kostokanellis v Allen* (1974) VR 596.

usually let judgment pass where there has been no proper adjudication.[10]

17 The plaintiff appropriately concedes that Mr Bryce's affidavit dated 29 May 2014, discloses that the defendant may have an arguable defence on the merits.

18 The plaintiff submits that even though the defendant may have a defence on the merits, given the judgment was regularly obtained, the Court should not set aside the judgment, and if the Court does set aside the default judgment, costs should be awarded to the plaintiff.

19 The plaintiff submits that there was delay in two respects. Firstly, in providing a defence (almost five months after it was due) and secondly, it took the defendant three months after the default judgment was obtained to file the present summons.

20 The defendant has exhibited a draft defence.[11] The document is dated 16 August 2013. There is no evidence before the Court as to when the document was prepared. The plaintiff's solicitors submitted that the Court should apply the rule in *Jones v Dunkel*[12] that absent any evidence as to when the draft defence was prepared, the Court should infer that there is no good evidence available and that the draft defence was available on 16 August 2013.

21 An appearance was entered on 16 August 2013 by the defendant. An amended statement of claim was filed on 18 June 2013. Looking at the totality of the evidence, I do not consider any negative inference can be made. In the letter dated 27 November 2013, Mr Bryce informed M+K Lawyers that counsel was instructed on 25 November 2013 to draft a defence. I consider it most likely that the date on the draft defence is not correct.

22 While that there has been unexplained delay by the defendant in the filing of the summons, I note that the delay was not inordinate.

23 The plaintiff submits that the delay of itself has caused prejudice, particularly in the

---

10 Ibid, at [603].
11 Affidavit of Andrew Bryce affirmed 29 May 2014, exhibit "AZB11".
12 *Jones v Dunkel* [1959] HCA 8.

context of a class action. While any delay must be considered by the Court, there is no evidence before the Court that the delay here has caused actual prejudice to the plaintiff. In this case, the defendant has been active in the litigation as seen by the correspondence between the parties seeking documents. These steps will have inevitably advanced the litigation to some extent.

24 The discretionary factors relied upon by the plaintiff, namely, some delay in the filing of the summons, although not major delay, and no specific prejudice, must be balanced against: the fact that there may be an arguable defence; the delay is not inordinate; the defendant made it clear from the outset that he intended to defend the claim and was actively participating in the litigation. In such circumstances I consider it is in the interests of justice to set aside the default judgment.

Costs

25 Both parties seek their costs of the application and relied on *Re Zagoridis; Ex parte Q'Plas Group Pty Ltd.*[13] In *Re Zagoridis'* case Spender J considered:

> Where judgment is irregular or signed in breach of good faith, the plaintiff is usually ordered to pay the costs of the application to set it aside, but if the judgment be regular, as a rule it will be set aside only on terms that the defendant pay the costs of the judgment and of the application to set the judgment aside. ...[14]

26 The defendant submits that the solicitors for the plaintiff engaged in "most egregious conduct" by obtaining the default judgment against the defendant without notice.

27 The defendant submits that at all relevant times the plaintiff's solicitors knew that the defendant would defend the claim; counsel had been briefed to prepare a defence; the defendant's solicitors understood the 20 January 2014 email to be a request for documents and that if the documents were provided within the time demanded the plaintiff would not enter default judgment; and the defendant had been actively and genuinely engaged with the plaintiff's solicitors in the progress of

---

13 *Re Zagoridis; Ex parte Q'Plas Group Pty Ltd* [1990] 27 FCR 108.

14 Ibid, at [114].

the litigation.

28 The plaintiff submits that following *Re Zagoridis,* the defendant should pay the plaintiff's costs. In addition the plaintiff relies on the defendant's failure to file a defence for almost six months after it was due and that the plaintiff's solicitors made it clear that they would enter default judgment without further notice.

29 Both parties referred to the *Civil Procedure Act 2010* and the overarching obligations in Part 2.3 of the Act.

30 The parties and their legal representatives have an overarching obligation to cooperate in the conduct of civil proceeding[15] and they must use reasonable endeavours to resolve a dispute by agreement.[16] The parties also have overarching obligations to minimise delay.[17]

31 The Court may impose sanctions on any party if it considers there has been a contravention of the overarching obligations.

32 As I have said, while I do not consider the plaintiff's conduct by entering the default judgment to be improper, it was high handed. That is, in circumstances:

(a) where M+K Lawyers knew that this was a defended claim:

(b) there was no evidence that the defendant was employing some delaying tactic for his benefit;

(c) it is a group proceeding raising complex issues and the defendant was required to respond to an amended statement of claim which is 65 pages long and contains 55 paragraphs;

(d) the parties had appropriately agreed to exchange documents to assist the defendant in preparing his defence; and

---

15 *Civil Procedure Act 2010*, Section 20.
16 Ibid, at section 22.
17 Ibid, at section 25.

(e) the defendant had briefed counsel and the defendant's solicitors had provided documents in the demanded time frame as per the 24 January 2014 email;

it must have been plainly obvious that if the plaintiff proceeded to obtain default judgment, the defendant would apply to have it set aside.

33 The defendant of course cannot escape responsibility for the current application. The plaintiff's solicitors, as early as 28 November 2013, offered to provide OLL with documents to assist in the preparation of the defence and demanded the defence be filed by 28 November 2013. On 10 December 2013 the plaintiff's solicitors unequivocally informed OLL that the defence was due and that they reserved their right to enter default judgment without further notice. The threat to enter default judgment without further notice was again raised in the 20 January 2014 email. Despite numerous extensions by the plaintiff, the defendant failed to provide a defence. At no stage did the defendant or his solicitors seek the Court's direction for an extension of time to file the defence. Once the default judgment was entered, the defendant filed a detailed draft defence. It is regrettable that this was not done sooner.

34 For the reasons set out above, I consider the conduct of both parties contravenes sections 20 and 22 of the *Civil Procedure Act 2010*. Further, I am satisfied that the defendant's failure to provide a defence has caused delay and contravened s 25 of the *Civil Procedure Act 2010*. The plaintiff's solicitors could have, after 24 January 2014, put the defendant's solicitors on notice that the default judgment would be entered and should have made it clear to the defendant's solicitors that they had exhausted any further indulgences. Equally, either party could have sought a directions hearing and orders from the Court dealing with the filing of the defence. The defendant unreasonably continued for almost six months to indicate that the defence would be forthcoming but it was not until the default judgment was entered that the draft defence was provided.

35 In these circumstances, I consider the appropriate costs order to be that the costs of the defendant's application to set aside default judgment and the costs of entering the default judgment be costs in the proceeding.

CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for Judgment of Zammit AsJ of the Supreme Court of Victoria delivered on 13 August 2014.

DATED this 13 day of August 2014.

Associate