

CITATION: *Rapid Metal Developments (Australia) Pty Ltd v Nicholas Skarlatos*  
[2003] NTMC 048

PARTIES: RAPID METAL DEVELOPMENTS (AUSTRALIA)  
PTY LTD

v

NICHOLAS SKARLATOS

TITLE OF COURT: LOCAL COURT

JURISDICTION: Local Court Act

FILE NO(s): 20216541

DELIVERED ON: 17 September 2003

DELIVERED AT: Darwin

HEARING DATE(s): 16 July 2003 and 10 September 2003

JUDGMENT OF: Judicial Registrar Monaghan

**CATCHWORDS:**

Application to set aside default judgement-whether judgment irregularly entered-whether debt liquidated.

*Local Court Rules* 5.09, 11.03

*Alexander v AJAX Insurance Co Ltd* [1956] VLR 436;

*City Mutual Life Assurance Society Pty Ltd v Giannarelli* [1977]VR463

*Australian Civil Procedure by Bernard Cairns* (5<sup>th</sup> Ed-Law Book Co) p382 to 384

**REPRESENTATION:**

*Counsel:*

Plaintiff: A McLaren

Defendant: V Farmer

*Solicitors:*

Plaintiff: A McLaren

Defendant: Withnall Maley

Judgment category classification: B

Judgment ID number: [2003] NTMC 048

Number of paragraphs: 28

IN THE LOCAL  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20216541

*[2003] NTMC 048*

BETWEEN:

**RAPID METAL DEVELOPMENTS  
(AUSTRALIA) PTY LTD**  
Plaintiff

AND:

**NICHOLAS SKARLATOS**  
Defendant

REASONS FOR DECISION

(Delivered 17 September 2003)

Judicial Registrar MONAGHAN:

1. This is an application to set aside judgement filed by the defendant Nicholas Skarlatos. The default judgement was entered in favour of the plaintiff on 29 January 2003 in the sum of \$30,150.85 inclusive of costs and interest.
2. This matter first came before me on 16 July 2003. The heart of the dispute is that the plaintiff maintains that the sum of \$24,630.05 plus interest and costs is outstanding and the defendant counters that all money owed to the plaintiff has in fact been paid.
3. Following submissions by Ms McLaren for the plaintiff and Ms Farmer for the defendant, it became clear to me that I was unable to decide whether or not the default judgement should be set aside without further affidavit evidence. I had a number of concerns including the following:

- 3.1 I had no idea from the affidavit evidence before me and the pleadings as to how the judgement sum had been calculated apart from a superficial breakdown in the statement of claim and application for default judgement. I could not therefore consider whether the plaintiff was right in asserting that the claim was for a liquidated sum. As a result, I could not consider whether judgment was regularly or irregularly entered.
- 3.2 There also appeared to be some inconsistencies between the particulars set out in the statement of claim as regards the form and terms of the contract and the oral submissions made by Counsel on 16 July that required further clarification.
- 3.3 It was noted that there were three errors in the statement of claim. The first error was in paragraph 6 which referred to a supply of building materials to the defendant between the months of October 2001 and January 2002. The submissions of Ms McLaren on 16 July and the later affidavit evidence filed by the plaintiff company seems to support a period of supply for several months after that.
- 3.4 The second error is that statement of claim at paragraph 5 also referred to an interest rate in “the contract” at 1.5% per annum on all unpaid accounts. It became clear on 16 July however that the term of the contract being relied upon actually spoke of interest at the rate of 1.5% per month as was noted in a document annexed to the statement of claim.
- 3.5 The third error only became evident when further affidavit evidence was filed. That error is that the plaintiff’s claim purports to breakdown the amount owed into various categories quantifying goods hired and purchased and giving an amount for interest claimed. There is no mention however of transport costs claimed

although it is now clear that there is in fact a transport component in the amount claimed.

3.6 At the first hearing, I also considered that I had insufficient particulars of defence to be able to consider whether or not the defendant had an arguable defence.

3.7 Finally, the defendant's affidavit evidence regarding issues of delay failed to explain why he did not respond when he was served with the default judgment.

4. In the light of the above, I adjourned the hearing to allow both parties to file further affidavit evidence. The parties came back before me on 10 September 2003 after each submitting further affidavits and on that date I heard submissions from both Ms McLaren and Ms Farmer on behalf of their clients.

5. In summary, Ms McLaren for the plaintiff argued three main points,

5.1 that judgement was regularly entered,

5.2 that there were inadequate excuses given for the defendant's delays in filing a notice of defence and in applying for default judgement to be set aside,

5.3 that the prejudice to the plaintiff should the judgement be set aside was something that could not be ameliorated by costs alone.

6. Ms Farmer for the defendant argued:

6.1 that judgement was irregularly entered; and if I did not accept that submission then;

6.2 that there was a valid excuse for the delays; and

6.3 that there was no prejudice to the plaintiff that an order for costs could not ameliorate.

7. The first question is whether the entry of default judgement was regular or irregular. My decision on this point will dictate the manner in which I deal with subsequent issues. The court has an unfettered discretion to set aside a regularly entered default judgment. There are of course general principles from caselaw that are often applied by court officers to assist them such as issues of delay, arguable defence and prejudice.
8. If judgement was irregularly entered then I must set it aside as of right regardless of whether or not there is a defence on the merits. This is so unless special circumstances exist. (see Cairns on *Australian Civil Procedure* 5<sup>th</sup> edition at page 382, 383).
9. Rule 11.03 Local Court Rules give the Registrar the power to enter a default judgment. It states:

“11.03 Registrar may make order or refer to magistrate

- (1) If a Registrar is satisfied that an order for default judgment should be made, the Registrar may –
  - (a) make the order and, where applicable, an order for the assessment of damages or value of goods; and
  - (b) enter judgment to the extent of the order made.
- (2) If a Registrar is not satisfied that an order for default judgment should be made, the Registrar may –
  - (a) direct that a further affidavit or declaration be filed;
  - (b) give directions relating to the application;
  - (c) refer the matter to a magistrate; or
  - (d) refuse to make the order.

(3) Where a Registrar refers an application to a magistrate, the magistrate may –

(a) make the order sought;

(b) order that –

(i) judgment as to liability only be entered; and

(ii) damages or the value of goods be assessed;

(c) direct that a further affidavit or declaration be filed;

(d) give directions relating to the application; or

(e) refuse to make the order.

(4) Where a magistrate directs that a further affidavit or declaration be filed, a Registrar may make an order for default judgment on the filing of that document. (my emphasis).

10. I have underlined the words “value of goods” in the above rule to emphasise that an assessment hearing can be used where there is some uncertainty in the Registrar’s mind as to the manner in which a certain claim had been calculated. Often, for example, claims arising in contract are referred to an assessment hearing in circumstances where there has been insufficient detail provided in the statement of claim to allow a proper consideration by the Registrar of the debt claimed.

11. Ms Farmer’s first submission is that there are problems with the statement of claim filed that mean that default judgment should not have been entered without an assessment of damages /value of goods hearing. I commented on these problems at paras 3.1 to 3.5 supra.

12. The Local Court Rules require certain form and content from pleadings. Rule 5.09 states:

“5.09 Form and content

(1) A pleading is to –

- (a) be expressed in plain English and in non-technical language unless required by the nature of the claim;
- (b) be divided into paragraphs numbered consecutively and each allegation, so far as practicable, is to be contained in a separate paragraph;
- (c) contain, in a summary form, a statement of all the material facts on which the party relies but not the evidence by which those facts are to be proved;
- (d) where a claim or defence of a party arises by or under an Act – identify the specific provision relied on; and
- (e) state specifically the amount of compensation sought (if any) or the relief or remedy sought.

(2) In a pleading, a party may –

- (a) raise a point of law; and
- (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.(my emphasis)

13. Ms Farmer’s submission with respect to the statement of claim is that there were errors in the particulars provided (as was noted earlier at paras 3.3 to 3.5). Further she submits that the claim’s simplicity of form was in fact misleading. Based on the claim, the Registrar had no qualms in granting default judgment for the sum claimed –especially in circumstances where he or she was assured in the application for default judgment that the entire debt was for a liquidated sum. In fact, the defendant submits that the claim was unliquidated and should have gone to an assessment hearing. To miss this step amounted to an irregular entry of judgment.

14. Cairns on *Australian Civil Procedure* at Pg 382 states:

“To be regular, a default judgment must strictly comply with the Rules and be for relief to which the plaintiff is entitled on the pleading ..The record must show the plaintiff to have a right to judgement, and the judgement entered must follow the relief claimed”.(my emphasis)

15. In considering Counsel's submissions, I look to the contract between the parties (the Quote) in question. I make the following comments:
  - 15.1 The Quote was provided by the plaintiff to the defendant and accepted by him. It estimates the consumables and accessories required for scaffolding and formwork at the Australian Mission in East Timor, Dili. A number of the items on the Quote were costed for either purchase at a fixed price or for hire at a weekly rate. I assume that the plaintiff in fact delivered the listed items to the defendant in the amounts estimated in the quote.
  - 15.2 There is a note on the Quote to the effect that the number of consumables and accessories suggested are "*estimated*" quantities and I understand from Mr Cotton's affidavit that the plaintiff in fact credited the defendant for a number of items sent to him in Dili but not used by him.
  - 15.3 There is a further note in the Quote that "*any material that has been cut or deemed by RMD to be unreturnable will be charged for at the new rates indicated above. Should your tender be successful further discussion on the project would be required*".
  - 15.4 Under the heading of "*Transport*" is a general statement that transport could be arranged by RMD from the Darwin depot to Perkins wharf for shipment to Dili if the defendant chose to avail itself of that facility. The terms of the Trading account application signed by the defendant –assuming they form part of the terms of the Quote- provided further detail as to the manner in which transport charges would be calculated-i.e. "*at RMD's current charges from time to time, including labour for loading and unloading the goods.*"
16. In the documents attached to the affidavit of Shane Cotton are a number of invoices/statements to support the claim for the sum of \$28,734.37 which



the plaintiff states in the statement of claim is owed to them. These documents provide:

- 16.1 details of the quantity, description and price of materials sold to the defendant for the Australia Mission Project in Dili.
  - 16.2 transport costs for goods delivered to and collected from Perkins wharf on various dates between October 2001 and April 2002.
  - 16.3 details of hire charges incurred by the defendant at various dates from December 2001 to November 2002.
  - 16.4 calculation details to explain the credit adjustments made to the defendant's account by the plaintiff in acknowledgment of the building materials supplied to the defendant pursuant to the Quote that were in excess of his needs.
  - 16.5 Invoices for interest accruing on the outstanding account for a certain period.
17. Looking now to the statement of claim, paragraph 7 provides a breakdown for the amount claimed of \$28,734.37. The breakdown includes the cost of building materials purchased, the cost of hire of building materials and interest pursuant to the contract.
  18. There are scales contained in the Quote for fixing both sale prices and hire charges. This means that the cost of any materials hired or purchased are prima facie able to be calculated by application of the relevant scale. Thus, this aspect of the claim could have been dealt with as a liquidated sum had it been properly pleaded. It was not properly pleaded however.
  19. Now that the relevant invoices and statements have been supplied to us, it is quite clear that a considerable amount has been claimed for transport and yet this aspect of the claim is not separately mentioned but is contained, I assume, in the figures given for hireage and purchase.

20. There is also no mention in the statement of claim of the credit of \$5188.06 provided to the defendant on 25 June 2002 to take account of items hired by him that were surplus to his requirements. A full breakdown of all credits and debits sufficient for us to understand the history of this matter should have been included. How else can a defendant properly respond by way of defence?
21. Had the Registrar been aware of these irregularities, default judgment would not have been entered. Even after having had the opportunity to consider the separate invoices for transport costs, I am unsure as to the manner in which the transport costs were calculated. If the relevant contractual term is that transport will be charged “*at RMD’s current charges from time to time, including labour for loading and unloading the goods*” then those current charges and labour rates should have been particularised in the claim.
22. Can it be said that the default judgement was regularly entered in these circumstances? I think not. Bernard Cairns in his text *Australian Civil Procedure* states at page 383;

“Almost any failure to comply with the rules renders the judgement irregular. A judgement signed too soon or for too much is irregular. In *Alexander v AJAX Insurance Company Limited* [1956]VLR436 a final default judgement for a purported liquidated sum was set aside because the claim was not in law liquidated.” He also comments at page 371 “A claim is liquidated if a formula or scale fixes its amount, as when there is no element of assessment or opinion”: *Alexander v AJAX Insurance Company Ltd* [1956] VLR436,445.(my emphasis)

23. I also note the words in the Quote that “*any material that has been cut or deemed by RMD to be unreturnable will be charged for at the new rates indicated above.*” There is no mention of any such materials “*cut or deemed by RMD to be unreturnable*” in the statement of claim and none of the documents provided to the court by the plaintiff clearly identify such items. This does not mean that in these circumstances I am confident that there

were none however. They may simply not have been mentioned in the claim.

24. Assuming that there were such “*unreturnable*” materials then I look back to paragraph 24 and the statement in *Alexander v AJAX Insurance Company Ltd* (supra) that “*A claim is liquidated if a formula or scale fixes its amount, as when there is no element of assessment of opinion”*. How can it be said that this clause in the contract has no element of assessment or opinion? Surely the plaintiff must have decided on each occasion that material was returned whether in its opinion the items were cut or “*unreturnable*”? This part of the debt (if any) must therefore be considered to be unliquidated.
25. In summary, I consider that had the claim been properly pleaded, then it would have disclosed that it was for debts partly liquidated and partly unliquidated. The unliquidated portion would then have been referred to an assessment hearing. The claim was not properly pleaded however and contained insufficient particularisation and errors as regards matters in issue. In these circumstances the entry of the sum claimed as a judgment is irregular and cannot stand.
26. I look to Cairns at page 384 and quote “*When the defendant applies to set aside an irregular judgement the only onus is to establish the irregularity. Of course, the court has a discretion and it may allow an irregular judgement to stand by making any order necessary to validate what was done: City Mutual Life Assurance Society Limited v Giannarelli [1977]VR463. The discretion to validate an irregular default judgement is only exercised in rare circumstances*”.
27. There is nothing before me to suggest that my discretion should be used to validate this judgement.

28. I accordingly make an order setting aside the judgement entered on 29 January 2003. I will hear the parties on the question of costs at their request.

Dated this 17th day of September 2003.

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**B MONAGHAN**  
JUDICIAL REGISTRAR