CITATION: SPORTINGBET AUSTRALIA PTY LTD v TURCO [2009] NTMC 057

PARTIES:	SPORTINGBET AUSTRALIA PTY LTD
	v
	MARIO TURCO
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	LOCAL COURT
FILE NO(s):	20915307
DELIVERED ON:	20 NOVEMBER 2009
DELIVERED AT:	DARWIN
HEARING DATE(s):	7 OCTOBER 2009
JUDGMENT OF:	ACTING JUDICIAL REGISTRAR SMYTH

CATCHWORDS:

COSTS – costs of an application to set aside default judgment regularly entered – consideration which apply

Local Court Rules, Rule 11.01(a), 32.02(e), 38. 02, 38.03
Supreme Court Rules, Order 63.18

TTE Pty Ltd v Ken Day Pty Ltd (1990) 2 NTLR 143
Otter Gold NL v Barcon (NT) Pty Ltd (2000) 10 NTLR 189
Federal Bank v Bate (1889) 5 WN (NSW) 67
Proudfoot v O'Brien (1896) 13 WN (NSW) 64
In Re Zagoridis & Anor; EP Q'Plas Group Pty Ltd (1990) 98 ALR 718
Heller Financial Services Ltd v Solczaniuk (1989) 99 FLR 304
Permanent Custodians Ltd v El Ali [2008] NSWSC 1391

REPRESENTATION:

Counsel:

Plaintiff:	Mr Baker
Defendant:	Mr O'Donnell

Solicitors:

Plaintiff:	Ward Keller
Defendant:	Halfpennys

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 057
Number of paragraphs:	9

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20915307

BETWEEN:

SPORTINGBET AUSTRALIA PTY LTD
Plaintiff

AND:

MARIO TURCO
Defendant

REASONS FOR JUDGMENT

(Delivered 20 November 2009)

Mr SMYTH, ACTING JUDICIAL REGISTRAR:

1. This is the defendant's interlocutory application seeking an order setting aside default judgment which was regularly entered against him on 6 August 2009. On the hearing of the application the parties consented to an order setting the default judgment aside. The only remaining issue was that of costs. The plaintiff sought costs of the default judgment and the interlocutory application. The defendant sought costs in the cause. On the conclusion of the application I reserved my decision on the issue of costs.

2. The factual background to the application is as follows:

(a) Proceedings were commenced on 29 April 2009 by statement of claim seeking payment of a debt amounting to $29 599.37 plus costs. The address for service of the defendant was 1/69 Quay Street Fremantle WA 6160. Attached to the statement of claim were the prescribed blank forms, for defence and counterclaim, including instructions for filling out a defence and or counterclaim. Also

included in such information was a statement referring a party who did not understand the notices to the Registrar of the Court, a legal practitioner or legal aid.

(b) The statement of claim was served personally on the defendant on 23 May 2009.

(c) A document headed "Notice of Defence" dated 24 June 2009 was filed on 26 June 2009. That document states "The Defendant's defence is as follows: - " and then is blank. The document then contains a counterclaim, in a separate titled section, which alleges the plaintiff's employee breached a betting agreement between the parties, and addresses a number of particulars in relation to that employee. The counterclaim makes no specific response to the plaintiff's statement of claim or answers the specific matters raised in it (such as receipt of the betting contract letter of 11 February 2009, upon which the plaintiff's claim is based). The counterclaim claims $151,800 in damages, interest and costs. The address for service noted on the defendant's document was 1/69 Quarry Street, Fremantle, Western Australia.

(d) The matter was listed, on 25 June 2009, for a conciliation conference in the Court. Notification of the conference was sent from the Court to both parties' addresses for service by pre-paid mail.

(e) On 7 July 2009 an application for default judgment was filed, on the basis that the defendant had failed to file a notice of defence within 28 days, pursuant to Rule 11.01(a).

(f) On 8 July 2009 a defence to the counterclaim was filed.

(g) The conciliation conference was held on the 6 August 2009. The defendant did not appear. The plaintiff pressed for default judgment to be entered on the basis that the defendant had failed to file a

defence within 28 days. The plaintiff further sought orders in relation to the non attendance of the defendant at the conference, namely pursuant to Rule 32.10(e). Orders were made for default judgment on the application and in accordance with Rule 32.10(e).

(h) On 19 August 2008 the defendant filed an application to set aside the default judgment. He had received a copy of the Court order.

(i) On 20 August 2009 a pre-hearing conference was held. The defendant had received notice of the conference. The defendant appeared by telephone and directions were given in relation to the application to have judgment set aside and other matters, including service of the application by facsimile to the plaintiff's solicitor.

(j) The application was listed by the Court to be heard on 7 September 2009.

(k) The defendant's solicitor filed a notice of acting on 28 August 2009.

(l) On 7 September 2009 the matter was brought on. The Court was informed that the plaintiff had not been served with the application. That was despite the Court granting dispensation to the defendant in relation to service, and allowing service to occur by facsimile sent to the offices of the plaintiff's solicitor. The matter was adjourned again to 16 September 2009.

(m) On 16 September 2009 the matter was brought on. On that date the defendant was not ready to have the application heard, his solicitor was ill and his counsel was not available. Costs orders were made in favour of the plaintiff on that occasion and the matter was adjourned to 7 October 2009.

(n) An affidavit in support of the defendant's application, annexing a draft defence, was filed and served on 23 September 2009.

(o) On 24 September 2009 the plaintiff's solicitor wrote to the defendant's solicitors, indicating that it was only upon receipt of the draft defence that their client knew, for the first time, the case the defendant intended to run, in so far as any defence to the claim was concerned. The plaintiff indicated it would consent to an order that default judgment be set aside on the basis that the defendant pay the plaintiff's costs of the application up to and including the date that the consent order was signed.

(p) On 25 September 2009 the defendant's solicitor responded, rejected the payment of costs and referred to the default judgment being made on the basis that the defendant had failed to attend the conciliation conference on 6 August 2009 because he did not get notice from the Court. In relation to the aspect of the defence, it was the defendant's position that the defendant was unrepresented and although the defence was not pleaded properly, it did disclose a defence of breach of contract by the plaintiff.

Decision

3. Local Court Rule 38.03 provides that the order of costs are discretionary:

> **38.03 Power and discretion of Court**
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> (1) Subject to the Act, these Rules and any other law in force in the Territory, the costs of and incidental to a proceeding are in the Court's discretion and the Court has the power to determine by whom, to whom, to what extent and on what basis the costs are to be paid.
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> (2) The Court may exercise its power and discretion in relation to costs at any stage of a proceeding or after the conclusion of a proceeding.

4. Further, pursuant to Local Court Rule 38.02, Order 63 of the Supreme Court Rules applies to costs in the Local Court. Order 63.18 relevantly provides:

63.18 Interlocutory application

Each party shall bear his own costs of an interlocutory or other application in a proceeding, whether made on or without notice, unless the Court otherwise orders.

5. Order 63.18 has been the subject of a number of judicial observations in the Supreme Court, most notably by Martin J in *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143. In *Otter Gold NL v Barcon (NT) Pty Ltd* (2000) 10 NTLR 189 at 192, Thomas J discussed various authorities:

> "In considering the issue of costs on interlocutory applications I respectfully adopt the principle in respect of costs on interlocutory applications expressed by Martin CJ in *TTE Pty Ltd v Ken Day* (1990) 2 NTLR 142 and discussed by Kearney J in *Yow v NT Gymnastic Association* (1991) 1 NTLR 180 at 181:
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> "In *TTE Pty Ltd v Ken Day Pty Ltd* (unreported, 29 May 1990) Martin J discussed the general principles applicable to the award of costs on interlocutory applications. His Honour noted the 'radical departure' from previous practice evinced by rr 63.18 and 63.04(3)(a); they involved a 'reversal of thinking about costs in interlocutory matters.' The reasons of policy which gave rise to that departure meant that:
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> '... there must be something exceptional about the circumstances of the interlocutory application under consideration to lead the Court, in the exercise of its discretion, to make an order as to costs, taxation and payment.'

His Honour went on:

> 'Given the tenor of the Rules, it would not be just to make interlocutory orders for costs, or, if made, to order that they may be taxed earlier than completion of the proceedings, with a view to punishing the unsuccessful party. To do so may engender a reluctance in parties to properly ventilate their problems during the pre-trial process. What is required is an approach which seeks to have a successful party reimbursed the expense of interlocutory proceedings which, for example, would have been unnecessary if the other side had acted reasonably; or which are unnecessarily burdensome; or which are made at a time, such as here, when that party has been deprived of the value of the work done in preparation of his case for trial. In such instances, and the list is not intended to be definitive or complete, it may well be within the Court's

discretion to exercise the power to override the principles established by the Rules.

> Costs in interlocutory matters no longer follow success. No order as to costs ought to be made against the unsuccessful party, in the usual run of cases, even if contested, if the grounds of the application or resistance [of that party], as the case may be, are reasonable. However, if such application or resistance [by the unsuccessful party] is without real merit, as if (sic) often the case, the successful party should not have to bear his [own] costs. As to taxation and payment of interlocutory costs ordered to be paid by one party to another, a just approach to take is to consider whether the successful party ought to have reasonably anticipated interlocutory proceedings of the kind in question. If so, then he should have anticipated bearing the expense, at least to the conclusion of the proceedings, and not reckoned on having it paid for by the other party. If, however, the kind of interlocutory application or the number of them could not have been so anticipated, then there may be a better case for ordering that the successful party's costs be taxed and paid earlier.' [emphasis mine]
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> In *Milingimbi Education and Cultural Association Inc v Davies* (unreported, 12 October 1990), I indicated that I 'respectfully agree with those general observations.' The guidelines his Honour provides cannot of course limit the general discretion of the Court."

6. Specifically, in relation to the issue of costs on an application to set aside default judgment, there is another line of authority which states that costs are normally imposed on the party seeking the order, usually on terms. As Williams' *Civil Procedure Victoria* states (at 21.07.55) "As a rule, the judgment will not be set aside except on terms that the defendant pay the costs of the judgment and costs of the application to set it aside (*Federal Bank v Bate* (1889) 5 WN (NSW) 67), that is, the costs thrown away: *Proudfoot v O'Brien* (1896) 13 WN (NSW) 64." In *Re Zagoridis & Anor; EP Q'Plas Group Pty Ltd* (1990) 98 ALR 718 at 723, Spender J stated:

> "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."

7. *Proudfoot v O'Brien* was cited by the Northern Territory Court of Appeal in *Heller Financial Services Ltd v Solczaniuk* (1989) 99 FLR 304. In *Heller*, in dealing with the issues of costs, Kearney J stated:

> "Mr Hiley submitted that the costs of the hearing of 8 and 9 June should in any event have been awarded against the respondent, as costs thrown away by the applicant. That is the usual rule, in the case of a defendant who shows cause; see *Proudfoot v O'Brien* (1896) 13 WN (NSW) 64. However, the award of costs is very much a matter of discretion. His Honour directed that the costs be costs in the cause. In the light of my opinion on this application I consider that the applicant should have the costs of the hearing of 8 and 9 June and of this application; and to that extent the order of 9 June in relation to costs should be varied."

8. The failure to file a defence, in other jurisdictions, has been described as a type of "misconduct in litigation" entitling the plaintiff to an award of costs on an application to set aside judgment in default (see *Permanent Custodians Ltd v El Ali* [2008] NSWSC 1391).

9. In relation to the general issue of costs, I have considered the submissions of Counsel, the background to the matter, the circumstances in which the relevant orders were made and the fact that the parties consented to the default judgment being set aside. An interlocutory application to have default judgment set aside is not a "run of the mill" application, such applications are exceptional. So too are the processes which precede such applications. In accordance with the general discretion to award costs I am of the view that the plaintiff is entitled to its costs thrown away on the application for default judgment and the conciliation conference of 6 August 2009. In relation to the actual application to set aside judgment, it not appropriate that each party should bear their own costs in accordance with Order 63.18. Nor is it appropriate that costs be in the cause. Notwithstanding that the application was resolved by consent in favour of the defendant, the plaintiff was justified in requesting its costs be paid, which were to be thrown away. The defendant should have realised that, notwithstanding the merits of his application, such costs would normally be

awarded. Although there is no evidence as to the quantum or reasonableness of the plaintiff's costs, it would appear that the defendant simply rejected the offer to pay them outright, and the application proceeded. My orders therefore are:

1. The defendant is to pay the plaintiff's costs of and incidental to the application for default judgment and attendance at the conciliation conference on 6 August 2009.

2. The defendant is to pay the plaintiff's costs of and incidental to the application to set aside the default judgment.

3. Costs are to be fixed at 80% of the Supreme Court scale.

4. Such costs are to be agreed or taxed in default of agreement at the conclusion of the proceeding.

Dated this 20th day of November 2009

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CRAIG SMYTH
ACTING JUDICIAL REGISTRAR