CITATION: *Atlas Holdings (NT) Pty Ltd v Abode New Homes Pty Ltd* [2011] NTMC 005

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| PARTIES: | ATLAS HOLDINGS (NT) PTY LTD |
| | V |
| | ABODE NEW HOMES PTY LTD |
| TITLE OF COURT: | Local Court |
| JURISDICTION: | Interlocutory |
| FILE NO(s): | 21034333 |
| DELIVERED ON: | 28 February 2011 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 21 February 2011 |
| JUDGMENT OF: | J Johnson JR |

**CATCHWORDS:**

SECTION 20 OF THE *LOCAL COURT ACT* - APPLICATION TO SET ASIDE JUDGEMENT IN DEFAULT - FUNDAMENTAL DUTY OF THE COURT TO DO JUSTICE BETWEEN THE PARTIES

**REPRESENTATION:**

*Counsel:*

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| Plaintiff/Respondent: | Ms Short |
| Defendant/Applicant: | Mr Kumar |

*Solicitors:*

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| Plaintiff: | Withnalls |
| Defendant: | Ward Keller |

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| Judgment category classification: | C |
| Judgment ID number: | [2011] NTMC 005 |
| Number of paragraphs: | 18 |

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

No. 21034333

BETWEEN:

**ATLAS HOLDING (NT) PTY LTD**
Plaintiff/Respondent

AND:

**ABODE NEW HOMES PTY LTD**
Defendant/Applicant

REASONS FOR JUDGMENT

(Delivered 28 February 2011)

Mr J JOHNSON JR:

1. This is an interlocutory Application by the defendant, pursuant to section 20 of the *Local Court Act* and Rule 36.01 of the *Local Court Rules*, to set aside default judgement ordered by the Registrar of this Court on 4 January 2011, and for the proceeding to be re-heard. Default judgement was ordered pursuant to Rule 11.03(1); the defendant having failed to file and serve a Defence within 28 days of service upon it of the plaintiff's Statement of Claim.

2. The essence of the dispute between the parties goes to what the plaintiff says are outstanding payments due to it from the defendant for the performance of sub-contracted building services. The plaintiff asserts a liquidated debt of $54,961.23 for shortfalls in payments for services performed between 20 July 2009 and 23 April 2010, plus costs and interest.

3. For its part, the defendant disputes the total amount asserted to be owing and, I am informed by Counsel, has recently undertaken an "audit" of records of

transactions between it and the plaintiff during the relevant period. That audit, it is said, taking into account amounts which it says have in fact been paid and other adjustments (eg, backcharges for defective work and the like) shows that the actual debt owed to the plaintiff amounts only to $6,577.48 (Exhibit "D1"). Such amount was paid by the defendant to the plaintiff's solicitors by cheque on 18 February 2011.

4. The defendant has yet to file a formal Defence to the Statement of Claim or, for that matter, propose a draft Defence by affidavit, and as at the date of hearing of this interlocutory Application that default amounted to a period of 14 weeks and 4 days ie; the period between 28 days post 14 October 2010 and 21 February 2011. In answer to that default the defendant says that it was "surprised" at default judgement being entered as it had been, and was attempting to continue to be, in negotiations with the director of the plaintiff to resolve the dispute.

**Findings**

5. It is convenient first to deal with the defendant's assertion that the Statement of Claim not having been served upon the ASIC listed registered office of the defendant (as to which see Rule 6.05(c) of the *Local Court Rules* and section 109X of the *Corporations Act*), service was improper and default judgement was thereby entered irregularly. As I understand it the Statement of Claim was served at an administration office of the plaintiff at Butler Place in Pinelands, as opposed to its registered office which is a residential address in Durack.

6. In my opinion, the effect of the mode of service adopted by the plaintiff did in fact lead to the defendant receiving notice of the existence of the Statement of Claim in the proceeding and did not lead to default judgement due to a lack of knowledge of such proceeding. The defendant admits (see the affidavit of the sole director of the defendant, Mr Justin Gill, affirmed 11 February 2011) that its Finance Manager was served with the Statement of Claim on 14 October 2010 at its office in Pinelands. I think it fair to presume that it was quickly

thereafter brought to the attention of Mr Gill as he avers at length in his affidavit as to the reasons he failed to act between that time and 4 January 2011 when default judgement was entered.

7. I find that service of the originating process in this proceeding was properly effected, although as Counsel for the defendant points out, absent strict compliance with Rule 6.05(c) of the *Local Court Rules*.

8. If I am in error in such finding I am minded in any event to set aside default judgement, but for reasons other than irregularity.

9. In *Geoffrey Wayne Nourse & Anor v Fresh Express Australia Pty Ltd & Ors* [2009 NTSC 73] Southwood J provides, at paragraphs [48] through to [52], a comprehensive and authoritative summary as to the principles applicable to setting aside a judgement in default.

10. In an attempt to not unreasonably labour the length of these reasons I will not recite His Honour's reasons in full here but, upon their reading, it appears to me that I am directed to initially focus my mind towards three primary considerations viz: whether the defendant has a defence on the merits; the reasons for the defendant's default, including timeliness and preparedness to make good that default; and any prejudice which may flow to the plaintiff which is unable to be remedied by a suitable award of costs and the giving of security.

11. Firstly, as to a defence on the merits, I am satisfied on the balance of probabilities that the defendant does have such a defence. Whilst I am not permitted to look behind that defence, it is tolerably clear to me that prima facie there is some measurable discrepancy between the amount said by the plaintiff to be owed to it by the defendant and the defendant's own audit of transactions between the parties during the relevant period.

12. Secondly, I must turn to the reasons for the defendant's default and its preparedness to make good that default. Let it be said that the defendant

corporation, effectively, blindly sat on its hands in the period between 14 October 2010 and 4 January 2011. Whilst I accept for the most part the affidavit evidence of Mr Gill going to his attempts to contact the plaintiff for the purpose of resolving the dispute, in my opinion that is not sufficient basis upon which to ignore an explicitly imposed Rule of Court requiring the filing of a Defence within 28 days of 14 October 2010.

13. The defendant further says in mitigation through the affidavit of Mr Gill that its sole Director had a particularly heavy workload at the relevant time brought about by the significant number of construction projects upon which it was engaged; the training and support of two new "key senior staff members"; and the onset of the wet season with its attendant impact on construction schedules. In addition, the defendant closed its operations between 18 December 2010 and 10 January 2011 and its sole Director was overseas for part of that period.

14. Be all of that as it may, the fact that the defendant did not file a Defence in compliance with Rule 8.01, and to date has continued to fail either to file a Defence or propose by affidavit a form of Defence, is to its discredit and I find the reasons advanced for its continued default to be less than satisfying.

15. As to preparedness to make good that default, I do note the defendant's belated audit of the transactions between the parties and its imbursement by cheque to the plaintiff of what it says is the actual shortfall in outstanding payments.

16. Finally, Counsel for the plaintiff submitted that there was actual prejudice accruing to it by circumstance of further delay resulting in the plaintiff being kept out of its money. That of course overlooks the plaintiff's claim for interest and, whilst I understand the argument in terms of day-to-day cash flow, I remain firmly of the view that any prejudice flowing from my Orders can be effectively mitigated by an order for costs or the giving of security.

17. In the event, and in the exercise my discretion, I have determined to allow the application for re-hearing and to set aside the Order for judgement in default. Notwithstanding my view that the reasons for delay and continuing default by the defendant in filing a Defence are less than satisfying, I am minded to heed the judgement of Priestley JA in *Cohen v McWilliam* (1995) 38 NSWLR 476 at 481 quoting from the Federal Court in *Davies v Pagett* (1986) 10 FCR 226:

> It is, however, another question whether concern about the extent of delays, either in a particular case or generally, should, in the absence of prejudice in the particular case, be taken into account in exercising a discretion to set aside a default judgment. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. The temptation to impose a limitation through motives of professional discipline or general deterrence is readily understandable; but, in our opinion it is an erroneous exercise of the relevant discretion to yield to that temptation.

**Summary**

18. In summary, I am satisfied on the balance of probabilities that the defendant has a defence on the merits, that its default can be properly remedied, and that any prejudice accruing to the plaintiff as a result of my Orders can be effectively mitigated by an order for costs or the giving of security. That being the case, it is my opinion that the interests of justice between the parties must prevail.

**Orders:**

1. Default judgement entered for the plaintiff against the defendant on 4 January 2011 is set aside.

2. The defendant is to file and serve a Defence on or before 4 March 2011.

3. The proceeding is adjourned to Conciliation Conference at 3:30pm on 16 March 2011 with attendance of represented parties required.

4. The plaintiff/respondent is to have its costs of and incidental to the defendant's Application at 80% of the Supreme Court scale to be agreed or taxed.

Dated this 28th day February 2011

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**JULIAN JOHNSON**
JUDICIAL REGISTRAR