CITATION:	*Kathryn Staite v A40F Group Pty Ltd & Ors* [2021] NTLC012
PARTIES:	KATHRYN STAITE V A40F GROUP PTY LTD (ABN 85 615 032 758) AND CHERIE LEANNE KEATCH
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	2020-02425-LC
DELIVERED ON:	12 April 2021
DELIVERED AT:	DARWIN
HEARING DATE(s):	8 February 2021
JUDGMENT OF:	JR Norrington

CATCHWORDS:

CIVIL LAW – LOCAL COURT (CIVIL JURISDICTION) RULES 1998 (NT) – costs of an application to set aside default judgment irregularly entered.

Local Court (Civil Jurisdiction) Rules 1998, rr 2.01, 2.04, 6.03, 7.05, 11.01, 11.02, 11.03(2)(a), 22.07, 36.01, 38.02, 38.03.
Local Court (Civil Procedure) Act 1989 (NT), s 20.
Supreme Court Rules 1987, *rr* 2.01, 63.18.
ACN 076 676 438 Pty Ltd (In Liq) & Anor -V- A-Comms Teledata Pty Ltd & Anor [2000] WASC 214
Anlaby v Pretorius (1888) 20 QB 764

Australian Guarantee Corporation Ltd v Francis & Anor [1995] NTSC 20

Building Guarantee and Discount Co Ltd v Dolejsi [1967] VicRp 94

Cameron v Cole (1944) 68 CLR 571

City Mutual Life Assurance Society v Giannarelli [1977] VicRp 53

Commonwealth Bank of Australia v Kilpatrick [2013] NSWSC 169

Craig v Kanssen [1943] 1 KB 256

Cusack v. De Angelis [2007] QCA 313

Elders Finance Limited v Invaway Pty Ltd [1991] 2 Qd R 398

Ezi-Frame Ply Lid v. Al-Cote (Australia) Pty Ltd [1982] Qd. R. 602

Faircharm Investments Ltd v Citibank International plc [1998] EWCA Civ 171

Gemini Property Investments v Woodards Investments (2000) SASC 210

Greg Meyer Paving Ply Ltd v Can-Recycling (SA) Pty Ltd and Greg Meyer Paving Pty Ltd v Marine Stores Pry Limited [2021] NTSC 16 at 16

Harkness v Bell's Asbestos and Engineering Ltd [1967] 2 QB 729

In Re Pritchard [1963] 1 Ch 502

Reid v Jensen [2002] QDC 247

RHG Mortgage Corporation Limited (formerly known as RAMS Mortgage Corporation Limited) v Cvetkovski [2015] NSWSC 753

TTE Pty Ltd v Ken Day Pty Ltd (1990) 2 NTLR 143

REPRESENTATION:

Counsel:

Plaintiff:	Ms Stephenson
First Defendant	No Appearance
Second Defendant:	Mr Sanders

Solicitors:

Plaintiff:	De Silva Hebron Barristers & Solicitors
First Defendant	No Appearance
Second Defendant:	HWL Ebsworth Lawyers

Judgment category classification:	B
Judgment ID number:	012
Number of paragraphs:	41

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

No. 2020-02425-LC

BETWEEN

KATHRYN STAITE

Plaintiff

AND

A40F GROUP PTY LTD

(ABN 85 615 032 758)

First Defendant

AND

CHERIE LEANNE KEATCH

Second Defendant

REASONS FOR JUDGMENT

(Delivered 12 April 2021)

CORAM: NORRINGTON JR

1. On 8 February 2021 I heard an application for costs in relation an interlocutory application filed by the second defendant seeking to set aside a default judgment. The plaintiff consented to an order being made setting aside the order for default judgment but opposed an order for costs as sought by the second defendant.

2. The first defendant was not heard on the application.

3. After hearing submissions from counsel for each party on the question of costs, I reserved my decision.

Factual background of the matter

4. The proceedings commenced by way of a statement of claim that the plaintiff filed in the Local Court on 26 June 2020. The Plaintiff applied for and obtained an order for a default judgment on 24 August 2020.

5. On 28 January 2021 the second defendant filed an interlocutory application seeking that the default judgment be set aside. On the same day the second defendant also filed a Form 36A - *Application for Order to be set aside and re-hearing*. The latter being the correct form to use pursuant to section 20 of the *Local Court (Civil Procedure) Act 1989* and Rule 36.01 of the *Local Court (Civil Jurisdiction) Rules 1998*, rather than the interlocutory application.

6. The application to set aside was listed for hearing before me on 8 February 2021.

7. On 4 February 2021 the solicitor for the second defendant wrote to the Plaintiff's solicitor and said as follows:

> On review of your Affidavit of Service, it is clear that the default judgment is invalid. You have relied on hearsay evidence to establish service, rendering the judgment to be a nullity: *Elders Finance Ltd v Invaway Pty Ltd* [1991] 2 Qd R 398. My client is clearly entitled to have the judgment set aside with a costs order against your client.
>
> Please confirm by 3pm tomorrow if your client consents to the orders sought in our application (ie including costs against your client on a standard basis), and if so please email the Judicial Registrar confirming this position. If your client does not do so, I will need to finalise my preparation for the application listed for Monday morning, and we will seek an indemnity costs order against your client in respect of the costs of and incidental to the application (or in the alternative in respect of those costs from 3pm tomorrow onwards). In seeking that order I will provide a copy of this email to the court, and will contend that the application was bound to

> succeed and your client's resistance to it had no prospect of success.[1]

8. Late on the afternoon of 5 February 2021 the plaintiff filed an interlocutory application seeking the following orders:

> 1. An order that personal service pursuant to r 6.03 of the *Local Court (Civil Jurisdiction) Rules 1998 (NT)* was effected on First and Second Defendant on 15 July 2020;
> 2. An order that the Plaintiff has complied with the requirements prescribed in rule 11.01 and 11.02(a) of the *Local Court (Civil Jurisdiction) Rules 1998 (NT)*;
> 3. In the alternative to order 2, an order pursuant with r 2.04 the *Local Court (Civil Jurisdiction) Rules 1998 (NT)* dispensing with compliance of rules 11.01 and 11.02(a);
> 4. An order for costs in the cause; and
> 5. Such further or other others as this Honourable Court deems fit;

9. The plaintiff filed three affidavits in support of their interlocutory application, including an affidavit of service from William Eglinton promised on 5 February 2021. Mr Eglinton attested to being the process server who effected service on the second defendant.

10. After being served with the plaintiff's interlocutory application, the solicitor for the second defendant sent a further email to the plaintiff's solicitor on 5 February 2021 stating:

> Your client's application misses the point
>
> We do not seek to argue that service was not validly effected, only that it was not validly proven to have been effected at the time default judgment was entered. That being the case, the judgment is a nullity and my client is, as of right, entitled to have it set aside.
>
> Given that your client is now on notice of my client's intention to defend the proceedings, any attempt to regularise your evidence of

[1] Exhibit D1 page 4.

> service and re-enter default judgment would amount to "snapping on default judgment", which is not tolerated by courts.
>
> I will refer the court to this email when seeking an indemnity costs order against your client.[2]

11. It was not in dispute that the second defendant had been served in accordance with Rule 7.05 of the *Local Court (Civil Jurisdiction) Rules 1998*. Indeed, the second defendant's affidavit sworn 28 January 2021 and filed in support of the application to set aside, concedes that service took place in July 2020.[3]

12. At the hearing on 8 February 2021 the plaintiff consented to the default judgment being set aside. The second defendant sought costs on a standard basis covering the field and indemnity costs from 3pm on 5 February 2021 when their Calderbank offer lapsed. The plaintiff opposed any order for costs.

13. As is outlined above in the extract from the second defendant's solicitor's email of 4 February 2021, the second defendant submits that the default judgment was a nullity because service was not validly proven. In support of that submission the second defendant relied upon the authority of *Elders Finance Limited v Invaway Pty Ltd* [1991] 2 Qd R 398.

14. The second defendant further submitted given that the default judgment was a nullity and must be set aside, any defence to the application was without merit and doomed to fail. Counsel for the second defendant relied upon the authority of *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143 (unreported) for the proposition that a meritless defence amounts exceptional circumstances that permit the Court to order costs in interlocutory proceedings, despite the general rule that parties should bear their own costs.[4]

15. Counsel for the second defendant also relied upon the authority of *Greg Meyer Paving Ply Ltd v Can-Recycling (SA) Pty Ltd and Greg Meyer Paving Pty Ltd v Marine Stores Pry Limited* [2021] NTSC 16 for the proposition that the plaintiff's consent

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[2] Exhibit D1 page 1.
[3] Affidavit of Cherie Leanne Keatch sworn 28 January 2021 at paragraph 18.
[4] See Rule 38.02 *Local Court (Civil Jurisdiction) Rules 1998* and Order 63.18 of the *Supreme Court Rules 1987*.

to the setting aside of the default judgment amounted to a 'total surrender or capitulation' and that 'costs are invariably ordered in both of those instances'[5]. Counsel for the plaintiff denied that the plaintiff had conceded that the default judgment was irregular and must be set aside. Counsel for the Plaintiff's submitted that:

> MS STEPHENSON: No. An email was sent to my learned friend this morning saying that we were allowing consent as to the default judgement being set aside on the basis of the substantive application which is before the court today.
>
> The application in regards to the default judgement being irregular has only just been put before the court. In any event obviously we were put on notice that they may intend to make this application but it didn't form part of the substantive application which is before the court.
>
> But we reviewed that the substantive application, my client did too. She's been through these sort of processes before. As the default judgement she's aware they generally are set aside so on that basis she allowed it to be set aside.
>
> In any event - - -
>
> THE REGISTRAR: So your client doesn't accept or concede that default judgement was irregular?
>
> MS STEPHENSON: It may be that that's the case. Quite honestly she hasn't been able to really turn her mind to it. It has been such a timeframe. But in any event on our advice she has accepted that the default judgement be set aside on consent.

16. Pursuant to Rule 38.03 *Local Court (Civil Jurisdiction) Rules 1998* the question of costs remains entirely at the discretion of the Court. However, due to Order 63.18 of the *Supreme Court Rules 1987*, the Court should not order costs in interlocutory

[5] *Greg Meyer Paving Ply Ltd v Can-Recycling (SA) Pty Ltd and Greg Meyer Paving Pty Ltd v Marine Stores Pry Limited* [2021] NTSC 16 at 16.

proceedings unless there is "*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*"[6].

17. Accordingly, the question to resolve is whether there are 'exceptional circumstances' which would justify the making of a costs order.

Was the default judgment a nullity?

18. Counsel for the second defendant submitted on a number of occasions that the default judgment was a nullity or invalid because the affidavit of service filed in accordance with Rule 11.02 of the *Local Court (Civil Jurisdiction) Rules 1998* relied upon hearsay evidence. The affidavit of service was attested by a solicitor for the plaintiff who annexed a letter from the process server confirming that service had been affected on the second defendant.

19. I disagree with this submission. There was a time in the middle of the last century when the common law rendered some fundamental irregularities as a nullity, such as when proceedings were not served on a defendant at all.[7] However, in response to this developing approach, amendments were made to the *Rules of the Supreme Court of England and Wales*[8] to provide that non-compliance with rules did not render proceedings a nullity but rather irregular and that the Court retained the discretion to set aside. This change was made in response to cases such as *In Re Pritchard* [1963] 1 Ch 502.

20. When considering these new rules in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Denning MR said at 735:

> This rule should be construed widely and generously to give effect to its manifest intentions. I think that any application to the court, however informal, is a 'proceeding'. There were 'proceedings' in being at the very moment that the plaintiff made his affidavit and

[6] *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143 at 145.
[7] See *Craig v Kanssen* [1943] 1 KB 256; *Cameron v Cole* (1944) 68 CLR 571; *In Re Pritchard* [1963] 1 Ch 502.
[8] *RSC* O 2 rr 1 and 2.

> his solicitor lodged it with the registrar ... This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

21. Similar rules were introduced in Australia and they are now found in most court rules. Relevantly, Rule 2.01 of the *Local Court (Civil Jurisdiction) Rules 1998* (NT) provides:

> **2.01 Effect of non-compliance**
>
> (1) A failure to comply with these Rules is an irregularity and does not nullify proceedings or a step taken, document used or order made in the proceedings.
>
> (2) Subject to rules 2.02 and 2.03, where there is a failure to comply with these Rules, the Court may:
>
> (a) set aside the proceedings, either wholly or in part;
>
> (b) set aside a step taken, document used or order made in the proceedings; or
>
> (c) exercise its powers under these Rules to allow amendments and make orders dealing with the proceedings generally.

22. A similar rule is found in Rules 2.01 of the *Supreme Court Rules 1987* (NT). When the Northern Territory Supreme Court was dealing with an application to set aside due to irregularity in the matter of *Australian Guarantee Corporation Ltd v Francis & Anor* [1995] NTSC 20 (24 February 1995), Justice Thomas found at 23:

> .....Counsel for the appellant argues that the irregularity does not invalidate the proceedings under rule 2.01. I agree that irregularity does not invalidate the proceedings. In particular an irregularity does not render a judgment a nullity. However, if an irregularity is established by the respondents on the balance of probabilities, then that is a ground to set judgment aside.

23. Counsel for the second defendant also submitted that the default judgment was 'invalid' and relied upon *Elders Finance Limited v Invaway Pty Ltd* [1991] 2 Qd R 398 as the authority for the proposition that that hearsay evidence is not permitted in order to prove service of a claim for the purposes pertaining to default judgment because default judgment constitutes final relief. In that matter the plaintiff had relied upon an affidavit of service from a solicitor deposing to a conversation she had with the person who had served the documents on the defendant's solicitors. The defendant's solicitor had also endorsed the writ confirming that he accepted service on behalf of the defendant.

24. In *Elders Finance Limited v Invaway Pty Ltd*, Senior Master Horton Q.C. found that the "*entry of judgment by default on a specifically indorsed writ was a proceedings for final relief and hence, it was not open to the plaintiff to rely upon a hearsay affidavit of service*."[9] The Master also found that despite the relevant rules deeming that service was effected if a solicitor so endorsed the writ, the indorsement in itself was not sufficient evidence that service had been duly carried out.[10] In applying this strict approach, the Master referred to the authority of *Ezi-Frame Ply Lid v. Al-Cote (Australia) Pty Ltd* [1982] Qd. R. 602 at 611, in which that Court held:

> It is well settled that where judgment is entered upon default, the rules must be strictly complied with. This principle has been established in a long line of cases: *Galli v Mongruel* (1865-6) I. L. R. C. P. 46; *Anlaby v. Praetorius* (1888) 20 Q. B. D. 764; *Hamp- Adams v. Hull* [1911] KB. 942, at p. 945 (where Buckley L.J. said that a party who desires to proceed on default must follow the rules strictly; it is a matter *strictissimi juris*); *Vosmaer v. Sprinks* [1964] Q.W.N. 36; *Pioneer Concrete (North Coast) Pty, Ltd v. Bennett* [1972] Qd. R. 544.

25. For the reasons outlined below, the authorities of *Elders Finance Limited v Invaway Pty Ltd* (supra) and *Ezi-Frame Ply Lid v. Al-Cote (Australia) Pty Ltd* (supra) are no longer consistent with the contemporary approach in both Australia and the UK as both the common law and statutes have evolved in recent decades.

[9] At 399.
[10] At 400.

26. Whilst it is well settled that there should be strict compliance with the rules when orders are sought in default, the Court still retains the discretion to decide whether or not an order is to be set aside. It is true that the common law approach for a long time has been that an irregularly obtained default judgment should be set aside *ex debito justitiae* regardless of whether the defendant has an arguable defence. However, with the introduction of Court rules such as Rule 2.01 of the *Local Court (Civil Jurisdiction) Rules 1998*, the Court now has a legislated power to remedy an irregularly obtained order. Indeed, even the common-law has moved away from the approach taken in the older cases. This evolution of the common-law was considered by the Supreme Court of Western Australian in *ACN 076 676 438 Pty Ltd (In Liq) & Anor -V- A-Comms Teledata Pty Ltd & Anor* [2000] WASC 214. In this case at 17 and 18 Justice Parker said:

> 17. It has been long established that where a judgment in default has been entered irregularly, ie without proper compliance with the Rules, or has been obtained in breach of good faith, it will be set aside; *Hughes v Justin* [1894] 1 QB 667; *Alliance Acceptance Co Ltd v Makas* (1976) 12 ACTR 19; *Daly v Silley* [1960] VicRp 57; [1960] VR 353. In such a case the Court is not obliged to enquire whether or not there is a good defence on the merits; *Anlaby v Praetorius* (1888) 20 QBD 764; *Alexander v Ajax Insurance Co Ltd* [1956] VicLawRp 70; [1956] VLR 436; *White v Weston* [1968] 2 QB 647; *Daly v Silley* (*supra*); *Acclaim Holdings Pty Ltd v Vlado* [1989] 1 WAR 128. The authorities recognise that in some circumstances those statements are to be qualified, as where the irregularity has been waived or results from an accidental omission which can be corrected, eg as to the precise amount for which the judgment is entered; *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Habib Bank Ltd* [1998] 4 All ER 753; *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VicRp 53; [1977] VR 463. Neither of those circumstances have application in the present case.
>
> 18. Some more recent decisions suggest that not every irregularity in the means by which a judgment in default is obtained will necessarily entitle the defendants to have the judgment set aside as of right. I was referred in particular to *Australian and New Zealand Banking Group Ltd v Kostovski*, unreported; SCt of Vic (Chernov J); No 5511 of 1997; 2 July 1997, (BC 97032660) where the writ contained two endorsements which breached the Rules and *Commonwealth Bank of Australia v Buffett* (1993) 114 ALR 245 where the writ had an incorrect endorsement as to service and stated that an appearance must be entered within 8 rather than 9 days of service. In both of these cases the writ was issued out of the Registry and served. In each case, the irregularity had not caused any prejudice to the

> defendant and did not lead to the defendant changing his position in any way or otherwise cause any injustice. In such circumstances the judgments were not set aside. In *National Australia Bank Ltd v Meehan*, unreported; SCt of Vic Appeal Division (Ormiston and O'Bryan JJ); No 8407 of 1993; 24 February 1994; (BC 9400980), the absence of the number of the proceeding from the service copy of the originating process was held to be merely a technical defect not producing an irregular judgment, although in contrast in *Sargent v Veneris*, unreported; SCt of Vic (Beach J); No 1303/1995; 20 December 1995; (BC 9507179) a failure to duly prove service of the originating process by omitting to exhibit a sealed copy of that process to the affidavit of service was held to be an irregularity which entitled the defendant to have the default judgment set aside. I was also referred to the observations of the Court of Appeal in *Perry v Wong* [1996] EWCA Civ 1031; [1997] 1 WLR 381 at 388 that, in this context, procedural irregularities vary greatly in significance and the discussion in *Farrow Mortgage Services Pty Ltd (in liq) v Victor Tunevitsch Pty Ltd & Ors*, unreported; SCt of Tas (Crawford J); No 1383 of 1993; 8 July 1994; (BC 9400421) at 4.

27. This shift in the common law has also occurred in the UK with decisions such as the English Court of Appeal in *Faircharm Investments Ltd v Citibank International plc* [1998] EWCA Civ 171. In this matter Sir Christopher Staughton found and the other Lord Justices agreed:

> It is now accepted that the judgment is irregular. Furthermore, it is submitted on behalf of Citibank that the error involved, in entering judgment in default of defence before the time for service of defence had even begun, was so fundamental that no exercise of the court's discretion could uphold the judgment. In support of that we were referred to an unreported decision of Russell LJ and Hollis J in this court in *Charlesworth v Focusmulti Ltd*, (17th February 1993). That decision has been criticised; it is said that it was based on the old law to be found in *Anlaby v Pretorius* (1888) 20 QB 764 and *In re Pritchard* (1963) Ch 502, and not on the revised Ord.2,r.6 and *Harkness v Bell's Asbestos and Engineering Ltd* (1967) 2 QB 792.
>
> However that may be, I am impressed by what both the deputy master and the judge said, that if Citibank are bound to lose on a subsequent application for summary judgment, it would be pointless to set aside the existing judgment. *Lex non cogit ad inutilia.* I would not go so far as to say that no irregularity could be so fundamental that the judgment in such a case would have to be set aside, whatever the other circumstances. But if indeed Citibank would be bound to lose I do not, in the circumstances of this case, consider that there is such a degree of fundamental error to require that the

> judgment be set aside. After all the tortured misunderstanding on both sides in this case and the regrettable imprecision in the pleading and court documents, it is time that justice is done once and for all in relation to this sum of £7,788.99. As was said over 100 years ago, "We are not here to punish people for their mistakes in procedure but to do justice."
>
> [emphasis added]

28. *Faircharm Investments Ltd v Citibank International plc* (supra) has now been followed in Australia in more recent cases such as *Commonwealth Bank of Australia v Kilpatrick* [2013] NSWSC 169 at 14; *RHG Mortgage Corporation Limited (formerly known as RAMS Mortgage Corporation Limited) v Cvetkovski* [2015] NSWSC 753 at 12 and *Cusack v. De Angelis* [2007] QCA 313 at 34.

29. In applying *Faircharm Investments Ltd v Citibank International plc* (supra), in *Cusack v. De Angelis* (Supra), Muir JA (with whom Lyons J agreed) found at 34:

> That decision is consistent with the contemporary approach of applying rules of practice and procedure, whether statutory or developed under the common law, not rigidly and with undue technicality, but with regard to considerations of cost, expedition, utility and justice.

30. The 'old law' referred to by Sir Christopher Staughton in *Faircharm Investments Ltd v Citibank International plc* (supra) included the matter of *Anlaby v Pretorius* (1888) 20 QB 764. It was these old authorities that the Court relied upon in *Ezi-Frame Ply Lid v. Al-Cote (Australia) Pty Ltd* (supra) and, as is outlined above, those authorities were followed by the Senior Master Horton Q.C in *Elders Finance Limited v Invaway Pty Ltd* (supra). Accordingly, the cases relied upon by counsel for the second defendant are not consistent with rule 2.01 of the *Local Court (Civil Jurisdiction) Rules 1998* or the more recent authorities in the UK and Australia.

31. The more contemporary approach appears to be that orders made by default which are irregular are not void or a nullity. The Court has the discretion to set aside, vary or amend the order. How the Court should exercise that discretion depends on a number of factors. For example, if the irregularity is so fundamental that it would cause an injustice, then the order should be set aside *ex debito justitiae*. For example, if a defendant hasn't been properly served with a process. On the other hand, where the irregularity is not fundamental and no injustice would be caused, the Court may remedy the irregularity. Examples of the latter include incorrect dates, or stamps on documents issued by the Court. Other examples of such cases were referred to by Justice Parker in *ACN 076 676 438 Pty Ltd (In Liq) & Anor -V- A-Comms Teledata Pty Ltd & Anor* [2000] WASC 214 at 17 and 18 (as extracted at paragraph 26 above).

32. The relevance of these matters to the second defendants application for costs is that it is submitted that the plaintiff's defence was without merit and doomed to fail because the Court had no option but to set aside the default judgment *ex debito justitiae* because it was irregular[11]. Accordingly, there are two questions to be considered. Was the default judgment irregular and if so, whether it must be set aside *ex debito justitiae.*

Was the default judgment irregular?

33. When applying for a default judgment, the *Local Court (Civil Jurisdiction) Rules 1998* require a plaintiff to file an affidavit or declaration of service, proving service of the statement of claim on the defendant[12]. In this matter, the plaintiff did file an affidavit of service attesting to the second defendant having been served with the statement of claim. The affidavit of service was authored by Kelly Ann Stephenson, who was the solicitor for the plaintiff.

34. Given that an affidavit of service had been filed in accordance with Rule 11.02, *Local Court (Civil Jurisdiction) Rules 1998*. It was arguable that the default judgment was regular. However, a further source of irregularity may come from whether the registrar had sufficient evidence before him or her to be satisfied that service had been affected under rule 7.05 of the *Local Court (Civil Jurisdiction) Rules 1998*. The registrar had discretion to refuse to make an order by default if the evidence of service was unsatisfactory. The registrar could have ordered that the plaintiff file a further affidavit under rule 11.03(2)(a). Given that a default judgment is not an interlocutory order, hearsay evidence is not admissible[13]. The only evidence of service before the registrar was hearsay evidence. In those circumstances registrar ought not to have been satisfied that service had been affected. Accordingly, the order made was *ipso facto* irregular.

Must the irregular order be set aside *ex debito justitiae?*

35. As has been outlined above, some categories of irregular orders must be set aside *ex debito justitiae* and some can be corrected. In determining these matters, it is relevant to consider whether the irregularity had caused any prejudice to the second defendant or lead to the second defendant changing their position in any way or otherwise caused an injustice to the second defendant.[14] It was not in dispute that the second defendant had been served. The second defendant's own affidavit sworn 28 January 2021 and filed in support of the application to set

[11] *TTE Pty Ltd v Ken Day Pty Ltd* (1990) 2 NTLR 143 (unreported)
[12] Rule 11.02, *Local Court (Civil Jurisdiction) Rules 1998.*
[13] Rule 22.07, *Local Court (Civil Jurisdiction) Rules 1998.*
[14] *ACN 076 676 438 Pty Ltd (In Liq) & Anor -V- A-Comms Teledata Pty Ltd & Anor* [2000] WASC 214 at 18.

aside, concedes that service took place in July 2020.[15] It is certainly arguable that the irregularity has not caused a prejudice to the second defendant or an injustice. It is in every respect an irregularity caused by a technical defect.

36. Ordinarily an application to set aside a default judgment requires the defendant to show that they have a good defence on the merits. However, if the default judgment was irregular then, in the usual course, the defendant would not be required to discharge this onus because the order should be set aside *ex debito Justitiae*. However, there is authority for the Court refusing to set aside an irregularly obtained default judgment if the defendant has no good defence on the merits and the setting aside of the judgment would simply cause a delay. In such circumstances the Court may exercise its discretion to amend the judgment[16].

37. In this matter the plaintiff did file an interlocutory application seeking that the Court rectify the basis for the irregularity. The orders sought were:

    1. An order that personal service pursuant to r 6.03 of *the Local Court (Civil Jurisdiction) Rules 1998 (NT)* was effected on First and Second Defendant on 15 July 2020;
    2. An order that the Plaintiff has complied with the requirements prescribed in rule 11.01 and 11.02(a) of the *Local Court (Civil Jurisdiction) Rules 1998 (NT)*;
    3. In the alternative to order 2, an order pursuant with r 2.04 the *Local Court (Civil Jurisdiction) Rules 1998 (NT)* dispensing with compliance of rules 11.01 and 11.02(a).

38. Ultimately, the plaintiff consented to the order setting aside the default judgment so it was not necessary to hear and determine their interlocutory application.

39. It is not necessary for me to determine if the plaintiff's interlocutory application would have been successful or indeed whether I would have exercised my discretion to rectify the irregularity. I am only to determine if there are exceptional circumstances to justify awarding costs if I find the plaintiff's opposition to the application to set aside was without merit and doomed to fail. In this regard, I find that it was not a *fait accompli* that the judgment would be set aside *ex debito Justitiae*. Whilst it may have been likely that this would have been the case, the defence was not entirely without merit.

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[15] Affidavit of Cherie Leanne Keatch sworn 28 January 2021 at paragraph 18.

[16] *Building Guarantee and Discount Co Ltd v Dolejsi* [1967] VicRp 94*; City Mutual Life Assurance Society v Giannarelli* [1977] VicRp 53; *Gemini Property Investments v Woodards Investments* (2000) SASC 210; *Reid v Jensen* [2002] QDC 247

40. In reaching this conclusion I have also taken into consideration that this was not a case where the plaintiff led the Court to believe that service had been effected when it hadn't or where incorrect information was provided to the Court. In this matter, the source of the irregularity was the Court finding that there was satisfactory evidence of service when there was not.

41. Accordingly, I do not find exceptional circumstances or any other basis to warrant an order costs against the plaintiff in favour of the second defendant as sought. The application for Costs is declined.

ORDERS

1. In relation to the Part 36 Application filed by the second defendant there is no order as to costs.

Dated this 12th day of April 2021

Judicial Registrar Norrington
LOCAL COURT