MAGISTRATES COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Bektas & Anor v M and D Investments (ACT) Pty Ltd**
Citation:	**[2019] ACTMC 35**
Hearing Date:	2 October 2019
Decision Date:	27 November 2019
Before:	**Special Magistrate McCarthy**
Decision:	See [99].
Catchwords:	**PRACTICE AND PROCEDURE** – application to set aside default judgment – default judgment set aside by consent – costs – whether 'general rule' should apply that party seeking to set aside default judgment should pay the costs of the other party – application for default judgment made without warning – whether default judgment was irregularly obtained – whether mere technical error constitutes default judgment irregularly obtained – incorrect description of claim as a liquidated demand – meaning of liquidated demand – default judgment for specified amount wrongly obtained – application to set aside not seeking indulgence of the Court – default judgment should never have been signed – plaintiffs to pay defendant's costs of the application
Legislation Cited:	*Building Act 2004* (ACT) s 151 *Corporations Act 2001* (Cth) s 109X *Court Procedures Rules 2006* (ACT) rr 102, 1118, 1119, 1120, 1121, 1128, 6256, 6467
Cases Cited:	*Abbey Panel & Sheet Metal Co Ltd v Barson Products* [1948] 1 KB 493 *Arnold v Forsythe* [2012] NSWCA 18 *Australia & New Zealand Banking Group Ltd v Kostovski* (Supreme Court of Victoria, Chernov J, 2 July 1997) *Bushby v Mackenzie* (1919) 19 SR (NSW) 104 *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 *Commonwealth Bank of Australia v Buffet* (1993) 114 ALR 245 *Cusack v Angelis* [2007] QCA 313; [2008] 1 Qd R 344 *Davies v Pagett* (1986) 10 FCR 226 *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26; 19 VR 358 *Ezekiel-Hart v Law Society of the Australian Capital Territory* [2012] ACTSC 103

	French v McKenna (No 2) [2012] TASSC 8
	French v Triple M Melbourne Pty Ltd [2006] VSC 36
	Fullinfaw v Neil Fletcher Design Pty Ltd [2019] VSC 142; 57 VR 169
	Hogg v J Isherwood-Hicks Pty Ltd (1992) 108 FLR 262
	Hunter Valley Developments Pty Ltd v Cohen [1984] FCA 176; 3 FCR 44
	Kostokanellis v Allen [1974] VR 596
	Pope v Aberdeen Transport Co Pty Ltd [1965] NSWR 1550
	Sargent v Veneris (Supreme Court of Victoria, Beach J, 20 December 1995)
	St George Bank Limited v O'Reilly [1999] ACTSC 21; 150 FLR 27
	Stormer Building Group Pty Ltd v Johnson [2014] ACTSC 23
Parties:	Can Bektas (First Plaintiff)
	Amanda Bektas (Second Plaintiff)
	M and D Investments (ACT) Pty Ltd trading as At Home Building Maintenance (Defendant)
Representation:	**Counsel**
	M Mascitti (Plaintiffs)
	J Ronald (Defendant)
	Solicitors
	Kamy Saeedi Law (Plaintiffs)
	Colquhoun Murphy Lawyers (Defendant)
File Number(s):	CS 65 of 2019

SPECIAL MAGISTRATE McCARTHY:

1. This application raises the question of who should pay costs, and why, when a default judgment is set aside. I first note the essential background.

2. On 17 December 2015, the plaintiffs contracted with the defendant for it to construct a house. They agreed on a price of $395,000. On 20 March 2017, a certifier issued a certificate of completion of building work in relation to the house pursuant to s 151 of the *Building Act 2004* (ACT).

3. By letter dated 4 May 2017, the plaintiffs issued the defendant with a written list of defects regarding the defendant's construction work. The parties fell into dispute regarding the defects.

4. The plaintiffs engaged Kamy Saeedi Law, lawyers, to act for them in relation to their claim against the defendant. Mr Barrington-Smith acted for the plaintiffs in relation to

the matter. The defendant engaged Colquhoun Murphy, lawyers, to act for it in response to the claim. Ms Teys, and others, acted for the defendant.

5. By letter dated 20 June 2017, Colquhoun Murphy wrote to Kamy Saeedi Law confirming that they act for the defendant. Between 20 June 2017 and 24 September 2018, the respective solicitors corresponded in an effort to resolve the dispute, but without success. The correspondence from Mr Barrington-Smith included a Scott Schedule itemising the alleged defects.

6. By letter dated 21 September 2018, Mr Barrington-Smith wrote to Colquhoun Murphy detailing his clients' position regarding the dispute. He stated that "your client remains unresponsive to the bulk of the claims as articulated in previous correspondence including in the scott schedule". He stated "there appears to be little utility in engaging in further correspondence". He concluded by asking Colquhoun Murphy whether it "could kindly confirm by 28 September 2018 whether your office is able to accept service on behalf of your client".

7. On 15 November 2018, Mr Barrington-Smith rang Ms Teys. They discussed Mr Barrington-Smith's letter dated 21 September 2018. In her affidavit affirmed 2 July 2019, Ms Teys states, and I accept, that she told Mr Barrington-Smith that Colquhoun Murphy "would accept service of any pleadings on our client's behalf". Ms Teys annexed a contemporaneous file note in which she noted Mr Barrington-Smith's advice that Kamy Saeedi Law was "in the process of drafting proceedings", to which she replied "we were happy to accept service".

8. On 11 April 2019, the plaintiffs filed an originating claim against the defendant. It identifies the "nature" of the plaintiffs' claim as "debt or liquidated demand". The plaintiffs claimed $188,923.11 "in liquidated damages from the defendant or as otherwise assessed" and pre-judgment interest.

9. The accompanying statement of claim pleads facts about the alleged defective work and refers to a Scott Schedule.

10. On 8 April 2019, the plaintiffs filed a Scott Schedule itemising 182 items of alleged defective work. In relation to each item, the Scott Schedule identifies the "particulars item claimed", the "amount claimed", "comments" about the claim and "remediation" proposed. Then, under the heading "party responding to claim", the schedule makes provision for "particulars of answer to item claimed" and "amount agreed to". An addition of the amounts claimed by the plaintiffs in the Scott Schedule produces a total of $188,923.11.

11. I will refer to the plaintiffs' originating claim, the statement of claim and the Scott Schedule collectively as the plaintiffs' "originating documents".

12. In an affidavit affirmed 31 May 2019, Mr Barrington-Smith states that on 8 April 2019 he obtained the defendant's registered company office and registered place of business from the ASIC Registry. Both were a residential address in Crace, ACT.

13. Mr Barrington-Smith then states in his affidavit that on or about 16 April 2019, he "served, by way of post," the plaintiffs' originating documents. He states that he did so under cover of a letter dated 16 April 2019, signed by him. Mr Barrington-Smith annexed his letter to his affidavit.

14. Why Mr Barrington-Smith sent the plaintiffs' originating documents to the defendant's registered address, rather than to Colquhoun Murphy, has never been explained. In my view, it called for an explanation in circumstances where Colquhoun Murphy had been acting for the defendant for approximately 15 months and where Ms Teys had told Mr Barrington-Smith that Colquhoun Murphy was "happy to accept service" of any commencing proceedings.

15. At hearing, Mr Mascitti, solicitor with Kamy Saeedi Law appearing for the plaintiffs, could offer only that it may have been "overlooked".[1] He offered "[i]f I had [had] carriage of the matter at this point in time it may have been different. I didn't".[2]

16. Mr Barrington-Smith states in his affidavit that as at 31 May 2019 his clients had not received any payment from the defendant. He sought default judgment for the amount claimed ($188,923.11), plus interest ($6,380.80) plus costs including the Court filing fee ($2,942.00).

17. There is no suggestion that Mr Barrington-Smith enquired of Colquhoun Murphy about whether they had received the plaintiffs' originating documents or when the defendant intended to file a defence, or that he told them of the plaintiffs' intention to apply for default judgment.

18. Again, why Mr Barrington-Smith did not do any of these things has never been explained. Mr Mascitti offered only "I agree that it would [have been] sensible, and if I had [had] carriage of the matter at that point in time, it may have been different. And that's not what occurred".

19. As to whether it should have occurred, Mr Mascitti replied "No, I don't accept that it should have. It could have".[3]

20. On 6 June 2019, in circumstances where the defendant had not filed a notice of intention to respond, the Court entered default judgment for the plaintiffs for $188,923.11, plus interest of $6,380.80 and costs of $2,942.00.

21. On 20 June 2019, Mr Mascitti sent an email to Mr Salloum, the sole director of the defendant, attaching a letter from Mr Mascitti dated 20 June 2019 informing Mr Salloum that the plaintiffs had commenced proceedings against the defendant by originating claim dated 11 April 2019 and had served their claim pursuant to s 109X of the *Corporations Act 2001* (Cth) by posting it to the defendant's registered office. The letter noted that, pursuant to rule 102 of the *Court Procedures Rules 2006* (ACT) (**the Rules**), the defendant was required to file a defence within 28 days of being served with the claim, and had failed to do so. The letter then states that the plaintiffs instructed Kamy Saeedi Law to apply for default judgment, and that on 6 June 2019 default judgment was entered against the defendant. Mr Mascitti attached a copy of the default judgment.

22. Mr Mascitti stated in his letter "We hereby demand you pay the sum of $188,923.11 within 28 days". He provided Kamy Saeedi Law's trust account details into which he asked the money be paid.

23. The letter concluded with the following statement:

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[1] Transcript of Proceedings, 2 October 2019, page 34, lines 25–41.
[2] Transcript of Proceedings, 2 October 2019, page 35, lines 5–6.
[3] Transcript of Proceedings, 2 October 2019, page 36, lines 1–43.

> In the event that you do not pay the judgment sum within 28 days we will proceed to take enforcement action against you and presume you are unable to pay your debts as and when they fall due.

24. It appears clear from the concluding sentence that the plaintiffs were putting the defendant on notice that they would make a statutory demand under the *Corporations Act*, being a precondition to taking action to wind up the defendant, if the sum owed under the default judgment was not paid in 28 days.

25. Ms Teys states that she did not receive any correspondence from Kamy Saeedi Law between 15 November 2018, when she spoke with Mr Barrington-Smith, and 19 June 2019. It appears clear that Colquhoun Murphy knew nothing about the plaintiffs commencing proceedings against the defendant or about their application for (and obtaining of) default judgment until Mr Salloum sent an email to them on 20 June 2019 forwarding Mr Mascitti's email and letter dated 20 June 2019 that he had received earlier that day.

26. By letter dated 20 June 2019, Colquhoun Murphy wrote to Kamy Saeedi Law stating their "surprise" to find that the plaintiffs had commenced proceedings and obtained default judgment without notice to Colquhoun Murphy. Ms Teys stated that they intended to file an application for the default judgment to be set aside, and invited the plaintiffs to consent. Ms Teys also requested a copy of the plaintiffs' originating process so that she could take instructions about it from the defendant.

27. By letter dated 25 June 2019, Mr Mascitti sent a copy of the plaintiffs' originating documents and Mr Barrington-Smith's affidavits in support of the application for default judgment to Ms Teys. Regarding Colquhoun Murphy's request for the plaintiffs to consent to an order that the default judgment be set aside, Mr Mascitti stated:

> Our clients are unable to consider the merits of your client's foreshadowed application until a draft defence has been provided.

28. On 2 July 2019, the defendant applied for the default judgment to be set aside. It did so on many grounds, including:

    (a) The plaintiffs' originating process never came to the notice of the defendant. In this respect it relied on an affidavit of Mr Salloum, the sole director of the defendant, sworn on 2 July 2019 that he never received the originating process and had no knowledge of it until 20 June 2019 when he received the email from Kamy Saeedi Law attaching a copy of the Court's default judgment.

    (b) The plaintiffs, via their solicitors, knew that Colquhoun Murphy had been acting for the defendant in relation to its dispute with the plaintiffs for a long period and had told Mr Barrington-Smith that it had instructions to accept service of any originating process.

    (c) The plaintiffs knew, before commencing proceedings, that the defendant denied liability and failed to enquire of the defendant or its solicitor about whether it intended to defend the proceedings.

29. The defendant's application was listed for hearing on 10 July 2019. Having regard to Mr Mascitti's letter dated 25 June 2019 and that the defendant had not filed a defence, Colquhoun Murphy reasonably understood that the application would be opposed and prepared accordingly. However, at the 11th hour, the plaintiffs consented to the defendant's application. Page 2 of the transcript of the proceeding before the

Deputy Registrar on 10 July 2019 records Ms Fogarty, solicitor for the defendant, stating "[m]y friend just told me outside that he will now consent to it being set aside".[4]

30. Lengthy submissions then followed about who should pay the costs of the defendant's application. The Deputy Registrar ordered that the defendant pay the plaintiffs' costs of and incidental to the application. The defendant appealed.

The appeal

31. The defendant appeals from the Deputy Registrar's decision pursuant to rule 6256 of the Rules. Pursuant to rule 6256(4), "the appeal is a rehearing of the matter anew". This means, as the parties accepted, that my role was to hear and determine afresh, or *de novo*, the defendant's application for the default judgment to be set aside.

32. Mr Ronald of counsel appeared for the defendant. Mr Mascitti appeared for the plaintiffs. There was no suggestion that I should do otherwise than order that the default judgment be set aside. Submissions were only on costs.

33. Mr Ronald submitted that I should not follow what is sometimes called the 'general rule' that where a party seeks an indulgence of the Court, and in this case the setting aside of the default judgment, the party seeking that indulgence (if granted) should pay the costs of the other party.

34. Mr Mascitti submitted that the defendant should pay the plaintiffs' costs or, in the alternative, there should be no order as to costs.

35. Mr Ronald began with reliance upon a decision of Beach J of the Victorian Supreme Court in *Sargent v Veneris* ('*Sargent*'),[5] where his Honour dismissed an appeal against an order to set aside a default judgment that was irregularly obtained. His Honour stated:

> There is no obligation upon a solicitor acting for a plaintiff in an action to ask solicitors he well knows act for the defendant and will undoubtedly be instructed to act in the proceedings to accept service of the writ on behalf of the defendant. If for reasons of his own a plaintiff's solicitor considers it more appropriate have the writ served on the defendant, so be it. Nor is there any obligation upon a plaintiff's solicitor to warn a defendant solicitor of his intention to enter judgment in default of appearance. But if he does those things, then in my opinion every step taken by the plaintiff in the proceedings must strictly comply with the rules.

36. Mr Ronald then contended that the plaintiffs' solicitor obtained default judgment without compliance with the Rules.

37. He submitted that the originating process wrongly identified the plaintiffs' claim as a claim for a "debt or liquidated demand", with the consequence that a process under the Rules for obtaining default judgment for a stated amount in relation to a claim for a debt or liquidated demand was wrongly used.

38. Mr Ronald also submitted that the plaintiffs' solicitor, in two respects, failed to comply with the Rules regarding service of the application for default judgment on the defendant. In this respect, Mr Ronald relied on rule 1118 of the Rules, which provides that an application for default judgment must be accompanied by the "relevant affidavits", one of which, pursuant to rule 1119, is an affidavit of service of the

[4] Transcript of proceedings, 10 July 2019, page 2, lines 45–46.
[5] (Supreme Court of Victoria, Beach J, 20 December 1995).

originating claim. Rule 6467 sets out the manner in which service of a document may be proved. Mr Ronald submitted that Mr Barrington-Smith's affidavits did not comply with rule 6467.

39. First, he noted that rule 6467(1)(a) provides that service of a document may be proved by affidavit of service "made by the person who served the document". In this case, the documents were served by post. Mr Barrington-Smith deposes that "[o]n or about 16 April 2019, I served, by way of post the Originating Claim, Statement of Claim and Scott Schedule on the defendant". Mr Ronald submits that that is, apparently, not true. He refers to an affidavit of Ms Bryant, an administrative assistant at Kamy Saeedi Law, affirmed on 27 September 2019, in which she states the "usual process" with respect to Kamy Saeedi Law sending documents by post and her belief that "I would have followed the usual practice" in relation to the documents sent to the defendant on or about 16 April 2019.

40. Second, Mr Ronald submitted that Mr Barrington-Smith's affidavits were defective in that they stated that the originating documents were "served, by way of post", but failed to state that they were sent "by prepaid post", as required under rule 6467(3)(a).

41. Mr Ronald relied also on the circumstances in which default judgment was obtained. He referred to the fact that the defendant was legally represented at the time the plaintiffs commencing proceedings (and had been for an extensive period beforehand) and continued to be legally represented at the time the plaintiffs' applied for default judgment. He relied on the fact that Colquhoun Murphy had advised Kamy Saeedi Law that they would accept service of any originating process, yet Kamy Saeedi Law did not take that pathway to effect service or tell Colquhoun Murphy that service had been effected by post sent to the registered address of the defendant. Mr Ronald relied on the absence of any warning of an intention to apply for default judgment. He relied also on the plaintiffs' conduct of not consenting to the default judgment being set aside until the day upon which the application was listed for hearing before the Deputy Registrar.

42. I turn to the plaintiffs' case.

43. Mr Mascitti submitted that the default judgment was regularly obtained.

44. On the question of service of the plaintiffs' originating documents, he submitted (and I accept) that the plaintiffs were entitled to serve the first defendant by prepaid post sent to its registered office. Mr Mascitti would not concede that there was anything inappropriate about serving the plaintiffs originating documents in that manner, rather than serving it on the defendant's solicitor, although conceding it may have been different if he had had carriage of the matter. He suggested that service on Colquhoun Murphy may have been "overlooked".

45. Regarding the need for an affidavit from "the person who served the document[s]", Mr Mascitti accepted that Mr Barrington-Smith's affidavit "does say he was the one who served the documents", and contended that Ms Bryant stated in her affidavit only the office processes that she reviewed in order to state that the letter and document was sent to the defendant. He submitted "it does not say that she sent it". Mr Mascitti

contended that Ms Bryant's affidavit said, "I've viewed our records and I can see that it was in fact sent".[6]

46. Regarding the need for the supporting affidavit to state that the document was sent by "prepaid" post in compliance with rule 6467(3)(a), Mr Mascitti submitted that it was "something that can be inferred". He agreed that it was an irregularity "on the face of it", but submitted that it was a technicality. He submitted that "mere technicalities such as this can be disregarded, and they do not render [a] judgment irregular". He submitted that "the omission of one single word, being 'prepaid', should not mean that the plaintiff is required to pay the defendant's costs of the application".

47. Mr Mascitti submitted that I should reject Mr Ronald's submission that the defendant was obliged to apply for the default judgment to be set aside, after receiving Mr Mascitti's letter dated 25 June 2019. He relied on Colquhoun Murphy's letter to Kamy Saeedi Law dated 20 June 2019, which, he said, stated that they would be making an application to set aside the default judgment in seven days "regardless of whether we consent[ed] or not".[7]

48. Mr Mascitti defended his response in his letter dated 25 June 2019, stating that the defendant needed "to establish a defence on the merits".[8] He submitted that in order for a default judgment to be set aside, a defendant "is still required to satisfy the Court that they have a reasonable defence on the merits". When I asked whether the plaintiffs were "putting the defendant to the proof that they had a defence on the merits", Mr Mascitti stated "[o]n 25 June, that was the position". He submitted that plaintiffs had concerns about the solvency of the defendant, and that by requiring a defence to be filed, it would show that the defendant was "genuinely taking part in the proceedings, rather than taking - simply biding time".[9]

49. In support of his submissions, Mr Mascitti relied on a decision of the Supreme Court of Victoria, per Chernov J, in *Australia & New Zealand Banking Group Ltd v Kostovski* ('*Kostovski*'),[10] in which his Honour stated that "it is no longer the law (assuming that it ever was law) that merely because the judgment was irregularly obtained, the defendant is entitled as of right to have the judgment set aside". His Honour referred to other decisions in which courts have concluded that a technical defect did not, in the case in question, produce an irregular judgment.

50. Mr Mascitti also drew on a reference by Chernov J to *Kostokanellis v Allen* [1974] VR 596 at 604–7, in which the Court in that case stated that a default judgment will not be set aside unless the defendant was able to show there was an arguable defence to the claim or some possibility that a defence may succeed.

51. Mr Mascitti also referred to a decision of the Queensland Court of Appeal, per McMurdo P, in *Cusack v Angelis* [2007] QCA 313; [2008] 1 Qd R 344 in which her Honour noted a court's ability to amend a default judgment that had been irregularly obtained. Her Honour noted the:

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[6] Transcript of proceedings, 2 October 2019, page 28, lines 1–13. Ms Bryant's affidavit does not contain those words, but Mr Mascitti gives a reasonable summary of paragraph 5 of her affidavit.
[7] Transcript of proceedings, 2 October 2019, page 31, lines 15–16.
[8] Transcript of proceedings, 2 October 2019, page 31, lines 41–42.
[9] Transcript of proceedings, 2 October 2019, page 32, line 33 – page 33, line 2.
[10] (Supreme Court of Victoria, Chernov J, 2 July 1997).

> 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.

52. On the question of costs, Mr Mascitti relied on the 'general rule' that a successful applicant (in this case, the defendant) should pay the costs of the respondent (in this case, the plaintiffs) to an application to set aside a default judgment. In this respect, he relied on a decision of the Supreme Court of Tasmania, per Holt AsJ, in *French v McKenna (No 2)* [2012] TASSC 8, referring in turn to the decision of Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 176; 3 FCR 44.

53. In support of his submission in the alternative that there be no order as to costs, Mr Mascitti relied on a decision of Buckley LJ, sitting as the Court of Appeal, King's Bench Division in *Hamp-Adams v Hall* [1911] 2 KB 942, in which his Honour stated at 945 that "it is clear that the proceedings have been wrong throughout. There are two parties to blame. The plaintiff ought not to have signed judgment. But further there must have been a slip in the offices of the Court". His Honour stated that "[w]here a plaintiff proceeds by default every step in the proceedings must strictly comply with the rules".[11] Where that had not been done, he concluded that "this judgment must be set aside. I agree that in the circumstances there ought to be no costs of the proceedings".[12]

Consideration

54. Where I am required under rule 6256(4) of the Rules to consider the matter "anew", I start with the application to set aside the default judgment. The power to do so lies in rule 1128 of the Rules, which empowers the Court to "amend or set aside a judgment entered under this division, and any enforcement of it".

55. As noted by Master Mossop (as his Honour then was) in *Stormer Building Group Pty Ltd v Johnson* [2014] ACTSC 23 ('*Stormer*'), the Court's discretion under rule 1128 is unconditional. However, as his Honour noted, there are recognised principles to guide the Court when deciding how to exercise the discretion. Drawing on the Full Court of the Federal Court of Australia's decision in *Davies v Pagett* (1986) 10 FCR 226 and Refshauge J's decision in *Ezekiel-Hart v Law Society of the Australian Capital Territory* [2012] ACTSC 103 ('*Ezekiel-Hart*'), his Honour noted at [11] those principles which are, in summary:

    (a) The length of the delay between the time for delivery of defence and the date of default judgment.

    (b) The length of the delay between the entering of default judgment in the application to set it aside.

    (c) The reasons for the delay, particularly where the defendant (contrasted with the defendant's legal advisers) contributed to the delay.

    (d) The evidence as to whether the defendant may have a defence.

    (e) Whether the plaintiff will be prejudiced by setting aside the default judgment, particularly whether that prejudice cannot be adequately compensated by a costs order.

[11] *Hamp-Adams v Hall* [1911] 2 KB 942 at 945.
[12] *Hamp-Adams v Hall* [1911] 2 KB 942 at 945.

(f) Whether the party who applied for and obtained default judgment did so without giving warning of its intention to do so, particularly where a defence on the merits is disclosed.

56. Sometimes, the application of these principles to the facts of a case raise difficult questions as to whether a default judgment should be set aside. *Stormer* is such a case. *Kostovski*, on which Mr Mascitti relied, is another.

57. The Court's discretion to order costs is also unconditional. However, in the case of an application to set aside a default judgment, in my view the discretion ought to be exercised not only by reference to the outcome of the application but also by reference to the facts and circumstances giving rise to the application.

58. In most cases, it can be properly said that a plaintiff has acted reasonably in its dealings with a defendant leading up to the plaintiff obtaining default judgment, and that the default judgment was regularly obtained. That situation underpins the following statement of his Honour Master Mossop in *Stormer:*

> Generally speaking, in an application such as this, the party seeking to set aside the default judgment is seeking an indulgence and the usual order would be that the moving party pays the cost of the application and the costs thrown away by reason of the setting aside of the default judgment.[13]

59. However, as his Honour implicitly stated, it does not necessarily follow that a party who successfully applies for a default judgment to be set aside must pay the other party's costs of the application and costs thrown away. Each case turns on its facts.

60. I refer also to *French v McKenna (No 2)* on which Mr Mascitti relied. Following the passage to which Mr Mascitti referred me, Holt AsJ continued at [6] as follows:

> The application of such principles, however, is not necessarily determinative. In *Norbis v Norbis* (1986) 161 CLR 513, Brennan J (as he then was) said at 537:
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> > "It is one thing to say that principles may be expressed to guide the exercise of discretion; it is another thing to say that the principles may harden into legal rules which would confine the discretion more narrowly than the Parliament intended. …"

61. In this case, in my view, the application to set aside the default judgment could not be properly characterised as seeking an indulgence of the Court. Indeed, the facts and circumstances giving rise to the default judgment make plain that it should never have been applied for and that it was irregularly obtained. I well understand why Mr Mascitti consented to it being set aside.

62. I begin with Mr Barrington-Smith's decision to serve the plaintiffs' originating documents by post sent to its registered business address, rather than serving the defendant's solicitor. Why he did so, in the face of Ms Tey stating she had instructions to accept service, was not explained. Mr Mascitti suggested it may have been "overlooked", but I struggle with that possibility. Assuming, by "overlooked", Mr Mascitti meant inadvertence, it makes no sense that Mr Barrington-Smith served the first defendant at its registered business address without turning his mind to the fact that he had been communicating with the first defendant's solicitor for approximately 15 months in relation to the defendant's dispute with his clients. Even if he had forgotten that Ms Teys had stated that Colquhoun Murphy had instructions to accept service, it was a short and obvious step for him to enquire if it did so.

[13] *Stormer* [2014] ACTSC 23 at [33].

63. Responsible conduct of litigation between legally represented parties expects service of documents on the legal representatives to occur as a matter of course. To serve on the defendant's registered business address only added to the plaintiffs' costs – for example, the need for Mr Barrington-Smith to conduct an ASIC search and then arrange service by post. And what did Mr Barrington-Smith hope to achieve? If Mr Salloum had received the documents, inevitably his first step would have been to give them to his solicitor. Unnecessary correspondence and expense for both parties would then have followed regarding arrangements for further service of documents.

64. Of greater concern, for present purposes, is that Mr Barrington-Smith never communicated with Ms Tey or Mr Salloum about his (or Ms Bryant's) service of the documents to confirm, for example, that the documents were received, to enquire about when or whether a defence would be filed, or to state his instructions to apply for default judgment if a defence was not filed by a stated date. A communication of any kind on any of those topics would have alerted the defendant and its solicitor to the fact that the plaintiffs had commenced proceedings against the defendant, and that the initiative was with the defendant to respond. I have no cause to doubt that if Mr Barrington-Smith had done any of these things, the prospect of default judgment would never have arisen.

65. Why Mr Barrington-Smith did not communicate with Ms Tey or Mr Salloum on any of those topics, as would ordinarily occur in the conduct of responsible litigation, was never explained. Mr Mascitti could offer only that it would have been "sensible". In my view, it would have been more than "sensible". It is an obvious step that should have occurred, and which would (in all probability) have produced a response that would have put aside the whole question of an application for default judgment.

66. My observations are not novel.

67. In *Bushby v Mackenzie* (1919) 19 SR (NSW) 104, the plaintiff had entered default judgment without notice to the defendant. In response to this action, Harvey J said at 104–5:

> I have frequently pointed out that the proper course in these cases is for the plaintiff to approach the other side before a notice of motion is taken out and find out whether the defendant intends to defend the suit. I have the strongest objection to this rule being taken advantage of, not in any sense for the benefit of the parties, but to enable their legal advisers to obtain an order for payment of costs. ... There may be exceptional cases in which the plaintiff may be justified in applying for a decree without approaching the defendant before the notice of motion is taken out. But I intend to lay down the rule that this must be done in ordinary cases, and if this practice is not complied with, the party in default may be ordered to pay the costs of the motion.

68. In *Hogg v J Isherwood-Hicks Pty Ltd* (1992) 108 FLR 262, Kearney J said at 264:

> where, as here, a solicitor has entered an appearance, the practice of "snapping on" a default judgement, without notice, immediately upon the expiration of the period prescribed by the rules, should be strongly deprecated. It serves no useful purpose. It increases the cost of litigation unnecessarily.

69. True, in this case, the defendant's solicitor had not entered an appearance, but the defendant's solicitor was not even aware that proceedings against its client had been commenced.

70. In *French v Triple M Melbourne Pty Ltd* [2006] VSC 36 at [23], the Supreme Court of Victoria, per Bongiorno J, reached the same conclusion. His Honour said:

> In the circumstances of this case, the entry of a default judgment at the earliest possible opportunity without warning against parties known to the plaintiff's solicitor to be represented constituted a precipitate and unwarranted, if nonetheless legal, attempt to advance his client's case by taking advantage of what any reasonable and experienced solicitor should have realised was an oversight or perhaps several oversights by the defendants and their legal advisors. It would be contrary to justice for this Court to allow this tactic to be successful by refusing to set aside the judgment entered by default. Litigation is not a steeple chase nor even a bike race where a fall can determine the outcome.

71. In *Pope v Aberdeen Transport Co Pty Ltd* [1965] NSWR 1550 at 1551 ('*Pope*'), quoted with approval by Refshauge J in *Ezekial-Hart* and by his Honour Master Mossop in *Stormer*, Wallace J said:

> I think that where the party signing judgment does so without giving warning of its intention to do so, such party will generally, though perhaps not invariably, be in difficulties on a summons to set aside the judgment where a defence on the merits is disclosed.

72. In this case, it was or should have been apparent to the plaintiffs' solicitors that the defendant had a defence on the merits: the solicitors for the respective parties had been debating the plaintiffs' claims about defective work and what needed to be done to rectify it for 15 months. Mr Mascitti submitted that the defendant must establish a defence on the merits, but that became otiose because the plaintiffs accepted that the defendant has a reasonable defence on the merits. Mr Mascitti stated that that was why, on 10 July 2019, he consented to the default judgment being set aside.[14]

73. The plaintiffs' opinion, if it were held, that the defendant's defence to their claims about defective work was weak is not to the point. Relevant to whether a default judgment should be set aside, the Court looks to whether or not a defendant may have a defence. In *Davies v Pagett*, quoted with approval by his Honour Master Mossop in *Stormer*, the Full Federal Court said:

> The probability of a successful defence need not be demonstrated, and the fact that the defendant's case may appear weak, will seldom be a bar.[15]

74. So what did the plaintiffs hope to achieve by applying, "without giving warning", for default judgment? I raised this question with Mr Mascitti. The transcript reads:

> HIS HONOUR: What was ever the intention of making an application for a default judgment?
>
> MR MASCITTI: Bringing finality to the proceedings. It's either one way or another it's going to get the proceedings moving. Or if the defendant is impecunious, which is what was suspected, the company would be wound up and a claim would be made in the usual way against the fidelity insurer, which happens every day in building disputes.

75. This explanation does not withstand scrutiny. The defendant was not 'hiding': Colquhoun Murphy had been representing it for two years. It is also inherently unlikely that it had been doing so for two years if the defendant was impecunious. It is also inconsistent with statements in Colquhoun Murphy's letter dated 20 June 2017 that the defendant "is committed to ensuring all the other defects which have been raised by your client are rectified", and the statement in Kamy Saeedi Law's letter dated 31 May 2018 to Colquhoun Murphy that since October 2017, Mr Bono (on behalf the

[14] Transcript of proceedings, 2 October 2019, page 27, lines 21–38.
[15] *Davies v Pagett* (1986) 10 FCR 226 at 230.

defendant) had attended the property "on at least three occasions to perform rectification work under your client's direction".

76. Also, I reject the proposition that to obtain default judgment without warning had any prospect of "bringing finality to the proceedings". From the beginning, the plaintiffs' solicitors knew or should have known that as soon as the defendant became aware that default judgment had been signed against it without its knowledge it would apply for the judgment to be set aside. They should also have known that, in the circumstances, it was almost inevitable that it would be set aside.

77. It follows, in my view, that the plaintiffs should have realised that an application for default judgment without warning was purposeless. In other words, to obtain default judgment in that manner gave them no forensic advantage at all. Once set aside, the plaintiffs would be back in the same position that they were prior to the application being made, save for costs on both sides unnecessarily incurred.

78. I refer to the observation of his Honour Master Mossop in *Stormer* at [34]:

> While parties to litigation are not obliged to give away a forensic advantage that they have, they are also obliged to conduct themselves reasonably and reasonably assess the prospects of being successful on an interlocutory application such as this.

79. The plaintiffs' decision not to consent to the default judgment being set aside, when asked to do so by letter dated 20 June 2019, only compounded the plaintiffs' error. On notice that a failure to pay $188,923.11 within 28 days may trigger a statutory demand, the defendant had no option but to file and serve an application for the default judgment to be set aside and affidavit evidence in support.

80. The plaintiffs' opposition to that application until the day of the hearing further compounded the error. Mr Mascitti acknowledged that on 25 June 2019 the plaintiffs' position was to put the defendant to proof that it had a defence on the merits to the plaintiffs' claim yet, 15 days later, he consented to the application for the default judgment to be set aside on the basis that the defendant had defence on the merits. There was no suggestion of any new information that the plaintiffs obtained in that 15-day period that caused them to change their position. I was left with a strong impression that Mr Mascitti knew the 'game was up' and that to consent to the application was the only prudent option.

81. The plaintiffs' actions achieved nothing towards resolution of the substantive dispute regarding the defendant's building work and caused themselves and the defendant to incur significant legal fees that should never have been incurred.

82. For these reasons, in my view, the defendant was not seeking an indulgence of the Court. It was applying for default judgment to be set aside that should never have been signed. In my view, for that reason, costs should follow the event.

83. My conclusion is consistent with a decision of Higgins J (as his Honour then was) in *St George Bank Limited v O'Reilly* [1999] ACTSC 21; 150 FLR 27. In that matter, the parties' respective solicitors were corresponding in relation to a mortgage in which the defendant was in default. The defendant asked the plaintiff's solicitor not to enter default judgment over the Christmas break. The plaintiff's solicitor did not agree not to do so, but did not give notice before entering default judgment. In response to an application for the default judgement to be set aside, his Honour said:

34. It was for that reason that I ordered the default judgment entered on 12 January 1999 [be] set aside. It was, in my view, entered in breach of the usual standards of practice between solicitors and, in that sense, in breach of the requirement of good faith.

35. As the plaintiff's solicitors had occasioned an unnecessary application to set aside the judgment, the plaintiff was ordered to pay the defendant's costs.

84. In deference to the arguments, I should also deal with the alleged irregularities in the manner in which the default judgment was obtained.

85. I begin by responding to Mr Ronald's submissions arising from the decision of Beach J in *Sargent.* It does not follow from an irregularity in an application for summary judgment that a default judgment obtained must be set aside, nor does his Honour say so. His Honour's comments, and his decision to dismiss an appeal from a decision of the Master of the Supreme Court of Victoria to set aside the default judgment, arose not from the irregularity *per se* but from the manner in which the default judgment was obtained.

86. In *Sargent*, Beach J noted a decision of his Honour Morling J in *Commonwealth Bank of Australia v Buffet* (1993) 114 ALR 245 ('*Buffet*') in which his Honour refused to set aside a default judgment, notwithstanding irregularities in the application, because he was not satisfied that the irregularity "caused any injustice to the first defendant". His Honour then gave his reasons for that conclusion. Beach J described *Buffett* as "clearly distinguishable" from *Sargent*.

87. In principle, Beach J's comments in *Sargent* are consistent with those of Wallace J in *Pope* about the "difficulties" that a plaintiff faces when it chooses to obtain default judgment without warning.

88. For these reasons, in my view little turns on the irregularity that Ms Bryant, rather than Mr Barrington-Smith, should have deposed to service of the documents or on the irregularity that Mr Barrington Smith's affidavits state that the originating documents were sent by "post" rather than "prepaid post".[16] The question is whether these irregularities "caused any injustice" to the defendant: plainly they did not. The prejudice arose from the plaintiffs applying for summary judgment without warning in circumstances where they knew that the defendant had a defence on the merits.

89. I have come to a different conclusion regarding the plaintiffs' characterisation of their claim as a claim for a debt or liquidated demand. On no view is it a claim for a debt (nor do the plaintiffs so contend): the question is whether it is a claim for a liquidated demand. That term is defined in the Dictionary to the Rules as follows:

> ***liquidated demand*** means a claim for payment of a specific sum of money the amount of which is worked out or capable of being worked out by calculation, and includes a claim for interest up to judgment.

90. I recognise that the definition is not easily applied. Nor is its common law meaning, to the extent that there is any difference. In many decisions, courts have needed to rule, one way or another, about whether a claim was a liquidated demand. However, the general 'touchstone' is whether the amount owed is capable of objective arithmetical calculation even if that may entail some measure of investigation. In *City Mutual Life Assurance Society Ltd v Giannarelli* [1977] VR 463 at 468, McInerney J said:

[16] Whilst not determinative of anything, I am satisfied from paragraph 6 of Ms Bryant's affidavit that she, not Mr Barrington-Smith, served the documents on the defendant. Mr Barrington-Smith was merely the author of the covering letter.

> In summary, it may be said that in all cases where the consideration has been executed and where there is an absolute duty to pay money or the value of the performance rendered, either debt on simple contract or *indebitatus assumpsit* is a proper remedy.

91. More recently in *Fullinfaw v Neil Fletcher Design Pty Ltd* [2019] VSC 142; 57 VR 169, with reference to earlier authority, Garde J said at [59]:

> The meaning of liquidated damages is well-established. 'Liquidated damages' are a sum fixed by the parties to a contract as a genuine pre-estimate of damage in the event of breach, whether a pre-determined lump sum, or by means of a specific calculation or scale of charges or other positive data.

92. Referring to these authorities, the 'line' between a liquidated demand and a claim for unliquidated damages may sometimes be difficult to draw, but it is not difficult to say on which side of the line a claim for defective work, itemised in a Scott Schedule, should be placed. It is plainly a claim for unliquidated damages. The whole purpose of a Scott Schedule is to itemise a claim where there are numerous distinct items to consider. The schedule is a 'case management' tool that the parties may use or the Court may order be prepared, with provision for each party to enter its view about the value of each item. It is done to assist the Court in its assessment of liability and quantum, often subjectively, in relation to each item to arrive at an award of damages. For the plaintiffs to state in their Scott Schedule the total amount they seek does not convert their claim to a liquidated demand.

93. Similarly, for the plaintiffs to state the nature of their claim as a liquidated demand does not make it so. In *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26, with reference to *Abbey Panel & Sheet Metal Co Ltd v Barson Products* [1948] 1 KB 493, Nettle JA (as his Honour then was) of the Victorian Court of Appeal said:

> It is also clear that a claim for unliquidated damages is not converted into a claim for liquidated damages by reason of the plaintiff having incurred and being able to specify the costs for which the damages are claimed.

94. In *Arnold v Forsythe* [2012] NSWCA 18 at [48], with reference to *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd*, Sackville AJA of the NSW Court of Appeal reached the same conclusion. His Honour said:

> There is little doubt that the drafter of the respondents' statement of claim intended to plead a claim for a debt or liquidated claim. The pleading specifies the amount of claim ($260,467.60), something that is not permitted in a claim for unliquidated damages: r 14.13(1). Moreover, the allegation that a precise sum is "*now due and payable*" by the appellant to the respondents suggests that the appellant's claim is for a liquidated sum. However, the specification of a precise amount does not convert what is otherwise a claim for unliquidated damages into a liquidated claim.

95. Once the plaintiffs' claim is seen for what it is – a claim for unliquidated damages – it becomes clear that the plaintiffs' application for default judgment was defective in substance as well as form.

96. The Rules distinguish between an application for default judgment in relation to a debt or liquidated demand and an application for default judgment in relation to a claim for unliquidated damages. The former is made under rule 1120. The latter under rule 1121. The difference, in substance, is that the former permits judgment to be entered "for an amount not more than the amount claimed". The latter permits the court to enter judgment "for damages to be assessed". In other words, the former

permits judgment on questions of liability and quantum, while the latter permits only liability.

97. It follows, where the plaintiffs' claim is, in truth, a claim for unliquidated damages, the default judgment for a specified amount should never have been entered. The error occurred because the plaintiffs incorrectly characterised their claim.

98. For this reason also, the defendant is not seeking an indulgence when applying for the default judgment to be set aside. It is applying for it to be set aside because it should never have been signed.

Conclusion

99. For these reasons, the Court's orders will be as follows:

    1. The default judgment entered against the defendant on 7 June 2019 is set aside.

    2. The Court's order made on 23 August 2019 that the defendant pay the plaintiffs' costs of and incidental to the defendant's application dated 2 July 2019 is set aside.

    3. The plaintiffs pay the defendant's costs of and incidental to the defendant's application dated 2 July 2019 and the defendant's costs of and incidental to its appeal dated 29 August 2019.

I certify that the preceding ninety-nine [99] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Special Magistrate McCarthy

Associate: Angus Brown

Date: 27 November 2019