Supreme Court of New South Wales

STEPHEN RESKYMER (KYM) MONKTON v EDWARD ALLAN STEPHENSON& ANOR [2011] NSWSC 67 (23 February 2011)

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	New South Wales
Case Title:	STEPHEN RESKYMER (KYM) MONKTON v EDWARD ALLAN STEPHENSON & ANOR
Medium Neutral Citation:	[2011] NSWSC 67
Hearing Date(s):	Friday 10 December 2010
Decision Date:	23 February 2011
Jurisdiction:	
Before:	Hall J
Decision:	(1) Appeal allowed. (2) The Magistrate's decision and order made on 21 June 2010 are set aside. (3) The proceedings are remitted to the Local Court for the determination of quantum of

damages in respect of the loss or destruction of the plaintiff's vehicle identified in paragraph 1 of the annexure to the statement of claim filed in the Local Court at Coonabarabran on 20 October 2008 and any claim for interest).

Catchwords: STRIKING OUT - notice of motion - Local Court Judgment set aside - motor vehicle accident caused by negligently kept livestock - default judgment on non-attendance of plaintiff - striking out of defence
ENFORCEMENT - stay of legal advice for plaintiff prior to default judgment - s.56 Uniform Civil Procedure Act - prejudice to creditor where monies already dispersed - error of law - default judgment of liquidated damages where claim for unliquidated damages - judgment in default obtained irregularly - to be set aside ex debito justitiae - no arguable case on liability - damages to be particularised in unambiguous terms - Local Court to re-determine damages

Legislation Cited: Local Court Act 2007

Cases Cited: Gemini Property Investments Pty Limited v Woodwards Investments Pty Limited [2000] SASC 210
Watson v Anderson (1976) 13 SASR 329

Texts Cited:

Category: Principal judgment

Parties: STEPHEN RESKYMER (KYM) MONKTON v EDWARD ALLAN STEPHENSON & ANOR

Representation

- Counsel: Counsel:
P: G Niven
D: D A Wetmore

- Solicitors: Solicitors:
P: S E O'Connor
D: D A Wetmore

File number(s): 10/240423

Publication Restriction:

Judgment

1. **HIS HONOUR** : These proceedings concern the refusal of a Magistrate to set aside a default judgment entered on 26 February 2009 against the plaintiff, Mr Stephen Monkton, in favour of the first defendant, Edward Allan Stephenson, in the amount of $59,830.44 entered on 26 February 2009.

The present proceedings

2. The plaintiff commenced proceedings in this Court by Summons and at the hearing proceeded by way of an Amended Summons filed on 13 August 2010. In it he seeks orders, inter alia, that the judgment of the Local Court given on 21 June 2010 on his notice of motion be set aside and further that the default judgment entered on 26 February 2009 to which the notice of motion related, be set aside to enable a defence to be filed.

3. The proceedings by way of appeal have been brought pursuant to the provisions of s.39 of the *Local Court Act* 2007 which permits an appeal as of right in respect of a question of law. Section 39(1) provides:-

"A party to proceedings before the Court sitting in its General Division who is dissatisfied with the judgment or order of the Court may appeal to the Supreme Court, but only on a question of law."

History of the proceedings

4. The cause of action originally pleaded in a Statement of Claim filed by Mr Stephenson in the Local Court alleged that, at all material times, he was the owner and operator of *"Ando's Outback Tours"* which took customers on tours of outback towns in New South Wales.

5. On or about 4 November 2002, at approximately 11.30 pm, Mr Stephenson was operating his Toyota Coaster tour bus, when a cow strayed from a farming property onto the roadway. It was alleged that Mr Monkton and a Mr Sutton were the occupiers of the farm.

6. According to the statement of claim, Mr Stephenson attempted to avoid a collision but was unsuccessful in that regard. As a result of the impact between the bus and the cow, the vehicle was said to have been a *"write-off"* .

7. Accordingly, Mr Stephenson, as plaintiff, commenced proceedings in the General Division of the Local Court at Coonabarabran. The cause of action was pleaded as *"damages due to negligence"* .

8. The Statement of Claim issued on 20 October 2008 provided particulars of the *"Relief claimed"* in the following terms:-

"The plaintiff claims: $37,500.00

Interest $22,500.00

Issue & Service fee: $189.00

Solicitor's costs: $575.30

Total claimed: $60,764.30

9. Mr Stephenson relied upon the facts and assertions as set out in an annexure to the Statement of Claim marked *"A"* and entitled *"Annexure to Claim"*.
10. Particulars of negligence were pleaded in that annexure against each of the defendants. In paragraph 11, the particulars of the damage were stated to be as follows:-

"11. Particulars of the damages suffered are:-

(A) Costs of replacement of the tour bus (less salvage) being $39,000.

(B) Costs of temporary replacement tour buses being $37,500."

11. A handwritten note was added after the amount of $37,500 stating *"and value of old bus"*.

"(C) Loss of anticipated profits being $2,886."

12. Accordingly, the particular amount of $37,500 was stated to be the *"relief claimed"* in respect of the particulars set out in paragraph 11(B) as reproduced in paragraph 10 above.
13. The Statement of Claim was filed in the Local Court on 20 October 2008, a few weeks before the expiration of the six year limitation period.
14. On 9 November 2008, a Defence was filed by the plaintiff, Mr Monkton.

Hearing of Mr Stephenson's claim for damages

15. The proceedings were set down for hearing in the Local Court on 19 January 2009. They were adjourned to 16 February 2009 as there was no attendance by Mr Monkton, he having sent a letter to the Registrar of the Courthouse at Coonabarabran dated 9 February 2009 stating that he was unable to attend the hearing.
16. On the further listing of the matter on 16 February 2009, there against was no appearance by the plaintiff, Mr Monkton. On that occasion, the defence was struck out.
17. A transcript of the proceedings of 16 February 2009 records that there was a letter that had been placed on file which stated that Mr Monkton was unable to attend due to prior commitments. The letter was produced to the Magistrate.

Entry of default judgment

18. It was noted by the Magistrate that a defence had been filed by Mr Monkton. The transcript records:-

"HIS HONOUR: He has chosen not to, for whatever reason. The Court therefore will strike out the defence that's been filed in the matter and you may - I can't give you legal advice about where that leaves you but it may be that the Registrar may be able to assist you as to

where you go from here. I'm going to strike out the defence and that's what I'll do and that is the order I make."

19. On 26 February 2009, a notice of motion was filed entitled *"Default judgment for liquidated claim"* . The orders sought in it included a judgment in favour of Mr Stephenson against Mr Monkton for the amount of $37,500 and *"for costs"*.

20. The default judgment was subsequently entered on the same day, namely, on 26 February 2009.

21. The notice of motion of 26 February 2009 was supported by an affidavit of Mr Stephenson also sworn 26 February 2009. In it, Mr Stephenson stated that he believed the information contained in his affidavit was true and that he had personally served Mr Monkton with the statement of claim on 20 October 2008. In paragraph 4 of the affidavit, he stated:-

"4. The amount owing to me at the time of commencement of the proceedings in respect to the cause of action was the amount of $37,500.00."

22. In paragraph 7, Mr Stephenson stated:-

"7. The amount of interest claimed under s.100 of the Civil Procedure Act 2005 or otherwise as at the date of swearing this affidavit is $22,141.44."

23. I was advised by Mr G Niven of counsel, who appeared for Mr Monkton in this appeal, that the default judgment was entered by the Magistrate in chambers. Accordingly, that circumstance explains why there is no transcript or a *"decision"* in relation to the entry of judgment for the amount of $59,830.44.

Enforcement of default judgment

24. On 9 March 2009, a garnishee order was made. It was served on the National Australia Bank.

25. On 13 March 2009, a payment was made under that order to Mr Stephenson in the amount of $20,070.16.

26. On an unknown date in May 2009, an order was made by a Magistrate in chambers for a writ for levy of property.

27. On 25 May 2009, a further garnishee payment of $37,853 was made.

28. On 12 October 2009, the solicitors, Nelson Keane & Hemmingway, sent a letter to Mr Monkton.

29. On 18 November 2009, a further motion for a garnishee order was filed.

Notice of motion to set aside the default judgment

30. On 29 January 2010, Mr Monkton applied for a stay of any garnishee order. He also filed a notice of motion to set aside the default judgment.

31. On 5 February 2010, the stay application and the application to set aside the default judgment were listed for hearing. The proceedings were stood over so that Mr Monkton could obtain legal advice.

32. On 8 March 2010, the proceedings were adjourned to 19 April 2010.

33. On 19 April 2010, his Honour Magistrate McPherson, made a garnishee order. The proceedings were then adjourned part heard.

34. On 17 May 2010, Magistrate McPherson heard the motion to set aside the default judgment. His Honour reserved his decision on that date until 21 June 2010.

35. At the hearing of the application to set aside the default judgment, Mr Monkton relied upon his own affidavit sworn 14 January 2010. There was no other evidence adduced on his behalf in support of the application.

36. In his affidavit of 14 January 2010, Mr Monkton stated that he had a bona fide defence to the matter. He annexed a copy of the defence which he intended to file should the default judgment be set aside. The proposed defence was identified as Annexure F to his affidavit sworn 14 January 2010. It was dated 14 January 2010 and it was verified by Mr Monkton's affidavit.

37. Mr Monkton's affidavit sworn 14 January 2010 did not contain any indication as to the nature of any evidence proposed to be called to support the proposed defence.

The Magistrate's decision

38. On 21 June 2010, the Magistrate announced his decision on the application. The notice of motion to set aside the default judgment was refused.

39. In the decision recorded in the transcript of the last-mentioned date, the learned Magistrate, in the last paragraph of his reasons for the decision (p.2), stated:-

"In relation to this case, as the creditor has pointed out, monies, and a significant amount has already been paid and distributed by him, so in terms of the prejudice, it is fairly great if the judgment were set aside. In the circumstances I have also got to take into account the overriding purpose of the uniform civil procedure rules. S 56 which is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. At the end of the day it is a balancing exercise and in my view the prejudice suffered by the, if the judgment is set aside, suffered by the judgment creditor in this case, Mr Stephenson, is outweighs [sic] *the judgment debtor's claim which on the face of it he certainly does have some ground of defence and that was not ventilated at a hearing. At the end of the day, in making that balancing exercise, THE NOTICE OF MOTION TO SET ASIDE, THE JUDGMENT IS REFUSED ..."*

Submissions

40. I have had the benefit of written submissions from Mr Niven of counsel, who, as I have earlier noted, appeared on behalf of Mr Monkton, and written submissions on behalf of the defendant by Mr D A Whetmore of counsel. These submissions of counsel were supplemented by oral submissions when the matter was heard on 10 December 2010.

Evidence on the appeal

41. The plaintiff, Mr Monkton, relied upon his affidavit sworn 19 August 2010. That affidavit essentially refers to and attaches the relevant documentation dealing with the history of the proceedings.

42. The plaintiff also relied upon the affidavit of Patrick John Latham, solicitor, sworn 19 August 2010. Mr Latham's affidavit also attached relevant documentation relating to the history of the proceedings.

Question(s) of law

43. Mr Niven argued that the learned Magistrate erred and that the relevant error involved a question of law in that his Honour should not have had regard to or taken into account the claimed prejudice that Mr Stephenson would suffer if the judgment was set aside, given the fact that he had already received and distributed the judgment monies. This was said to be particularly so, given the reference to the existence of a defence on the merits by the Magistrate in his decision. Accordingly, the error involved a question of law insofar as an irrelevant consideration, namely, the abovementioned claim of *"prejudice"* was taken into account.

44. Mr Niven also raised a further matter, said to involve a question of law. The argument was, as finally presented, as follows. In the event that the Local Court determined that it would not set aside the judgment so far as liability was concerned there was still an issue as to the quantum of damage. The claim was said to have been in the nature of an unliquidated damages claim. The argument was that the Magistrate should have considered whether the default judgment should have been set aside, at least so far as the issue of damages was concerned. Reference, in this respect, was made to the provisions of Part 16 Rule 7 of the UCPR.

45. A further matter raised in the course of argument, although not strictly speaking put forward as involving a question of law, was that the award of interest was made on the basis of interest running from the date when the cause of action arose (4 November 2002). This involved a discretionary determination and no opportunity had been provided for Mr Monkton to be heard on the appropriate order for interest. I note that a liquidated demand for the purposes of the UCPR includes a claim for interest under s.100 of the CPA: UCPR Part 16.6(1)(b) authorises a default judgment to include interest.

Consideration

46. The initial question is whether or not the decision by the learned Magistrate involved a question of law. This Court, of course, does not have jurisdiction to undertake any general review of the proceedings by way of appeal. It is limited to a question of law.

47. It is necessary to consider the question as to whether there was any irregularity in the default judgment, having regard to the nature of the claim for damages.

48. The damages claimed in the statement of claim filed in the Local Court at Coonabarabran (as particularised in paragraph 11 of the annexure to the statement of claim and which has been extracted above) was a claim in the nature of *unliquidated* damages, not *liquidated* damages. Mr Whetmore of counsel for the defendant, with respect, correctly did not contend to the contrary.

49. Part 16 Rule 7, *Default judgment on claim for unliquidated damages* , provides, so far as is relevant:-

"16.7.1 If the plaintiff's claim against a defendant in default is for unliquidated damages only, judgment may be given for the plaintiff against the defendant for damages to be assessed and for costs " (emphasis added)

50. Accordingly, an issue arises in the present case as to whether or not a default judgment entered for a specified money (or a liquidated amount) in proceedings where the claim was for unliquidated damages, and not for liquidated damages, means that entry of default judgment in those circumstances constituted an irregularity. A similar question was considered in **Gemini Property Investments Pty Limited v**

Woodwards Investments Pty Limited [2000] SASC 210 (Debelle J). In that case, his Honour noted:-

"3. The defendants contended a default judgment was irregularly obtained, in that the plaintiff signed judgment on the footing that their demand was a liquidated demand. While there may be elements of a liquidated demand on the plaintiff's claim, it is beyond question that part of the claim is for damages for alleged misrepresentation."

51. Debelle J proceeded to consider the question as to whether the judgment had been irregularly obtained and whether, on that basis, it should be set aside. His Honour noted that, where a judgment in default has been obtained irregularly, the defendant will normally be able to set it aside ex debito justitiae: **Watson v Anderson** (1976) 13 SASR 329 at 333.

52. Debelle J then continued:-

"16. The irregularity in this case is asserted to be the fact that the judgment was entered for specified amounts payable by each of the first, second, third and fourth defendants. The claims against the first and second defendants were not for liquidated demands ...

17. I have not been able to ascertain any case in which it has been held that entry of the judgment on the footing that the judgment is for a liquidated demand, where in truth it is an unliquidated demand, constitutes an irregularity of a kind which requires that the judgment be set aside. Nor have researches of counsel disclosed such a decision. However, given that there is clear authority that a judgment entered for an amount in excess of the amount actually due is irregularly entered, there are strong reasons for concluding that the judgment in this case was also entered irregularly. For the purpose of this application, I am prepared to assume that it was. There remains the question whether the judgment should be set aside."

53. In the circumstances in which the claim brought by the statement of claim was, as I have earlier indicated, an unliquidated claim and not a liquidated claim, I consider that the judgment entered for the specified amount in question could and should be regarded as an irregularity consistent with the principles identified and the approach taken by Debelle J in **Gemini** (supra).

54. The questions that then arise is whether such irregularity constitutes an error on a question of law both in terms of the default judgment and in relation to the decision of the Magistrate on the application to set aside the default judgment.

55. It is, of course, a fundamental principle of procedural fairness that a defendant to proceedings is entitled to receive proper notice of the precise claim made against him or her. In the case of an unliquidated damages claim, a defendant is entitled to be informed, whether by way of appropriate particulars in the initiating process or by subsequent notice, of the amount of the damages for which an order is sought against the defendant and the precise basis or bases for the claim.

56. I have earlier extracted particulars from the annexure to the statement of claim. In paragraphs 10 and 11, the three relevant heads of claim were set out in sub-paragraphs (A), (B) and (C). Mr Whetmore properly conceded that there was an element of confusion or ambiguity in the way in which the claim is therein expressed. The claim in respect of paragraph 11(A) is stated to be loss associated with the loss or destruction of property, referred to as the *"write-off"* of the vehicle, that is, *"costs of replacement of the tour bus (less salvage) being $39,000"* .

57. The claim in paragraph 11 (B) for $37,500 (the sum for which judgment was entered), is described not as loss of the bus, alone, but as a claim in relation to two matters, namely:-

(1) *"Costs of temporary replacement tour buses being $37,500"*

(2) *"Value of old bus".*

58. The way in which the claim is expressed conveys the notion that the amount of $37,500 was a composite or combined amount embracing what might be referred to as *"demurrage"* claim or a claim for the temporary replacement of the tour bus and a claim for the destruction or loss of the bus itself. Insofar as the claim was intended to be a claim for loss of property (the Toyota Coaster bus) as Mr Whetmore confirmed it was intended to be, the value of that vehicle described as *"value of old bus"* specified in paragraph 11(B) must have been something less than the total sum of $37,500 which, as I have stated above, was expressed to be for both temporary replacement of the bus as well as for loss of the bus itself.

59. As noted earlier, the judgment was entered by a Magistrate in chambers for the amount of $59,830.44. For that reason, there is no transcript of any proceedings recording the entry of judgment or explaining the basis upon which the Magistrate acted. Indeed, no notice of the notice of motion dated 26 February 2009 appears to have been given to Mr Monkton.

60. On the hearing of the application to set aside judgment on 19 April 2010, as also earlier noted, Mr Monkton relied upon his *"Defence"* dated 14 January 2010. The Defence, apart from issues of liability, separately raised the question of quantum. In sub-paragraph (f) of the Defence, the following matter appears:-

"(f) The first defendant disputes the quantum of the plaintiff's claim:

(i) the first defendant claimed that the pleading of the plaintiff in respect of damages is misleading and the amount claimed in the Statement of Claim, namely, $37,500 appears to relate to the cost of temporary replacement tour buses and value of old bus and not the cost of replacement of the tour bus (less salvage) .

(ii) the first defendant claims that the claim of the plaintiff involves a claim for unliquidated damages and should have been commenced by a summons." (emphasis added)

61. By this paragraph, Mr Monkton was specifically raising an issue as to damages, in particular, the basis upon which judgment had been entered against him in the amount of $37,500 which it was suggested embraced both damages referrable to the *"value of old bus"* and temporary replacement of the tour bus.

62. At the hearing of the application to set aside judgment, Mr Stephenson was not legally represented. He, accordingly, does not appear to have raised the point as to any irregularity in the default judgment having been entered in respect of what was an unliquidated damages claim.

63. The learned Magistrate could hardly be criticised for not having specifically considered the question of any irregularity involved in the entry of judgment for the amount specified, given that it was not raised as an issue at the hearing, although, as noted above, the proposed defence did raise an issue going to the quantum of damages. However, be that as it may, the fact remains that the judgment entered on 26 February 2009 was infected by an error of law. This, as I have earlier indicated, consisted of the irregularity in entering judgment for a specified amount on an unliquidated claim. Further to that, the default judgment was entered for an amount which included the sum of $37,500 in circumstances in which paragraph 11 did not make clear either what precise amount was claimed for the loss of the Toyota bus itself and the basis for the calculation of that amount.

64. Mr Monkton's application before the Magistrate to set aside default judgment raised two quite separate issues. The first relates to the judgment entered by default on 26 February 2009 in relation to the issue of liability. The second issue concerns the amount of damages for which judgment was entered on 21 June 2010, that is, an issue of quantum.

65. For reasons I will shortly state, I am of the opinion that there has been no error demonstrated on this appeal involving a question of law on the issue of liability determined by the default judgment of 26 February 2009.

66. In relation to the question of the quantum of damages for which judgment was given on 21 June 2010, default judgments for particular or specified amounts in claims for liquidated damages are, of course, permitted and authorised by law: UCPR, Part 16.6(1).

67. However, where a default judgment is for *unliquidated* damages, Part 16.7(1) provides for a different procedure for determining judgment in the proceedings, namely, by way of assessment, *"... judgment may be given for the plaintiff against the defendant for damages to be assessed ..."* .

68. The proposed defence dated January 2010 was before the Magistrate at the time of the hearing of the application to set aside the judgments entered in these proceedings and, as discussed above, it raised a specific issue as to quantum of the judgment (paragraph (f)) sought and obtained by Mr Stephenson.

69. The application determined by the learned Magistrate on 21 June 2010 required a determination by the Magistrate. That, in turn, required consideration as to what precisely had been the claim made by Mr Stephenson and whether Mr Monkton was given proper notice of the claim and the basis for it.

70. There is a further question remaining (as discussed above) as to what, given the confusion or ambiguity in paragraph 11, the claim for $37,500 represented.

71. Upon consideration, I have concluded that by reason of what I have referred to as the confused or ambiguous claim made in paragraph 11 of the particulars of claim, an injustice arose in Mr Stephenson having obtained a judgment for an unliquidated claim in circumstances in which, although he was entitled to the default judgment which determined liability, an order ought to have been made for an assessment of damages, not final judgment for the amounts claimed.

The issue of liability

72. I will, as indicated above, return to deal separately with the question of liability. There was significant delay by Mr Monkton in seeking to set aside the default judgment. However, that said, delay was only one matter to be taken into account. The evidence relied upon by Mr Monkton did not, in my assessment,

constitute evidence of a reasonably arguable case on the merits on the issue of liability. The affidavit before the Magistrate in other words did not provide any factual sub-stratum for the defence on the issue of primary liability which Mr Stephenson relied upon. The defence, in that respect simply constituted verified denials of the essential elements constituting Mr Stephenson's cause of action.

73. In this respect, I consider that the observations of Debelle J in **Gemini** (supra) are also pertinent. His Honour stated at [8]:-

"A party seeking to set aside a judgment must show that it has a defence which is fairly arguable in law and in fact. In other words, that party must not only state that it has a defence but say something about the merits of the defence. It is not sufficient simply to assert that the defence exists or to say that the defendant denies the claim made against it. As Bray CJ pointed out in Watson v Anderson (1976) 13 SASR 329 at 334 - 335, the defendant must show that it has a bona fide intention of defending and that there is a reasonably clear and bona fide case of legal merit. None of the affidavits filed in support of the application to set aside the judgment set out any defence on the part of the first defendant or give any hint of the grounds upon which the defence is to be advanced. In addition, the proposed defence does not set out any ground of the defence on the part of the first defendant. It simply puts in issue certain of the allegations made in the statement of claim as against the first defendant."

Conclusions

74. I have concluded that there is no basis for setting aside the default judgment by which the issue of liability was determined in favour of Mr Stephenson.

75. I have, however, concluded that the judgment awarding damages in Mr Stephenson's favour was entered on the basis of an irregularity. In that regard the judgment was entered for an amount of damages which had not been properly particularised in the statement of claim and, in any event, was one to be determined by way of an assessment hearing. In that way, Mr Stephenson's entitlement to damages could be proved and established.

76. Mr Monkton had before the learned Magistrate on his application to set aside the judgments entered against him clearly raised the issue as to the validity of the claim for $37,000. That issue in turn raised a question as to the regularity of the judgment in a claim for unliquidated damages. The fact that Mr Monkton was not legally represented probably explains why the learned Magistrate did not examine that aspect.

77. It is a matter of fundamental importance in the administration of justice that any claim for damages must be particularised in unambiguous terms so that a defendant who suffers judgment will have been accorded procedural fairness by having received adequate notice of the claim against him or her. A defendant is entitled to have the Local Court determine an unliquidated claim for damages on the basis of evidence that enables damages to be assessed by the Court.

78. Accordingly, I am satisfied that there is a question of law raised by the appeal and that there was an error in that respect in the learned Magistrate's failure to set aside the default judgment.

79. By reason of the conclusion that the judgment entered on 26 February 2009 was vitiated by the irregularity to which I have referred, it is unnecessary that the issue of *"prejudice"* referred to in paragraph [43] be finally determined.

80. Accordingly, the orders I make are as follows:-

(1) Appeal allowed.

(2) The Magistrate's decision and order made on 21 June 2010 are set aside.

(3) The proceedings are remitted to the Local Court for the determination of quantum of damages in respect of the loss or destruction of the plaintiff's vehicle identified in paragraph 1 of the annexure to the statement of claim filed in the Local Court at Coonabarabran on 20 October 2008 and any claim for interest).

> 81. In the circumstances in which the plaintiff has been successful in this appeal, ordinarily costs would follow the event. Unless written submissions are lodged with my associate seeking some other order as to costs within 14 days of the date of this judgment, then the order of the Court will be that the defendant is to pay the plaintiff's costs of the appeal on the ordinary basis.

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