SHARPLES v. NORTHERN TERRITORY OF AUSTRALIA No. 14 of 1986 Practice and Procedure (1988) 55 NTR 35 [1988] NTSC 20 (22 March 1988)

COURT
IN THE SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
Asche C.J(1)
CWDS
Practice and Procedure - Application - To set
aside judgment in default of defence - Necessity for supporting affidavit to be sworn by deponent from personal own knowledge and belief - Affidavit by solicitor setting out his instructions not sufficient

Cases applied:
Palmer v Price (1980) WAR 61
Worldwide
Products Pty Ltd v Hoffmann (1982) Qd R 316
Cases referred to:
Collins Book Depot Pty Ltd v Bretherton (1938) VLR 40
Wiedenhoffer
v The Commonwealth of Australia [1970] HCA 54; (1970)
122 CLR 172
HRNG
ALICE SPRINGS
#DATE 22:3:1988
Counsel for the Plaintiff: R. Bennett
Solicitors for the Plaintiff: Martin and Partners
Counsel for the Defendant:
P. Walsh
Solicitor for the Defendant: Solicitor for the Northern Territory
JUDGE1
By writ issued 29 October 1986, the plaintiff sought damages against the Northern Territory of Australia, claiming that the plaintiff suffered those damages arising out of the negligence of the defendant "in failing to notify the plaintiff of the positive result of severe dysphasia carcinoma in situ of a Pap smear test, which the defendant took of the plaintiff at Tennant Creek Hospital".

2. Appearance was entered on behalf of the defendant. A Statement of Claim was delivered, but no defence was filed within the appropriate time. The defendants were warned by a letter written by the solicitor for the plaintiff on 13 November 1987 that if defence was not filed within a times which they agreed to extend to four weeks, then they would proceed to enter interlocutory judgment for damages to be assessed without further notice.

3. Owing to some difficulties in the office of the solicitor acting for the defendant, and a change of solicitors dealing with the matter within that office, the defence was not filed. There is sufficient in the affidavit filed on behalf of the defendant,

which is not contradicted on this aspect, to establish that there was some misapprehension or understandable delay.

4. Judgment was, in fact, entered, and was regularly entered pursuant to the rules, and no submission is made that it was not regularly entered. The defendant then applied, by summons filed on 23 February 1988, to have that judgment set aside. The defendant had acted promptly enough, because the judgment was entered on 1 February 1988, and I understand there had been some communication between the solicitors before the application was made for setting aside the judgment.

5. In support of the application to set aside judgment, the defendant filed an affidavit sworn by its solicitor. That affidavit first set out the reasons whereby the defendant had failed to file a defence within the appropriate time, and then purported to set out the defence. The solicitor acting for the defendant says that he travelled to Tennant Creek to obtain instructions, and he then appended to his affidavit the defence drawn as a result of the instructions.

6. Mr Bennett, on behalf of the plaintiffs, says that that is not sufficient, and he refers me to a number of cases which establish that in order to have judgment in default of appearance or defence set aside, it is normally the rule that the affidavit should disclose a defence and should be sworn by somebody in a position to prove the defence, or by a person who has personal knowledge of the events out of which the claim arises.

7. The cases do not seem to establish just how far that should go, although I am satisfied that it does not mean that a defendant should voluminously put forward the whole of the defence and the witnesses who will be called, and a general proof of what they will say. I'm quite sure that that is not required.

8. In Palmer v Prince (1980) WAR 61, Burt J. (as he then was), says at page 64:

> " The test in these matters is not whether upon facts as asserted by way of instructions to a solicitor or otherwise the applicant appears to have an arguable defence; it is whether the facts have been sworn to by a person who would be competent to depose to them if the matter should go to trial, which is approved would satisfy the court that the applicant has a good defence on the merits."

Jackson C.J. says, at page 62:

> " The general rule is that where a judgment has been regularly entered, it is not to be set aside unless

the court is satisfied that there is a defence on the merits:
Rubin v Eacott (1912) 14 WALR 612, following Farden v Richter (1889) 23 QBD 124. This rule has been approved by the House of Lords in Evans v Bartlam [1987] UKPC 2; (1937) AC 473. At p 480 of the report Lord Atkin refers to the rule laid down by the courts to guide the normal exercise of their discretion in a case where the judgment was regularly obtained that 'there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence', although he concedes that in rare but appropriate cases the rule could be departed from."

9. Jackson C.J. then cites an instance where that rule was departed from, and that is Collins Book Depot Pty Ltd v Bretherton (1938) VLR 40. There, Martin J. held that it was sufficient to establish that the failure to deliver a defence arose from a solicitor's clerk's error, and the defendant, an executor, sought and was given the opportunity to investigate by his defence circumstances of suspicion regarding his testator.

10. But Jackson C.J. then goes on to point out that instances of departure from the rule are rare. He refers to Williams Supreme Court Practice at what was then page 390 of volume 1. In the later edition, which I have before me, it is page 1185 of volume 1.

11. The case of Palmer v Prince was followed in the Supreme Court of Queensland by McPherson J., in the case of Worldwide Products Pty Ltd v Hoffman (1982) QR 316. There His Honour was dealing with a case where judgment had been entered on behalf of the plaintiff.

12. As in this case, an application had been made to set aside the judgment, and in support of that application an affidavit by a solicitor had been filed, in which the solicitor stated that he was informed by his clients and verily believed that they had a defence on the merits to the plaintiff's claim. He then exhibited to his affidavit a proposed defence and counterclaim.

13. McPherson J., applying Palmer v Prince, held that that was not sufficient. He did make these remarks at the conclusion of his judgment:

" Accordingly, I propose to give effect to the submission advanced by the respondent (plaintiff) to this application. No doubt the applicants will now simply file a further affidavit in the appropriate form deposing to precisely the same facts, with the consequence that the respondent's success is likely to

be short lived."

14. It has been put to me by Mr Walsh for the defendant that, as a matter of
expedition
and on the basis that the defendant here in the Northern Territory of Australia - that is, a large corporation with many servants
- that an
affidavit by those who could swear personally to every aspect of the defence
would put the defendant in a very inconvenient
position.

15. I do not accept that the fact that the defendant is a large corporation makes any difference to the general rule.

It seems to me that the principle behind the approach of the courts, as illustrated by such cases as Palmer v
Prince and Worldwide
Products Pty Ltd v Hoffman - although I have been unable
to find it clearly stated - is this: that if a plaintiff has regularly obtained
judgment he is entitled to that judgment, and he is entitled to be
assured that the defendant has at least an arguable defence.
He is entitled,
therefore, to be so assured by somebody who is personally concerned with that
defence, and is sufficiently personally
concerned in that defence to make an
affidavit concerning the details of that defence, knowing full well the
penalties of perjury.

16. In other words, the <Plaintiff> is entitled, **not to be told by a solicitor that his instructions are that there is a good defence, but to be told by somebody directly concerned with the events that have occurred that there is a good defence, and have that sworn to. That obviously would prevent the more extreme cases of evasion of a justly entered judgment, and would certainly give pause to defendants who might otherwise wish to evade the consequences of the judgment by some sort of false account. 17. If such persons have to swear to that account, they may well reconsider what they might otherwise have cheerfully proceeded to do by hiding behind their solicitor and giving him the instructions which they would not have been prepared to swear to on oath.**

That, I think, is the principle behind the rule, and it is for that reason **that it does not seem to me that the fact that the defendant is a large corporation makes any difference to the principle.**

18. It does, however, I think affect the sort of affidavit which may be sworn, particularly
if the case is a complicated case. I would have
considerable sympathy with a defendant who was obliged to swear to every point
of
the defence by the personal affidavits of a whole series of witnesses; and
it seems to me - without necessarily binding myself to
any conclusive view -
that an affidavit sworn as to the general facts by somebody with personal
knowledge of the overall situation
would normally be appropriate in those
circumstances.

19. I should add that I was also referred to the case of Wiedenhofer v The Commonwealth of Australia [1970] HCA 54; (1970) 122 CLR 172, a decision of Gibbs J., as he then was. That was a case where His Honour had before him a notice of motion seeking judgment to be entered in default of defence. The defence had, in fact, been filed, although out of time and, as is obvious from the report, no judgment had been entered. In that case His Honour refused to enter judgment in default of defence, and it is clear that the situation was somewhat different to the present case.

20. Bearing in mind the remarks of McPherson J. in Worldwide Products Pty Ltd v Hoffman, which, if I may say so, contain sound common sense, it seems to me that I should give effect to the plaintiff's objection that a proper affidavit has not been served; but at the same time give the defendant the opportunity to file an affidavit sworn by somebody with knowledge of the facts to comply with the rules.

21. It seems to me, therefore, that I should adjourn the present application for a period which I will discuss with Counsel; but I should adjourn the present application for a positive period of days to enable a further affidavit to be served.