CASE NOTE: *THOMAS V DEPUTY COMMISSIONER OF TAXATION* (UNREPORTED, DISTRICT COURT OF QUEENSLAND, WHITE DCJ, 5 AUGUST 2004)

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INTRODUCTION

His Honour Judge White of the District Court of Queensland recently had cause to consider the philosophy and approach that should be observed by a court, in light of the procedural changes effected by the *Uniform Civil Procedure Rules 1999*.[1] His Honour did so within the context of an appeal against the refusal by a magistrate of an application to set aside a default judgment *ex debito justitiae*.[2]

I FACTS AND ARGUMENTS

The respondent commenced an action for recovery of unpaid tax by way of claim and statement of claim in the Magistrates Court at Cairns on 19 December 2002. The respondent served the originating proceeding on the appellant's nephew on 30 January 2003. The appellant failed to file a notice of intention to defend within the time prescribed by the *Uniform Civil Procedure Rules (UCPR)* and on 28 February 2003 the respondent obtained default judgment against the appellant.

The appellant applied some time later to the Magistrates Court seeking to set aside the default judgment on the basis that it was irregularly obtained because of the manner in which the originating process was served. Although the magistrate found that the default judgment had been irregularly entered, the magistrate considered that he nevertheless retained

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[1] *Uniform Civil Procedure Rules 1999* (Qld), ('*UCPR*').

[2] That is, as of right.

a discretion as to whether or not the judgment should be set aside, and he exercised that discretion against the appellant.

The appellant appealed against that order to the District Court at Cairns on the basis that the judgment was irregularly entered and should have been set aside *ex debito justitiae*.

The appellant contended that the default judgment was irregular because service of the originating process was not in compliance with the *UCPR*. The rules provide that for documents in Magistrates Courts proceedings, service needs to be [QUERY 1]~~either~~ personal service upon the appellant,[3] ~~or~~ service by 'leaving it with someone who is apparently an adult living at the relevant address'~~.~~[4] or service on the appellant's solicitor. 'Relevant address' is defined in rule 112(3) of the *UCPR* as meaning:

> (a) the person's address for service; or
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> (b) for an individual that does not have an address for service —
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> (i) the individual's last known place of business or residence.

The appellant argued that the address at which the documents were served was not the appellant's 'last known place of business or residence' as required by the rules.

The respondent served the appellant's nephew with the originating proceedings at the address '45 Cheviot Street'. This was not the address for service nominated by the respondent in the claim. In fact, this address had been nominated as an address for service of documents relating to two companies with which the appellant was associated and which were involved in separate and unrelated Supreme Court proceedings.

The appellant deposed that he had not been served with the documents and that he did not ever see or receive a copy of the statement of claim until after judgment had been entered. This was at odds with a letter from the appellant's accountant to the respondent dated 18 February 2003 which referred to the Magistrates Court claim and a request by the appellant that the respondent agree to a repayment arrangement.

The appellant argued that the magistrate had correctly found that the default judgment was irregular but that his acceptance of the respondent's submission to exercise a discretion to allow the default judgment to remain notwithstanding was wrong. This was on the basis that default judgment had been obtained in circumstances involving a lack of compliance with the rules. Furthermore, the appellant submitted that the magistrate had taken into account a number of affidavits which had been objected to and which contained hearsay.

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[3] See r 105 *UCPR*..

[4] See r 111 and r 112 *UCPR*..

The respondent, on the other hand, argued that the magistrate ought to have found that the judgment was regularly entered or, alternatively, that the judgment ought in any case be permitted to stand in the exercise of the Court's discretion.

It was contended for the respondent that while an irregularly entered judgment has traditionally been set aside *ex debito justitiae*, that is no longer necessarily the case under the *UCPR*. While it was once the case that the entry of the default judgment involved a ministerial or administrative act by the registrar requiring strict compliance with the rules, the function of the registrar today in relation to the entry of a default judgment involves the exercise of judicial power. On this basis, an irregularity does not mean that the entry of the default judgment is necessarily a nullity. Furthermore, rule 5 of the *UCPR*, which expresses the general philosophy of the rules, requires the avoidance of 'undue delay, expense and technicality' so as to facilitate the 'just and expeditious resolution' of disputes.

II THE DECISION

White DCJ considered in detail the rules relating to service and default judgment and, in particular, the philosophy or approach that should be applied in relation to the interpretation of the rules relating to default judgment.[5] He considered that 'the registrar must act in a judicial capacity and must be satisfied that all of the conditions precedent to the giving of the judgment are properly proved.'[6]

His Honour found that the registrar had sufficient evidence before him to be satisfied as to service of the claim and statement of claim[7] and that the appellant had not satisfied the magistrate that 45 Cheviot Street was not his last known place of business or residence.[8] His Honour therefore concluded that the Magistrate ought to have found that the judgment was regularly entered.[9] On that reasoning, the magistrate 'made an error of law and he should have found that there was no irregularity in the entry of default judgment.'[10]

His Honour went on, however, to consider what the position would have

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[5] Particularly, r 283 *UCPR*.

[6] *Thomas v DCT* (Unreported, District Court of Queensland, White DCJ, 5 August 2004) [3].

[7] Ibid [21].

[8] Ibid [16].

[9] Ibid.

[10] Ibid.

been if the appellant had proven that 45 Cheviot Street was not his last known place of business or residence. In his view, there has been a fundamental change in the philosophy that entry of default judgment is a ministerial act by a registrar. '[T]he words "the court as constituted by a registrar may give judgment" make it clear that the registrar now performs a judicial rather than a ministerial function.'[11]

His Honour noted that there may still be circumstances where a default judgment can be set aside *ex debito justitiae*. Those circumstances include where the entry of default judgment is obtained by fraud, or where the registrar has given judgment in error because the evidence and material is insufficient to confer jurisdiction to give judgment, or where the request had been made by a plaintiff who is not acting in good faith.[12] But this was not the case here and:

> [u]nder r 283 the court constituted by the registrar must act judicially. He must decide whether or not to exercise his discretion to give judgment on the basis of the evidence and materials before him at the time ... the registrar acting judicially properly gave judgment to the plaintiff. Even if it was established by the later evidence that as a matter of objective fact on the hearing of the later application 45 Cheviot Street, Smithfield was not the appellant's last known place of business or residence that does not automatically give rise to an irregularity in the proceedings before the registrar. It would certainly give rise to a discretion to set aside the default judgment but not a right in the defendant to have it set aside *ex debito justitiae*.[13]

In dismissing the appeal, his Honour further noted that the evidence demonstrated that the appellant was aware of the originating proceeding, that he offered no explanation as to why an entry of appearance and defence was not filed within the prescribed time period, and that he had not made any attempt to demonstrate that he has a defence to the plaintiff's claim on the merits.[14] For those reasons, his Honour considered that the magistrate had rightly exercised his discretion to dismiss the application.

III COMMENT

The overriding philosophy of the *UCPR* is set out in rule 5(1) as being 'to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.' Further, rule 5(2) provides that the 'rules are to be applied by the courts with the objective of avoiding undue

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[11] Ibid [18].

[12] Ibid [19]–[20].

[13] Ibid [21].

[14] Ibid [23].

delay, expense and technicality'. The decision of White DCJ in this case demonstrates a recognition of this philosophy from a number of perspectives.

First, the registrar in issuing a default judgment pursuant to the regime now provided for by the *UCPR* no longer exercises a purely ministerial or administrative role. According to the interpretation of rule 283 applied by his Honour, Judge White, the role of the registrar involves an exercise of judicial (albeit delegated) power which is subject to discretionary considerations. Where historically, a default judgment irregularly entered should be set aside as a nullity, this is no longer necessarily the case. This interpretation of the rules demonstrates a degree of flexibility that was not previously available under the old regime, which required strict compliance with adjectival requirements for the entry of default judgment.[15]

Second, and most importantly from a practical perspective, the decision highlights the significance of being able to demonstrate a defence on the merits as a prerequisite to seeking to have a default judgment set aside. This aspect of the decision reiterates the overriding philosophy that the rules are intended to prevent undue delay and expense. If this were not the case, the plaintiff would be put to the arguably unnecessary expense of having to press on with an action that would lead, inevitably, to a further judgment.

Finally, the decision provides guidance in relation to the circumstances that would need to prevail in order for a default judgment to be set aside *ex debito justitiae* under the *UCPR*.

The appellant has since filed an appeal to the Queensland Court of Appeal against the order of the District Court.

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[15] See for example the approach in cases such as *Vosmaer v Spinks* (1964) QWN 36 and *Luka Brewery v Grundman* (1985) 2 Qd R 204; referred to by White DCJ at [17].