JUDGMENT : McCALLUM J : Supreme Court New South Wales, Common Law Division. 12th February 2008

1 This is an application to set aside the default judgment entered in favour of the plaintiff in the proceedings on 3 April 2006. The orders made on that date were:

1) That the plaintiff be given possession of the land described in the schedule;

2) That the first defendant, second defendant and third defendant pay to the plaintiff $1,028,725.29.

The land in question is a property at 68 Lyons Road, Drummoyne purchased by the first defendant as an investment property. A writ of possession was issued on 22 May 2006 and the plaintiff entered into possession of the property on 1 November 2006. The property has now been sold and the proceeds of sale applied in reduction of the debt the subject of order two of the judgment.

2 The proceedings arise out of the first defendant's default in the repayment of two loans secured by registered mortgage given by the first defendant over the property the subject of the possession order. The loans were also secured by guarantees given by the second and third defendants.

3 The Statement of Claim was filed on 22 July 2005. It was served on the first and third defendants on 26 July 2005 and on the second defendant on 3 August 2005. No notices of appearance were filed at that stage.

4 On 31 January 2006, no step having been taken in the proceedings for over five months, the Court wrote to the plaintiff to inform it of the proposed dismissal of the proceedings under rule 12.8 of the Uniform Civil Procedure Rules (UCPR). In response to that letter, the plaintiff sought to have the proceedings re-listed for directions and, in due course, filed its motion for default judgment. No notices of appearance having been filed by any of the defendants at that stage, the defendants were not notified of any of those steps.

5 By their Notice of Motion dated 4 October 2007, the defendants seek the following orders:

"1) The judgment dated 3 April 2006 is set aside.

2) The plaintiff is ordered to restore the possession of the land described in the schedule to the judgment.

3) The plaintiff and the respondents are ordered to restore the defendants to their pre-judgment position and reimburse the losses suffered by the defendants on account of the unfair, illegal and fraudulent acts of the plaintiff in collusion with the respondents."

6 At the time the Notice of Motion was filed, there were still no notices of appearance filed on behalf of the defendants. However, on 12 December 2007; (a) the first defendant filed a notice of appearance indicating its intention to appear through the third defendant, its authorised officer; (b) the second defendant Bhogi Watts filed a submitting appearance; (c) the third defendant filed a notice of appearance in his own name.

7 The basis on which relief is sought is not articulated in the Notice of Motion. Mr Mehigan, who appeared for the plaintiff (the respondent to the motion), invited me to consider the application under both UCPR 36.16 (2) in relation to default judgments, and UCPR 36.15, which is the general power to set aside a judgment of the Court on sufficient cause being shown. I have considered the application under each of those rules.

8 The third defendant, Mr Watts, argued that the judgment should be set aside because it was obtained clandestinely by misrepresentation of facts and by keeping the defendants in the dark, without serving them or informing them of any documents after the service of the Statement of Claim. Mr Watts argued that the defendants were accordingly denied natural justice. He relied on the decision of McDougall J in ***Musico v Davenport*** [2003] NSWSC 977. The issue in that case was whether the determination of an adjudicator made pursuant to s 22 of the *Building and Construction Industry Security of Payment Act* 1999 is susceptible to judicial review. The principles outlined by McDougall J in his decision have no application to the relief claimed in the present application. However, the fact that the judgment was obtained by default and in the absence of the defendants is relevant and I have taken it into account in considering the application.

The Court's power under UCPR 36.15

9 The Court has power to set aside the judgment under UCPR 36.15 if it is established that the judgment was given or entered irregularly, illegally or against good faith. A default judgment signed contrary to the terms of a contract between the parties or in breach of a promissory representation may be "against good faith" within the meaning of the rule: ***Roach v B & W Steel Pty Ltd*** (1991) 23 NSWLR 110 at 113F.

10 Mr Watts contended that an arrangement had been entered into between the first defendant and the plaintiff through its agent Mr Rocco Reitano under which the plaintiff agreed that it would not proceed with any legal action. He relied on a letter dated 19 July 2005 from Gadens, the solicitors for the plaintiff, to the first defendant. In that letter, Gadens informed the first defendant that they were instructed to file and serve the Statement of Claim but that the bank may be prepared to consider deferring the current legal action if the first defendant complied with certain conditions. The conditions called for payment of outstanding amounts and also required that there be no further default. The letter does not record an agreement and contains qualifications and reservations common in such correspondence but it does indicate a tentative willingness on the part of the plaintiff to forbear from the prosecution of its legal proceedings if the defaults were rectified and not repeated.

11 The evidence before me does not disclose whether the letter dated 19 July 2005 was received by the first defendant before or after the service of the Statement of Claim on Mr Watts and the first defendant on 26 July 2005. In any event, the uncontested evidence is that the first defendant made the payments of arrears and continued to make payments under the loans when due until November 2005, after which it again fell into default of the two loan agreements.

12 Mr Watts does not dispute that there were defaults in the two loan agreements, nor that the penalty charges incurred as a consequence were calculated in accordance with the two loan agreements. However he contended that, after the Statement of Claim was filed, the defendants raised their objection and "the plaintiff promised they would not proceed with the Statement of Claim and advised the defendants that they need not file their appearance". There was no admissible evidence to sustain that allegation. An assertion in those terms was contained in one of Mr Watts' affidavits but I rejected that evidence as being bad in form. Mr Watts declined an opportunity to adduce further evidence on that issue.

13 In a letter dated 8 August 2005 from Mr Watts to Mr Reitano, Mr Watts acknowledged receipt of a letter from Gadens "putting certain conditions", which I infer is the letter dated 19 July 2005 referred to above, and stated that the defendants had already complied with all of those conditions. The concluding paragraph of the August letter states:

"*Relying on your confirmation and re-confirmation that you would not proceed with the recalling of the entire loan or repossession we have not filed our appearance in the Court in response to the claims lodged by your solicitors as matter of a formality to fulfil the conditions listed in their letter referred to previously.*"

14 If the matter had rested there, I might have had a basis for concluding that the defendants' failure to file an appearance in the proceedings was due to their reliance on some representation made, or which at least they believed to have been made, by Mr Reitano and the Court's discretion under r 36.15 might have been invoked. However, the matter did not end there. As noted above, in November 2005 the defendants again fell into default. By email dated 19 January 2006, Mr Reitano advised Mr Watts of the amount of arrears and informed him that they needed to be cleared as soon as possible. Mr Watts responded that he should be able to clear outstanding amounts by 31 January 2006 and asked Mr Reitano to "be considerate". A further email from Mr Reitano on 31 January 2006 noted that the defendants had failed to clear the arrears as promised and said "Adelaide Bank have now instructed me to commence legal action". Mr Watts responded by asking the bank to allow until 11 February 2006 to clear all overdue instalments and fees.

15 On 13 February 2006, the arrears had still not been cleared and Mr Reitano informed Mr Watts that the files had been referred to the solicitors for "legal actioning" and possible listing as a default under CRAA. Mr Watts' response dated 16 February stated that the funds were coming, but were delayed by a week or so.

16 There is a further email from Mr Reitano to Mr Watts which appears to be a reply to that last email. However, it is dated 15 February 2006, the day before Mr Watts' last email. In any event, the email notes that the matter has been dragging on for some time and that Adelaide Bank had given Mr Reitano stern instructions to continue. The email concluded "*solicitors will be instructed to proceed to judgment, as the Statement of Claim served against you was good for a period of six months*". That statement misrepresented the position to the extent that it suggested that the Statement of Claim would no longer be valid after a period of six months. It is a matter of speculation but it is possible that Mr Reitano had in mind the period within which a Statement of Claim is required to be served after being filed. In his submissions, Mr Watts sought to place some reliance on that misrepresentation. However, there is no evidence to suggest that he or any of the defendants in fact relied on it at the relevant time. The final email from Mr Reitano to Mr Watts is dated 24 February 2006. It advises Mr Watts of outstanding amounts that need to be paid and states "*solicitors have been instructed to proceed to judgment*".

17 As the emails referred to above were not included in the evidence served on the defendants by the plaintiff, I granted the defendants an opportunity to adduce further evidence in reply. Mr Watts filed a further affidavit annexing the full exchange of emails at around that time, concluding with the email dated 24 February 2006. In his further affidavit, Mr Watts states that he has underlined the sentences which indicate that Mr Reitano made arrangements for deferral of legal action. The only new material within the bundle that sustains that contention is an email dated 21 March 2005 which refers to an arrangement to postpone commencing legal action pending clearance of all arrears by 31 March 2005. That arrangement was overtaken by the events following the further defaults from November 2005 outlined above.

18 I am satisfied that, although in August 2005 the defendants had put the bank on notice that they had not filed any appearance in the proceedings in reliance on their understanding that, for the time being, they had satisfied the bank's requirements, by 24 February 2006 the first and third defendants were well on notice that the indulgence granted in August 2005 would no longer be afforded to them. Mr Reitano had informed them that the plaintiff had instructed the solicitors to proceed to judgment. As the letter of 8 August 2005 makes plain, Mr Watts was aware of the need to file an appearance in the proceedings in the absence of such an indulgence.

19 Accordingly, I am satisfied that the judgment was not given or entered irregularly, illegally or against good faith. No basis for the exercise of the Court's power under r 36.15 is established.

Court's power under UCPR 36.16

20 The Court has power under rule 36.16 to set aside a default judgment or one which has been obtained in the absence of a party. The task in the exercise of that discretion is to balance the competing interests of the plaintiff and the defendants and to determine whether or not the interests of justice require that the defendants should be permitted to contest the plaintiff's claim.

21 Plainly, the order that the plaintiff be given possession of the land should not be set aside at this stage, the land having been sold. There is no suggestion that the sale was other than to a bona fide third party. The evidence

discloses that Mr Watts was aware of many of the steps taken to effect the sale and indeed participated in identifying a buyer.

22 As to whether the judgment debt should be set aside, the principal consideration in the present case is whether the defendants have established an arguable defence to the debt. Mr Watts argued that, if the defendants had been given an opportunity to defend the claim, he would have argued two matters; "hardship" and that the contract was unreasonable by reason of the imposition of penalty charges calculated by reference to the whole of the loan, rather than by reference only to the arrears at any particular time.

23 As to the issue of "hardship", the proposition, as developed in oral argument, appeared to be that Mr Watts would have argued that entry of judgment should be delayed so as to enable him to get his affairs in order. He stated that he owns several properties and should have been given time to sell another property in order to pay his debt to the plaintiff. That would not have amounted to an arguable defence.

24 As to the alleged unreasonableness of the contract, Mr Watts acknowledged that he signed each of the loan agreements but stated that he did not read the fine print. He did not dispute the bank's contractual entitlement to the penalty charges accrued but maintained that the bank had behaved unreasonably in refusing to waive those charges at a later time. The gist of the complaint was that the plaintiff has not been as indulgent as many other lenders have been when he has been in default of other loans. He said that he has been investing in properties for 10 years and no other bank has done this to him. No arguable defence is established on the strength of that contention. The first defendant failed to comply with notices served under section 57(2)(b) of the *Real Property Act* 1900 as a result of which the plaintiff had, as at 11 June 2005, an immediate right to sell the security property, call up the principal of the two loans pursuant to acceleration clauses in the loan agreements (clause 11.4 in each agreement) and enforce the guarantees. None of those propositions is in dispute.

25 The notice of motion also seeks an order restoring the parties to their pre-judgment position and reimbursing losses suffered by the defendants by reason of the conduct of the plaintiff. As submitted by Mr Megihan, if the defendants wish to challenge the propriety of any conduct of the plaintiff in respect of the enforcement of its security, it remains open to them to do so in other proceedings: ***Carr v Finance Corporation of Australia Ltd*** (1982) 150 CLR 139 at 152. I do not wish to be taken to suggest that there is any evidence before me that discloses a basis for the defendants' making such a claim but even if there were, that would not be a basis for setting aside the judgment debt.

26 Accordingly, I am not persuaded that the Court should exercise its discretion to set aside the default judgement under r 36.16.

27 The application is dismissed. I will hear the parties as to costs.

Mr T Meighan (Plaintiff) instructed by Gadens Lawyers (Plaintiff)
Mr G Watts (3rd Defendant appearing in person)