

Mohd Farok Abdul Majeed t/a Australasia Pacific Management v Dato Onn Mahmud (defendant)

JUDGMENT : BRERETON J. Supreme Court New South Wales, Equity Division, Expedition List. 30th January

- 1 On 31 August 2007, in circumstances described and for reasons given in my judgment published on 13 December 2007 [*Majeed v Mahmud* [2007] NSWSC 1413], I gave judgment in proceedings 5010/06 that the first defendant Dato Onn Mahmud pay the plaintiff Mohd Farok Abdul Majeed the sum of \$2,212,615, ordered that Mr Mahmud pay Mr Majeed's costs, and dismissed the proceedings as against the other defendants. The basis of that judgment which followed an ex parte hearing, was that Mr Majeed had served on Mr Mahmud a payment claim under the (NSW) *Building and Construction Industry Security of Payment Act 1999*, and no payment schedule had been provided within time or at all in respect of that payment claim. The claim in question had been for a sum of \$3,825,780, but I excluded from the judgment two items in the claim – of \$1,390,620 and \$344,500 respectively – on the basis that those items were not in respect of construction work or related goods and services within the meaning of the Act, and were thus not properly the subject of a payment claim under that Act. However, I indicated that if Mr Majeed wished to pursue a claim in respect of matters not within the scope of construction work and related services, the possibility of which I did not intend to exclude, he would have to do so in other proceedings. In due course, on 11 October 2007, Mr Majeed filed a summons in proceedings 4977/07 claiming the sum of \$1,735,120. Subsequently, on 12 November 2007, he amended that summons to claim a sum of \$15,385,120. The basis of the claim for that sum is set out in a draft Statement of Claim, which appears never formally to have been filed, nor served.
- 2 Subsequent to the judgment to which I have referred, Mr Majeed applied for and obtained the issue of a writ of execution in respect of Mr Mahmud's property at 26 Carrara Road, Vacluse and he appears also to have lodged a caveat in respect of that property. Mr Mahmud thereupon instructed solicitors, and by Notice of Motion filed on 9 October 2007 sought orders setting aside and alternatively staying the judgment and the writ of execution, and directions for the further conduct of the proceedings.
- 3 The motion came before Windeyer J, sitting as Duty Judge, on 9 October 2007, who that day by consent made orders staying the writ until further order, requiring that the caveat be withdrawn forthwith, and adjourning the matter for directions. The motion subsequently was fixed for hearing before me on 13 December 2007. Contemporaneously with that motion, there was also fixed for hearing a motion filed on behalf of Mr Mahmud in proceedings 4977/07, by which he sought to have those proceedings stayed as an abuse of process on the basis they claimed substantially the same relief as proceedings 5010/06.
- 4 In the days before 13 December 2007, Mr Majeed, in correspondence with my Associate – which was on-forwarded to the solicitors for Mr Mahmud only when it was pointed out to Mr Majeed it was not appropriate unilaterally to communicate with my Associate – indicated that he was not in a position to proceed on 13 December and sought an adjournment. Although he announced that he would be overseas, he was informed that he should not assume that an adjournment would be granted.
- 5 Initially there was no appearance on his behalf when the matter was listed on 13 December, but after communication with the solicitors who had filed a Notice of Appointment of Solicitor on his behalf, there was an appearance in which it was indicated that little in the way of instructions had been obtained, the solicitors had been given to understand that the matter was to be adjourned, and were not in a position to proceed. With some reluctance, in the circumstances, I adjourned both motions for hearing today, ordered Mr Majeed pay Mr Mahmud's costs of 13 December on an indemnity basis, stayed operation of the judgment of 5010/06 up to and including today, and made directions for the service of any further affidavit evidence upon which Mr Majeed might wish to rely, and for the provision of lists of affidavits and outlines of argument.
- 6 Mr Mahmud provided an outline of argument in accordance with those directions. Although, on 15 November, Mr Majeed provided a folder filed that day containing affidavit evidence in response to the motion, and also the draft Statement of Claim to which I have referred, he has provided nothing since. Nothing has been heard of him by my chambers since then. The solicitors on the record for him have corresponded with him by email, notifying him of the adjournment of proceedings to today and that they would seek leave to cease to act if he did not put them in funds and provide instructions, and Mr Mahmud's solicitors have served on him their outline of argument and other material, all drawing to his attention the circumstance that the matter was listed today. However, he did not appear. On the application of his former solicitors, I granted them leave to file a Notice of Ceasing to Act. I am satisfied on the present state of the evidence that Mr Majeed has notice of the hearing today.
- 7 Mr Mahmud invokes Uniform Civil Procedure Rules ("UCPR"), r 36.15(1), which empowers the Court to set aside any judgment where it was given or entered irregularly, illegally or against good faith upon sufficient cause being shown, and UCPR, r 36.16(2)(b), which empowers the Court to set aside the judgment given in the absence of a party, whether or not the party had notice of the application. It is plain that the judgment of 31 August 2007 was given in the absence of Mr Mahmud and that the power conferred by r 36.16(2) is, therefore, available, and I do not need to be satisfied that the judgment was entered irregularly, illegally or against good faith.
- 8 On such an application, the principal relevant considerations are whether the defendant can show that it has an arguable defence on the merits, and such explanation if any the defendant can offer for not having appeared when an appearance was called for.
- 9 So far as a defence on the merits is concerned, as I have foreshadowed, the judgment was based on failure to provide a payment schedule in response to a payment claim. Mr Majeed had served two payment claims, one in

December 2006 and the second in early May 2007. It appears that the May 2007 payment claim was served on 3 May 2007. The evidence of service is proof of delivery provided by Australia Post of registered correspondence. In respect of that service, there is strong evidence that a payment schedule was served on 14 May 2007 at the Neutral Bay registered place of business of Australasia Pacific Management, and at the Chatswood address shown on its letterhead. I am satisfied that an arguable defence in respect of that payment claim has been made good.

- 10 In respect of the previous attempt at service of the payment claim in December 2006, there is no such proof of delivery as there is in respect of the 3 May service; the only evidence of service is the affidavit evidence of Mr Majeed, read on his application for judgment, that he posted the payment claim to Mr Mahmud's Vaucluse residence. Mr Mahmud's evidence is that he did not receive it, and that having made inquiries of his family who resided in the Vaucluse premises, they did not receive it. While, in the light of the evidence as a whole of the various attempts at service - not only of payment claims but also of the summons - one might otherwise entertain some doubt as to the Mr Mahmud's evidence in this respect, on this application it stands unchallenged and uncontradicted and, in those circumstances, I do not see any basis for declining to act on it. Accordingly, I am satisfied there was an arguable case that the payment schedule was not served in December 2006, which was the alternative basis upon which Mr Majeed might have been entitled to support the judgment. It follows that I am satisfied that Mr Mahmud has demonstrated a sufficiently arguable defence on the merits.
- 11 So far as an explanation for the Mr Mahmud's failure to appear and defend the matter is concerned, again, one might, if the matter had been contested, have entertained some reservations about his protestations to the effect that he had no notice of the claim against him. But again, in circumstances where that evidence is uncontradicted and unchallenged, I see no reason why I should do anything other than act on it. Absence of notice of the proceedings is ample explanation for failure to appear. Accordingly, I am satisfied that the judgment should be set aside.
- 12 Mr Mahmud seeks an adjournment of the hearing of the motion in proceedings 4977/07, on the basis that until more is known of the nature and basis of Mr Majeed's claim in those proceedings, it will not be apparent whether or not any abuse of process is concerned. Prima facie, it seems to me that pursuit of a motion for stay of those proceedings is an unnecessary expenditure of effort and costs, in circumstances where both proceedings are in the same court and they can be consolidated or heard together so that no prejudice will be occasioned by the circumstance that there are two rather than one proceedings. But that is a prima facie view only and it is, I think, appropriate to afford Mr Mahmud an opportunity of understanding the basis upon which the claim 4977/07 is put before disposing of that motion.
- 13 Mr Mahmud has proposed a number of other orders and directions. One is that Mr Majeed not correspond directly with Mr Mahmud but only with his solicitors. As things now stand, Mr Majeed is, as he was originally, a self-represented litigant. Whatever might be the inconvenience involved in his corresponding directly with Mr Mahmud, I do not see any proper basis disclosed by the evidence at this point on which Mr Majeed should be restrained from corresponding with Mr Mahmud personally if he wishes to do so. Of course, whether that amounts to good service in circumstances where Mr Mahmud has an address for service is another matter, but I will decline to make a direction that Mr Majeed not correspond directly with Mr Mahmud.
- 14 A direction is also sought that Mr Majeed serve on Mr Mahmud's solicitors any document filed in the proceeding within 48 hours of that document being filed. Although, at first, it seemed to me that this direction was superfluous since the UCPR require such service, it now seems that the conduct of the proceedings may be facilitated if I do make such a direction expressly so that Mr Majeed is clearly aware of his obligation to serve any documents filed.
- 15 Thirdly, a direction is sought that Mr Majeed respond to a request for particulars made on 29 November 2007. The Registrar made directions on 16 November that Mr Mahmud request particulars by 29 November, which he did, and Mr Majeed answer that request by 12 December, which he has not. Some of the requests may be answered by the draft Statement of Claim to which I have referred, which Mr Majeed delivered to the Court some time prior to 13 December last year, but an understanding of the nature of Mr Majeed's claim will be facilitated by a response to the request for particulars. Mr Majeed has not, so far as the evidence goes, raised any objection to the request.
- 16 Ordinarily on an application to set aside a default judgment or in equivalent circumstances such as the present, the successful defendant/applicant is ordered to pay the plaintiff's costs, on the basis that the defendant has been granted an indulgence to escape the consequences of its own default. That approach is not necessarily appropriate where the defendant has not had notice of the hearing in the first place and is not relevantly at fault, and is plainly inappropriate where a judgment has been entered irregularly, illegally or against good faith and the defendant is entitled *ex debito justitiae* to have the judgment set aside.
- 17 Although, as I have indicated, one might otherwise have some reservations about Mr Mahmud's protestations of ignorance of the claim, on the evidence on this application, and given Mr Majeed's failure to contradict or challenge it, I should proceed on the basis of accepting Mr Mahmud's evidence. As has been pointed out, it does not appear that any attempt was made to serve the summons on Messrs Tress Cox who, to the knowledge of Mr Majeed, were acting for a company related to Mr Mahmud in related matters.

- 18 On the other hand, it seems that the summons was served on an address in Malaysia of a company in which Mr Mahmud concedes that he is involved, though he says he attends but rarely at that particular address. As recorded in my previous judgment, it was Mr Majeed's evidence that in November 2006 he made several visits to Mr Mahmud's Vaucluse premises to attempt to serve the summons there, but no one was at home, and it seemed tolerably clear that he then made considerable attempts in Malaysia to serve the summons, albeit not successfully, before obtaining an order dispensing with further service.
- 19 More significantly, Mr Majeed has resisted the application to set aside the judgment, and by that resistance, and by the adjournment in respect of which a costs order has already been made, culminating in his non-appearance today, has put Mr Mahmud to additional costs. I should rely on the evidence before the Court as it stands, and not on speculation as to what explanations might have been given by Mr Majeed were he present. In those circumstances, I accept that he should be ordered to pay Mr Mahmud's costs.
- 20 I make the following orders:
- 21 In proceedings 5010/06:
- (1) Order that the judgment, contained in paragraph 1 and the order in paragraph 2 of the orders made on 31 August 2007, be set aside;
 - (2) Order that the plaintiff pay the defendant's costs of the motion filed on 9 October 2007 save insofar as any special costs order otherwise provides.
- 22 In proceedings 4977/07:
- (3) Adjourn the hearing of the defendant's motion to 29 February 2008 at 10am before me for directions, to follow the Expedition List that day;
 - (4) Direct that the plaintiff by 21 February 2008 provide answers to the defendant's request for particulars contained in the letter from Tress Cox to the plaintiff dated 29 November 2007.
- 23 In both matters:
- (5) Adjourn the proceedings to 29 February 2008 for directions;
 - (6) Direct that the plaintiff serve on the solicitors for the defendant any document he files in the proceedings within 48 hours of having filed such document;
 - (7) Upon the undertaking of the defendant's solicitor to return the same to my Associate within 24 hours, I grant leave to the defendant's solicitor to uplift the draft Statement of Claim and annexures for the purpose of photocopying the same.

Ms T Mijic (plaintiff) (solicitor) instructed by Robinson Legal
Mr C D Wood (defendant) instructed by TressCox Lawyers