

JUDGMENT Sidis DCJ New South Wales District Court 11th June 2008

- 1 The defendant by motion sought to have the judgment entered against it on 15 February 2008 set aside. The application was heard on 24 April 2008 and on 16 May 2008 reasons were published indicating that I proposed to set aside the judgment to the extent of \$103,653. The proceedings were listed for further directions on 11 June 2008 to deal with issues of costs and ongoing management of the claims made in the statement of claim.
- 2 The plaintiff argued that the defendant, as one might ordinarily expect, should pay the costs of the application to set the judgment aside. It has been argued that this is not a case of a judgment entered irregularly in the sense set out in Uniform Civil Procedure Rule 36.16 and I accept that argument.
- 3 The defendant seeks costs of the application, pointing to the fact that the plaintiff was aware at the time that it entered judgment that a defence was proposed and that by consenting to the application it could have avoided the contested application and the costs incurred by the parties, in particular those of the defendant in travelling from Lismore to Newcastle for the purposes of the hearing of the application.
- 4 It is apparent also that there are other proceedings between the parties in the Lismore Registry of the court and that these proceedings, albeit dealing with different issues, arise out of building work undertaken by the plaintiff on the same construction project, so that there is, to some extent, a duplication of effort.
- 5 It does appear to me that it was open to the plaintiff to accept that there was a defence on the merits and that it was inevitable that the judgment would be set aside, at least in respect of all but the claim for the storeroom. The arguments that were pursued in respect of the application to set aside the judgment were substantive arguments concerning the plaintiff's rights under the *Building and Construction Industry (Security of Payment) Act 1999* and those arguments were determined against the plaintiff.
- 6 In those circumstances, I am satisfied that it is appropriate in this particular case that the plaintiff pay the defendant's costs of the application to set aside the judgment.
- 7 Having entered judgment, the plaintiff by garnishee order secured payment of \$121,204.99. The defendant sought repayment of the whole of that amount. Having regard to the decision that I made on 16 May 2008, the defendant is entitled to repayment of the sum of \$103,653.00. The plaintiff informs me from the bar table that it does not have this money. I was informed at the time of the hearing of the application that the money had been spent, notwithstanding an order that I made on 18 March 2008 that the plaintiff provide security in respect of the funds transferred to it pursuant to the garnishee order.
- 8 The plaintiff argues that since the parties are in dispute as to their respective entitlements to the parcel of money that was the subject of the garnishee order, the court might entertain a proposition that the plaintiff retain that parcel of money or, alternatively, order that the plaintiff pay one half of the judgment sum into court, pending the resolution of the issues between the parties.
- 9 Much debate has been entered into in the course of these proceedings concerning the plaintiff's conduct in obtaining judgment and obtaining the funds pursuant to the garnishee order. I have already noted that the plaintiff allowed the defendant no indulgences when it embarked upon the conduct that secured to it the parcel of money in question.
- 10 In those circumstances, it does not appear to me that the court in fairness should be entertaining an indulgence towards the plaintiff. Those monies were secured pursuant to a judgment that has now been set aside to the extent of \$103,653. That sum together with interest agreed in the sum of \$2,640.81, is to be repaid to the defendant.
- 11 The orders which I make are as follows:
 1. The judgment is set aside to the extent of \$103,653 and interest in the agreed sum of \$2,640.81.
 2. The plaintiff is to pay the defendant's costs of the application to set aside judgment on an ordinary basis.
 3. The proceedings are transferred to the Lismore Registry. The venue for the proceedings henceforth is to be the Lismore Registry of the court.
 4. The affidavits filed in support of the application to set aside the judgment are returned.
 5. The proceedings will be listed for further directions in the Lismore Registry together with the proceedings currently before that court on a date to be advised to the parties.
 6. The exhibits are returned.
- 12 I note that the proceedings in the Lismore Registry are numbered 46 of 2008.
- 13 As far as the costs order is concerned, I note that there are issues remaining between the parties in the proceedings and in those circumstances the payment of the costs is deferred until these proceedings are finally determined.

P R Cummings (Plaintiff) instructed by Gillis Delaney Lawyers
A C M Mulcahy (Defendant) instructed by Mulcahy Lawyers