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Legal Bulletin

FREEDOM FROM EXCESSIVE FORMALITY: THE INHERENT DISCRETION OF THE COURT IN SECURITY OF PAYMENT CASES

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In a recent court decision in Victoria, the key importance of lodging payment schedules on time was reiterated. The Court also found that allegations of fact are taken to be admitted if a notice of appearance is not filed by a defendant, and the plaintiff seeks judgment by default.

Another key finding of this decision was that the Court has an inherent discretion to allow a plaintiff to amend the sum for which default judgment has been entered, and this is bolstered by Rule 36.07 of the Rules.

Background facts

The case concerned an application by a Builder (head contractor) to set aside a judgment entered in default of appearance for the sum of \$566,445 plus interest and costs. The judgment was obtained by a subcontractor who had served three payment claims under the *Building and Construction Security of Payment Act 2002*. There had been no payment schedules served under the Act by the head contractor.

During the course of the hearing the Plaintiff subcontractor alerted the Court that due to an accounting error the total of its claim was too high by \$49,500, in that the unpaid amount on the first invoice had been included in the second invoice. The Plaintiff applied to vary the amount of judgment sum downward to \$516,945.

Various arguments were raised by the Defendant in regard to the regularity of the judgment sum. This included the argument that because the third and final invoice was described in the Statement of Claim as only becoming due for payment on 25 December 2009, **after** the issue of the Writ on 22 December 2009, the sum in this invoice of \$280,000 was an invalid claim.

Decision

The Judge in this decision referred to an English Court of Appeal case (*Faircharm Investments Ltd v Citibank International plc [1998] EWCA Civ 171*). It was stated there that in exercising the discretion it would be pointless to set aside a judgment entered irregularly if the

defendant was bound to lose on a later summary judgment application.

Reference was also made to the case of *Cusack v De Angelis [2008] 1 Qd R 344 at 348*, where the Queensland Court of Appeal considered that in exercising the discretion a court should “...do whatever is necessary to achieve justice between the parties and to avoid unnecessary delay and expense...”

As a result, the Court gave the Plaintiff leave to vary the judgment amount to the lower sum of \$516,945, based on the Court's inherent discretion and Rule 36.07.

In relation to the arguments raised by the Defendant on the merits (in support of its application to set aside the judgment), the Court referred to prior case law to the effect that the main consideration is whether the defendant has a prima facie defence on the merits.

The Defendant raised arguments about how the judgment had been entered and that the Court could not have been satisfied of certain matters at that time, however it was ruled: “*The short answer to this submission is that every allegation of fact in the plaintiff's Statement of Claim is taken to be admitted by virtue of the defendant's default in filing an appearance.*”

As to some other allegations, for example that a deduction had not been made in payment claims for retention monies, it was accepted by the Court that it was up to the Builder to with-hold retention monies when making payment. It was considered that this argument, and others, could have been made in payment schedules under the Act. However, the defendant had failed to do so.

Finally, in relation to the third payment claim, the Court decided this sum (\$280,000) could be validly included in the judgment sum, even though this invoiced amount fell due under the contract around 3 days after the Writ was filed. In any event, the sum was overdue by the time of service of the Writ, and well overdue by the date that judgment was entered (2 February 2010).



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As Rule 36.01(3) allows the addition of a cause of action arising after the commencement of a proceeding, the Judge considered that, once again, the inherent discretion of the Court and the findings of the *Faircharm* decision would allow the sum to be included. There was seen to be no point in setting aside the judgment for this sum if the Plaintiff could merely then amend its Statement of Claim and obtain summary judgment for the revised sum.

This case highlights the importance of a respondent to a claim meeting its deadline dates, but also shows the flexibility of the Court in employing its discretion consistently with rules of procedure and prior case law.

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