IN THE HIGH COURT OF NEW ZEALAND A. 12/83

WHANGAREI REGISTRY

1252

BETWEEN GLENICE JEAN McLACHLAN

PLAINTIFF

A N D IAN ROBB McLACHLAN

FIRST DEFENDANT

A N D ROSS CHARLES McLACHLAN

SECOND DEFENDANT

Judgment: 7 September 1984

Hearing: 7 September 1984

Counsel: J.W. Watson for Plaintiff
R. Harrison for Defendants

ORAL JUDGMENT OF CASEY J.

This is an application by the First and Second Defendants for orders setting aside a judgment entered against the First Defendant on 29th November 1983 and subsequent charging orders obtained thereunder against land at Russell described in the motion. The First and Second Defendants also seek leave to file Statements of Defence on such terms as the Court deems fit.

The dispute between these parties goes back a long way. The Plaintiff and the Second Defendant were husband and wife and the First Defendant, Ian Robb McLachlan, is the husband's brother. His current whereabouts are unknown and an order for substituted service was obtained against him. It relates to the disposal of the net proceeds of sale in June 1981 of a property owned by the First Defendant at Long Beach. The Plaintiff's interest in this

property was the subject of proceedings filed under the Matrimonial Property Act in this Court, M. 83/80, which are still current. This present action is based on a family agreement which the Plaintiff alleged had been entered into in September 1979, whereby she was entitled to receive the sum of $35,000 out of the property concerned. However, the Defendants now say that she joined in as a party to an agreed settlement of the matrimonial property proceedings which was signed on her behalf by Counsel on 29th April 1982. In it she acknowledged that in consideration of the receipt of $15,000, she had no further claim on the Russell property and in due course, a cheque for that amount was tendered to her. It was returned by her solicitor in June 1982 who filed a memorandum in Court purporting to set aside the matrimonial property settlement which had been in its turn, the subject of a memorandum filed in those proceedings.

The Writ in this action was issued in March 1983 and sealed copies were served on the Defendants. The affidavit from the solicitors discloses that a Statement of Defence was drafted shortly afterwards but it was inadvertently placed on his Court file and overlooked, and was never lodged in Court nor were copies ever served. On 29th November 1983 the Plaintiff obtained judgment by default for the sum of $35,000 with interest of $7,433.60 and costs of $750, and to secure that judgment, she registered a charging order against the Russell property in which the Defendants' mother has a life interest. On 12th April 1984 the Defendants' solicitors discovered their oversight and immediately prepared the Statement of Defence and forwarded it for filing in the High Court. As Counsel says, by coincidence at the same time there was an exchange of correspondence for the first time in some twelve months with the Plaintiff's solicitors, who did not see fit to inform them of the fact that judgment had been entered and they were not apprised of this until 22nd May 1984. On 21st June the Defendants filed this application for the order setting aside

the judgment and Counsel told me they had offered to meet the Plaintiff's costs to date if she would consent. Mr Watson has found himself unable to do so and opposed this application.

The principles applicable have been recently the subject of consideration by the Court of Appeal in Russell v. Cox (1983) NZLR 654, and it is now made abundantly clear that Rule 236 is to be given its ordinary literal meaning when it says that any judgment obtained by default may be set aside or varied by the Court or a Judge on such terms as may seem just. As indicated in that judgment, the over-riding test must always be the justice of the case, where a defendant has been deprived of the opportunity of judgment on the merits by failure to adhere to procedural rules, the very purpose of which is to secure the just disposal of litigation. There can, of course, be no excuse for the blunder made by the Defendants' solicitors and none is proferred by their Counsel. He did take me through a number of matters which he considered demonstrated that there was an arguable defence, and particulars of this were set out in the affidavit of Mr Collis in support. There were some amendments to the statements made in this document, but they really have no bearing on the issues I have to decide.

The first defence is that the agreement of September 1979 to which the Plaintiff refers is disupted; but in any event, if it does exist, then it is claimed that she had not fulfilled conditions to which it was subject. Alternatively, it is claimed that any such agreement was cancelled or discharged by the subsequent settlement achieved under the Matrimonial Property Act, and it was incompetent for the Plaintiff to repudiate or resile from this unilaterally. There is no suggestion that the Defendants have ever agreed that she could do so. The settlement evidenced in the memorandum filed in Court is therefore pleaded as an accord and satisfaction. A further argument

is put forward on the basis of estoppel or waiver because of the proceedings issued under the Matrimonial Property Act. Finally, it is argued that so far as there was an agreement between Mr Ross Charles McLachlan and the Plaintiff, it should be disposed of under the Matrimonial Property Act and not be the subject of an ordinary action. Mr Watson informed me that it was because of that consideration judgment was only sought and obtained against Mr McLachlan's brother.

There have been criteria laid down in the past by Courts in New Zealand suggesting that before leave should be granted, the cause of the default must be explained, there has to be an arguable defence and finally, that there would no be irreparable injury to the Plaintiff if the judgment were set aside. Following the decision in Russell v. Cox, these matters can be seen in their true perspective as considerations which the Court can take into account in determining the justice of the application looked at in the overall circumstances. Mr Watson sought to persuade me that Mrs McLachlan would suffer irreparable injury if the leave were granted, because she now has a judgment against Ian McLachlan who nobody has been able to find. However, there is a valid order for substituted service upon him and service has been effected in accordance with that, and so far as anybody is aware at the moment, the same solicitors are acting for both Defendants. The land at Russell is unlikely to be disposed of. It is proteced by a charging order at the moment, but Mrs McLachlan senior is residing in it and the position, so far as I am concerned, is no different from that which would have prevailed if the solicitors had done their job properly in the first instance and filed the Statement of Defence which they prepared. It certainly does not go to the lengths that Mr Harrison now suggests would be covered in the Statement of Defence, but that, of course, is quite understandable. It is only when Counsel get down to grips with a case such as this that

something other than just grounds for inclusion in a holding document come to light. That is a common enough experience. Overall, therefore, I am satisfied that the justice of this case requires that the application be granted. It will, of course, be on terms because the Plaintiff has thrown away costs and disbursements in getting judgment by default.

There will be an order setting aside the judgment subject to the Defendants paying the sum of $500 costs to the Plaintiff, being compensation to her for the amount thrown away in the judgment by default. It is normal in these cases that the Defendant, even though successful on a motion to set aside a judgment, should also have to pay costs on the application occasioned by bringing the Plaintiff to Court to oppose. However in this case I think it proper to observe that having regard to the background circumstances and to the fact that this is really part of the on-going matrimonial property dispute, Mrs McLachlan could well have consented to this application on the terms originally mooted and saved the appearance in Court. I am told that she is legally aided. In those circumstances, while my own view is that an order for costs ought to be made against her for today's appearance, I will reserve them awaiting the final disposal of the matter. The ancillary charging order will also be set aside and there will be leave granted to the Defendants to file and serve a Statement of Defence within fourteen days. It will be expected to cover those matters now raised in Mr Harrison's submissions as potential defences which satisfied me that there are arguable issues to be tried. This will no doubt involve the effect of the Plaintiff's action in seeking to withdraw her consent to the settlement of the matrimonial propery dispute. It is obviously desirable for that point to be determined effectively before the parties can proceed any further in the resolution of their long-standing problems. Mr Watson indicated that if they were given leave to defend, then the

desired course would be to have both this action and the matrimonial property application dealt with at the same time, and I would certainly agree with that procedure.

M.B. Casey J.

Solicitors

Johnson Hooper & Co., Whangarei, for Plaintiff
Milne Meek & Partners, Auckland, for Defendants