3/10

file

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. A.161/82

1158

BETWEEN RADNOTY (also known as
of Christchurch,
Factory Worker

Plaintiff

A N D RADNOTY of Christchurch,
Forklift Driver

Defendant

Hearing: September 11, 1984.

Counsel: Mr. Couch & Mr. Leggatt for Defendant in support
Mr. Wylie for Plaintiff to oppose

Judgment: 19 SEP 1984

JUDGMENT OF WALLACE, J.

This is a motion under Rule 265 of the Code of Civil Procedure to set aside two judgments entered by default on 18th April 1982 and 3rd November 1983. There is also a further motion under Rule 594 of the Code seeking an order enlarging the time for filing the motion under Rule 265.

In outline, the facts are as follow. The parties to the action are both Hungarian. They were married in Hungary on 5th November 1960. They apparently wished to leave Hungary but were not able to do so together. In his second affidavit, the husband, who is the Defendant in the action, deposes that he left Hungary on a tourist visa to Italy and

eventually reached New Zealand on 25th November 1970. His wife, who is the Plaintiff, did not immediately succeed in following him and there was as a result correspondence between the parties. Apparently it was difficult for the Plaintiff to obtain permission to leave Hungary because of the circumstances in which the Defendant had left. The Plaintiff then divorced the Defendant in Hungary and remarried. Under her new name she eventually obtained a visa to leave Hungary. Although it is not specifically stated in the affidavits, it appears from the Plaintiff's earlier evidence that the divorce and remarriage were part of a device to enable her to leave Hungary. She eventually arrived in New Zealand in 1977, accompanied by the daughter of her marriage to the Defendant.

In 1973, during the time efforts were being made to obtain permission for the Plaintiff to leave Hungary, the Defendant wrote a letter addressed "to whom it may concern" inviting the Plaintiff and daughter to live with him in New Zealand and stating that a property at 276 Breezes Road, Christchurch would be "bequeathed to me and my wife by my brother and father 50/50 on the arrival of my wife and daughter". The letter is particularly relied upon by the Plaintiff in support of her claim to share in the proceeds of sale of that property. It is the Defendant's contention that the letter was written in unusual circumstances with a view to assisting to persuade the Hungarian authorities to allow the Plaintiff to leave Hungary. The letter was apparently not successful for that purpose, but the Plaintiff later obtained permission to leave Hungary,

having gone through the form of marriage previously mentioned.

Well before the Plaintiff came to New Zealand in 1977 the property at 276 Breezes Road had been acquired by the Defendant from his family. He, however, in 1974 sold the property and with the proceeds of sale purchased another property at 77 Breezes Road. The Defendant also acquired the normal household goods.

When the Plaintiff and the daughter arrived in New Zealand they went to live with the Defendant at 77 Breezes Road. The Plaintiff and the Defendant lived together for some three years, during which time various work was done on the property. In addition, payments were made under the mortgage.

Unfortunately the relationship between the parties did not prove to be happy and they parted in 1981. As a result the Plaintiff issued proceedings in the High Court in Christchurch claiming a half share in the proceeds of sale of the property at 276 Breezes Road (or in the alternative, in the property at 77 Breezes Road) on the basis of a trust. She also made various other claims in relation to a motor car, the payments in relation to the mortgage, the cost of refurbishing the bathroom, the purchase of new carpet and the return of certain personal property.

The claims made by the Plaintiff were originally advanced in a letter addressed to the Defendant by the Plaintiff's solicitor on 23rd December 1981. At that juncture

the sum of $8,000 was sought as a satisfactory settlement of all claims. The Defendant then instructed Mr. Champion to act as his solicitor. Thereafter, communications took place both by telephone and letter between Mr. Champion and the Plaintiff's solicitor, Mr. Wilson. Initially, Mr. Champion indicated that the Defendant would contest the claims but might concede a payment in relation to the car. Eventually, Mr. Champion indicated that "probably the only way to get some effective response" from the Defendant would be for the Plaintiff to issue proceedings. Communications between the solicitors concluded with a telephone discussion on 2nd August 1982 when Mr. Champion advised Mr. Wilson that he would not accept service of proceedings "because of problems in tracking down" the Defendant.

Thereafter, the Plaintiff's solicitors issued proceedings, with the writ being served on the Defendant on 27th August 1982. The Defendant, in his second affidavit, claims that although he presumed the writ and statement of claim were legal papers, he could not read them properly because of inadequacies in his English. He therefore took the papers to his brother Stevin, who can read English, and was told by his brother not to worry about the matter and that "she (the Plaintiff) couldn't do anything". Thereafter, the Defendant took no further steps and in particular did not bring the writ and statement of claim to the attention of Mr. Champion.

Accordingly, the matter came on for trial on an undefended basis before Cook, J. on 5th November 1982.

Following the initial hearing, counsel for the Plaintiff sought leave to adduce further evidence and also to amend the statement of claim. Leave was granted, but subject to the amended statement of claim being served on the Defendant. The amended pleadings were served on 7th December 1982. Although the Defendant claims not to recall service of the amended statement of claim, his counsel does not dispute that it was in fact served.

The action again came on for hearing before Cook, J. on 9th March 1983. On 18th April 1983, he delivered a brief reserved judgment making various orders in relation to the property in dispute and directing, pursuant to Rule 394, the Registrar to make an inquiry to determine certain of the amounts in dispute. By letter dated 21st April 1983 the Plaintiff's solicitor wrote to the Defendant enclosing a copy of the judgment and very shortly thereafter the Registrar summoned the Defendant and Mr. Champion to give evidence for the purpose of the inquiry. The Defendant deposed that on receipt of the letter he took it to Mr. Champion and that he also, on receipt of the summons, telephoned Mr. Champion who informed him that he himself had received a summons to appear before the Registrar. Mr. Champion arranged to meet the Defendant at the Court. The Defendant claims it was only on receipt of the letter and the summons that he realised the papers served upon him the previous year were of significance and that something to his detriment had happened. He, therefore, on meeting Mr. Champion, instructed him to do whatever could be done to remedy the matter and Mr. Champion indicated that he would apply to set aside the

judgment, which the Defendant authorised him to do.

The fact that the Defendant had instructed Mr. Champion to move to set aside the judgment is confirmed in a memorandum made by the Registrar and produced as an exhibit to Mr. Wilson's affidavit. The Registrar's memorandum is dated 30th May 1983. It is clear that the Defendant thereafter relied on Mr. Champion to file an appropriate motion. However, for reasons which are unexplained in the affidavit evidence, neither Mr. Champion nor his partner Mr. Taylor who later took over conduct of the matter, filed the motion until 1st December 1983 (despite telephone communications and a letter from the Plaintiff's solicitors - the letter was handed to Mr. Taylor by the Defendant). This delay is significant, particularly bearing in mind the five day period provided by Rule 265. Any delay subsequent to the filing of the motion appears to have been due to the inability of the Court to give the matter an earlier fixture.

I deal first with the application under Rule 594 for an extension of time. As I apprehend the law, the basis upon which the Court should act is succinctly summarised in Ratnam v. Cumarasamy (1965) 1 W.L.R. 8; (1964) 3 All E.R. 933 (P.C.) in which Lord Guest said:

> "The rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation."

That summary of the law was adopted by O'Regan, J. in Day v. Ost (No. 2) (1974) 1 N.Z.L.R. 714. I therefore deal with the matter on the basis that there must be some material upon which the Court can exercise its discretion which indicates that the delay is excusable and that it is in all circumstances just to extend the time.

On behalf of the Defendant, Mr. Couch submitted that it was proper to conclude from the established facts that the Defendant gave his solicitors instructions to file the motion to set aside the judgment as soon as practicable after he became aware that judgment had been entered. In that regard Mr. Couch pointed to the evidence that the Defendant contacted Mr. Champion immediately he received the letter from the Plaintiff's solicitors dated 21st April 1983 and again, very shortly after that, when the Defendant received the summons from the Registrar. It appears that on both those occasions the Defendant instructed Mr. Champion to take the necessary steps to protect his interest - this is confirmed by the Registrar's note made at the time of the examination of Mr. Champion. Mr. Couch submitted that any further delay was not the Defendant's fault, that it was entirely due to lack of action on behalf of the Defendant's solicitors and that the Defendant should not be held responsible for this in the particular circumstances where he had taken reasonable steps to ensure his solicitors would file the necessary motion. In that regard Mr. Couch contended that the case was similar to Tokoroa Earthmovers Ltd. v. Currie (1966) N.Z.L.R. 989 and Re Izett (1982) 2 N.Z.L.R. 425.

In opposition to those submissions Mr. Wylie accepted that, on the motion for leave to enlarge time, it was not unreasonable to excuse the Defendant for delay up until the time when he became aware of the judgment. Mr. Wylie contended, however, that thereafter the evidence did not clearly establish the delay was the responsibility of the Defendant's solicitors (either by way of a clear assertion of blame by the Defendant or acceptance of blame by the solicitors). Mr. Wylie further submitted that, if the solicitors were to blame, then the Defendant must accept the consequences of their dilatoriness. Mr. Wylie pointed out that in Tokoroa Earthmovers Ltd. v. Currie (supra) the client had made persistent efforts to ensure that the solicitor was dealing with the matter (whereas, in the present instance, the Defendant did not follow up matters with his solicitors between the end of April and mid October 1983) and that in Re Izett (supra) the solicitor had, to some extent, been lulled into a false sense of security.

On the evidence contained in the affidavits, I consider it is clear that, in relation to the filing of the motion for leave to enlarge time, the Defendant's solicitors were dilatory. The sequence of events as disclosed in Mr. Wilson's affidavit shows that in a telephone discussion of 7th June 1983, Mr. Champion stated he had passed the matter to Mr. Taylor who had seen the Defendant the day before and would be filing an application within the next day or two. Thereafter, a period elapsed apparently without action, but following Mr. Wilson's letter to the Defendant of 13th October 1983, Mr. Taylor, on 25th October 1983 wrote

to Mr. Wilson stating that the Defendant had handed the letter to him and that "we will very shortly be making application....". The letter also asked Mr. Wilson to defer any proceedings in the meantime. To this he responded on 3rd November 1983 stating that his instructions were to proceed to enforce the judgment. Nevertheless, he did not immediately do so, but on 30th November 1983 telephoned Mr. Taylor advising he had firm instructions to proceed with execution. The motion was finally filed on 1st December 1983, after the bailiff attended at the Defendant's house to seize his goods in execution.

It is, in my view, clear that, if the Defendant is to be held responsible for his solicitors' conduct, the application under Rule 594 must be refused. However, the decision in Tokoroa Earthmovers Ltd. v. Currie (supra) establishes that the issue is not whether the Defendant should be held vicariously responsible for his solicitor's delay. Rather, the Court is obliged to consider whether it is just to grant leave, which involves an examination of all the circumstances of the case in order to determine whether a party has inexcusably slept on his rights. Although the Defendant in the present case did not go to the lengths of the client in Tokoroa Earthmovers Ltd. v. Currie (supra), the Defendant did clearly on two occasions instruct his solicitor to act and there is thereafter no indication that the Defendant failed to co-operate with his solicitors or had any warning or inkling that anything was amiss until he received the letter from the Plaintiff's solicitor dated 13th October 1983. He promptly also took that letter to his

solicitors. The conclusion which I have reached is that the Defendant did just sufficient to avoid being held responsible for his solicitors' conduct. Likewise, the overall justice of the situation, taking account of all the circumstances, in my view justifies the grant of an order enlarging the time under Rule 594 (bearing also in mind that the Defendant is not well versed in Court procedures or in the English language). In that regard I have also taken into account that there appears to be no specific prejudice to the Plaintiff apart from the question of costs, which can at least partially be compensated by an appropriate order, and the general prejudice caused by the period of delay. To the extent that the prospects of success in defending the action are relevant to an application under Rule 594, I take the same view as I later express in relation to the application to set aside the judgment.

I accordingly turn to consider the application for leave to set aside the judgment pursuant to Rule 265. In that regard I was referred to numerous authorities, but I think it is necessary only to advert to Russell v. Cox (1983) N.Z.L.R. 654 in which the Court of Appeal reaffirmed that the test against which an application under Rule 265 should be considered is whether it is just in all the circumstances to set aside the judgment. Considerations such as whether the Defendant's failure to appear was excusable, whether the Defendant has a substantial ground of defence or whether the Plaintiff will suffer an irreparable injury if the judgment is

set aside, should be treated as tests by which the justice of the case is to be measured and should not be treated as rules of law. Most of the other cases referred to me were merely indications of the way in which the above considerations have been applied to individual cases.

On this aspect of the case, Mr. Wylie, on behalf of the Plaintiff, made a comprehensive analysis of the evidence in support of two principal submissions, the first being that the facts demonstrated that the failure to respond to the writ was inexcusable and the second being that the Defendant had failed to show a reasonable or substantial ground of defence.

In support of the first submission, Mr. Wylie pointed to the evidence that the Defendant had knowledge of the details of the claim, both from the original letter of claim and from the further letter to his solicitors giving full details of the claim. That letter was, as Exhibit F to Mr. Wilson's affidavit shows, drawn to the Defendant's attention. Mr. Wylie further pointed out that the Defendant had been advised to see his solicitor when the writ was served on him, that there was another opportunity to do so when the Defendant was served with the amended statement of claim on 7th December 1982, that the Defendant's evidence that he could read English but not very well was possibly open to some doubt (e.g. the Defendant was able to respond promptly after receipt of the Registrar's summons), that the Defendant at least knew the writ was a legal paper and must have known it

related to the previous claim, and finally, that there was no affidavit from the brother corroborating the Defendant's version of what was said to him. Mr. Wylie contended that all the circumstances indicated the present case was not an example of an excusable failure, but rather one where the Defendant had made an informed and conscious decision to take no action in relation to the writ.

Mr. Wylie's second submission that the Defendant had failed to establish a substantial defence on the merits was based on a detailed examination of each aspect of the claim with a view to demonstrating that the Defendant had not provided a valid or substantial answer in any respect. Thus, Mr. Wylie pointed out, for example, that the Defendant did not deny the letter concerning the 50/50 share in the property and that several of the Defendant's claims concerning that issue were irrelevant as a matter of law (e.g. that the parties were not married and that the Defendant had no interest in the house at the time the letter was written).

Both aspects of Mr. Wylie's submissions were forcefully advanced and clearly have some substance. I have, however, come to the conclusion that the Defendant has put forward sufficient to show that his default should be excused and that there is some possibility he has an arguable defence. My reasons for this are as follow.

In relation to the Defendant's failure to respond to the writ, it is clear that the essential premise upon which Mr. Wylie's submission is based is that the

Defendant made an informed and deliberate choice to ignore the writ. It is true that the Defendant decided no further action was necessary after receiving the advice from his brother. It is also true that he was most unwise to consult his brother rather than take the writ to his solicitors. As best, however, I can judge, the Defendant did genuinely accept the advice he received, though there may have been some element that the advice was precisely what he wanted to hear. It is not a case of a Defendant making a fully informed choice; rather it is a case of a Defendant acting on misleading advice given to him. Although it is clear that the Defendant was most unwise, it is also clear that it is difficult to make him understand his legal obligations - as is evidenced by the efforts of Miss Coup to explain the situation to him when she served the writ. In my view therefore, the case does not fall into the category of a deliberate and conscious disregard of obligations and I consider the Defendant has on this aspect also placed just sufficient information before the Court to justify a finding that his failure to file a defence was excusable.

In relation to the issue as to whether there is a substantial ground of defence, Mr. Wylie, as I have previously indicated, carefully analysed each aspect of the claim and the Defendant's response thereto with a view to establishing that, in each instance, there was no defence of substance.

The Plaintiff's principal claims are to a half

share in either the proceeds of sale of the property at 276 Breezes Road, or a half share in the new property at 77 Breezes Road, plus half the value of reductions of principal made in relation to the mortgage on the latter property. Although there is clear documentary evidence supporting the Plaintiff's claim to share in the property, one of the principal documents (the letter written by the Defendant when his wife was in Hungary) was written as long ago as 1973 and well before the Plaintiff came to New Zealand. The letter did not achieve the desired result with the Hungarian authorities, and it was not until 1977 that the Plaintiff was able to come to New Zealand. In the meantime, her divorce and remarriage had taken place and there had been various communications, direct and indirect, between the parties. The Defendant claims that the later correspondence made it clear the Plaintiff was not to obtain a half share in the property simply by coming to New Zealand. The Defendant also wishes to call evidence from allegedly independent witnesses concerning the arrangements between the parties.

The existence or otherwise of a trust is very much a matter to be determined on the basis of all the evidence concerning the facts and intentions of the parties, and there is no doubt it is important for the Court on such an issue to hear the evidence of both sides. While it is impossible to express any opinion on the basis of the evidence before the Court at this juncture, I am of the view that the Defendant has, in the respects mentioned in the previous paragraph, placed sufficient information before the Court to indicate that he may have some defence to the Plaintiff's

claim in relation to the share in the house. The same applies, in my view, to the remaining claims, though in relation to several, the Plaintiff appears to have a strong case. If, however, the main claim is to be reconsidered, I think it desirable to hear all matters again.

In considering the motion to set aside the judgment, it is also necessary to keep in mind, as indicated in Russell v. Cox (supra), that any one factor is not necessarily decisive and that an overall view of the justice of the matter is required. In that regard I am influenced by the fact that, unlike many of the cases where leave is refused, there is in the present instance no evidence of any specific prejudice to the Plaintiff (apart from the general delay, which has been considerable). Although it is not for the Plaintiff to establish prejudice, and although I accept that delay is always a factor to be considered, I am of the view in the present case that the delay on its own is not sufficient to weigh against the granting of leave, particularly if the Plaintiff is reasonably compensated in costs. Any harm caused to the Plaintiff by the delay has also to be weighed against the potential injustice to the Defendant and the permanent grievance he is likely to entertain if he is not given the chance to be heard.

It is always unfortunate when a claim has to be reheard after considerable time has been expended upon it and extensive costs incurred. That would seem to be particularly so in the present case, since the amount at stake is not very great. Indeed, the parties bid fair to

expend on costs a great part of the monetary sums which are in issue. It is very much to be hoped, therefore, that the Defendant will now carefully listen to any advice given to him by his new solicitors.

It is important that the action should be dealt with as soon as possible and the Defendant must be put on strict terms as to time. I also indicate, for the benefit of the Registrar, that the case should have priority as far as is consistent with the disposal of other urgent work before the Court.

With regard to the terms of the order, I have had the advantage of relatively detailed submissions concerning costs. Mr. Wylie sought costs on a solicitor and client basis in respect of all costs and disbursements which have been wasted or thrown away in the action to date. He indicated that those costs, i.e. preparation for trial, appearance at trial and all attendances in relation to the Registrar's inquiry and enforcement of the judgment, had reached a substantial figure. The figure indicated by Mr. Wylie may well, in view of the likely time involved, be justifiable, but it does throw into strong relief how much the parties are expending on litigation in which only a comparatively modest amount is at stake. Mr. Wylie also drew my attention to some of the earlier United Kingdom authorities in which the Court ordered payment of solicitor and client costs: see e.g. Cudworth v. Hayward (1897) 75 Law Times 456. It seems, however, that recent New Zealand practice has been either to award a fixed figure assessed by the Court on a party and party basis or,

alternatively, to order payment of the costs originally awarded on the judgment set aside: see e.g. Russell v. Cox (supra). In the present case the costs ordered on the judgment were $750.

I consider that a strong argument can be made for payment of solicitor and client costs in respect of all truly wasted expenditure (which may not necessarily include all costs of preparation for trial) so that the Plaintiff, when judgment is set aside, is placed in the same position (apart from delay) as if the Defendant had complied with his obligations. As against that argument it can perhaps be contended that, under our system, a party is never fully compensated in costs (other than in the case of contumacious conduct - and in the present instance the Defendant's actions do not fall into that category). The situation is also complicated in the present case both by the high costs incurred in the action in relation to the amount at stake and by the by the time taken to hear the present motions which justifies a reasonably substantial award of costs in relation to this hearing. Making the best assessment which I can, I have concluded that it is appropriate for the Defendant to be required to pay the sum of $1,000 in respect of the Plaintiff's wasted costs of the action, although that sum falls considerably short of the wasted costs which Mr. Wylie indicated have been incurred. The Defendant is also ordered to pay the sum of $400 for costs in relation to the present motions. I consider that all costs awarded to the Plaintiff should be paid promptly by the Defendant, whose counsel has indicated that the Defendant has the ability to do so at the level I have determined.

Finally, I record that counsel indicated agreement concerning a term maintaining a mortgage previously given by the Defendant as security on the stay of execution of the judgments.

There will accordingly be an order pursuant to Rule 594 of the Code of Civil Procedure enlarging the time for making the application under Rule 265, and a further order pursuant to Rule 265 setting aside the judgments of this Court given on 18th April 1982 and 3rd August 1983 upon the following terms.

1. The Defendant must, within 14 days hereof, file in the High Court a statement of defence pleading all defences which he proposes to raise and must thereafter comply with all the rules of Court and co-operate fully in the setting down of the action for hearing, including any priority fixture which may be sought.

2. The Defendant must, within 30 days of the date hereof, pay to the Plaintiff
   (a) The sum of $1,000, together with all wasted disbursements (as fixed by the Registrar) in respect of the conduct of the action to date
   (b) The sum of $400, together with any disbursements (as fixed by the Registrar) in respect of the motions to enlarge time and set aside the judgments.

3. Notwithstanding the provisions of the mortgage given to the Registrar as security on the stay of execution ordered on 7th December 1983 (being the provisions which limit the effect thereof to such time, if any, as the judgments in favour of the Plaintiff are set aside) the mortgage shall remain in full force and effect as security for the Plaintiff in the event that judgment shall eventually be given in her favour and for the amount of such judgment provided that the mortgage shall not be called up or otherwise enforced until any judgment obtained by the Plaintiff shall be enforceable by execution and provided further that if final judgment shall eventually be given in the Defendant's favour the mortgage shall be released forthwith and the mortgage shall be deemed to be varied accordingly.

J. Williams J.

Solicitors:

Champion Taylor & Co., Christchurch, for Plaintiff
Weston Ward & Lascelles, Christchurch, for Defendant