IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.190/83

928

BETWEEN RANCHHOUSE PROMOTIONS LIMITED
a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as property owners

Plaintiff

A N D ROCKY'S CABARET LIMITED
a duly incorporated company having its registered office at Auckland and carrying on business as a cabaret operator

Defendant

Hearing: 12 July 1984

Counsel: S. Elias for Defendant in Support
J.F. Timmins for Plaintiff to Oppose

Judgment: 9 AUG 1984

JUDGMENT OF SINCLAIR J.

This is an application by the defendant to set aside a judgment which has been obtained by default and for leave to defend. The action has its origins in a fire which occurred in the premises which were owned by the plaintiff and leased by the defendant. That fire generated some heat but that heat is a mere bagatelle compared with the heat generated by this litigation.

It is necessary to relate some of the history of the matter and it is interesting to note the chronology of events. The fire occurred in October 1981 and a year later claims were made on behalf of the plaintiff company, which included a claim for loss of rental sustained as a result of the fire totalling $41,666. It was alleged by the plaintiff that by reason of certain agreements made between the parties, the liability to insure for this loss rested with the defendant.

On 9 March 1983 a Writ was served claiming the above amount, but no statement of defence was filed within the required period of 30 days. On 11 April 1983 a meeting of creditors of the defendant company was held to discuss a scheme of arrangement under s.205 of the Companies Act 1955, but the required majority was not obtained and on 4 May 1983 the defendant company was ordered to be wound-up. A creditors' meeting was held by the Official Assignee on 15 June 1983 and subsequently it was indicated on 8 August 1983 that the Official Assignee was minded to continue the defence of the present proceedings but that he had to obtain indemnities in relation to costs and of course obtain the leave of this Court to follow that course of action.

On 15 September 1983, the plaintiff's solicitors were advised by telephone that the indemnities required by the Official Assignee had not been obtained as at that date and by reason of those indemnities not being available, no application had been made to this Court for leave to defend the action.

On 17 November 1983, a notice of motion was filed by the plaintiff seeking leave to continue the action and included was an application that judgment be entered by default. On 28 November 1983 I made the order permitting the plaintiff to continue with the proceedings, but the motion for judgment was adjourned with the defendant being allowed a further 21 days within which to file its defence. So far as the Court was concerned, nothing appeared to happen and on 9 May 1984 on the application of the plaintiff at a time when Mr Bartlett appeared as counsel for the plaintiff, judgment was entered by default.

Various matters have been traversed by both parties in affidavits, but I was not aware that on 16 December 1983 an application had been made by the Official Assignee, ex parte, for leave to defend the action and to employ solicitors to act in the proceedings. The affidavit filed by Mr Payne in support of that motion referred to the nature of the plaintiff's claim and to the fact that in December 1983 the Official Assignee had received an opinion from counsel which recommended defending the action on the basis that there was a conflict as between the plaintiff and the defendant as to the true nature of the arrangements which were made in relation to the insurance of the premises which had been destroyed by the fire and if that conflict was resolved in favour of the defendant, then no liability would attach to the defendant at all. Mr Payne's affidavit went on to disclose that a deed of indemnity had

been sent to the Maori Trustee in respect of the proposed defence, that person being interested by reason of the fact that the Maori Trustee held a debenture over the defendant company. At that time, it was indicated that if the necessary indemnity was forthcoming, then it was proposed to approach Messrs Menefy, Tapp and Co. as solicitors for the Official Assignee as they had been apparently acting for the shareholders of the defendant company in relation to the defendant's operations. However, for some reason which commended itself to the plaintiff's legal advisers, they objected to the above firm of solicitors being engaged by the Official Assignee and what ground they had for that is simply beyond me. However, the Official Assignee seems to have taken heed of that objection and subsequently a further notice of motion was filed by the Official Assignee seeking leave to defend and to employ Messrs Howard-Smith and Co. of Auckland, as solicitors. This motion was on notice so as to apparently avoid the situation which arose at the time when the ex parte motion was filed.

Mr Payne's further affidavit filed on 30 March 1984 indicates that the plaintiff's solicitors were kept informed of what was going on and on 29 February 1984, wrote to Messrs Sheffield, Young and Ellis, informing them that it was intended to appoint Messrs Howard-Smith and Co. as the appropriate firm of solicitors to act and they were asked whether they wished the motion for leave to defend and to appoint the above firm as solicitors, be served upon them.

On 27 March 1984, a letter was received from Messrs Sheffield, Young and Ellis and signed by Mr Timmins, acknowledging receipt of the February letter and a follow-up one of 20 March 1984 and it was indicated that the motion should be served upon Messrs Sheffield, Young and Ellis and there was an additional statement in the letter that settlement discussions had been unsuccessful and that the plaintiff was applying for judgment.

Those motions and the affidavits in support of them were not on the action file at all but were on a separate file M.1858/83, that course apparently being followed by the Official Assignee in view of the fact that Rocky's Cabaret Limited was then in liquidation and the machinery to obtain leave to defend and to appoint solicitors was regarded as being independent of the actual action itself. Further, at the time when the matter finally came before me for judgment to be entered on 9 May 1984, no draft statement of defence had been filed, nor was I aware - as is now disclosed from an affidavit filed by Mr Lockhart Q.C. - that he on behalf of the Maori Trustee had discussed further settlement proposals with Mr Timmins of Messrs Sheffield, Young and Ellis on 8 May 1984. Mr Lockhart deposes to the fact that in that telephone conversation he was advised that the proposed settlement would be referred to Mr Hoare of the plaintiff company and that he, Mr Lockhart, would be advised whether the proposal was acceptable. His affidavit goes on to state that he did not hear further from Mr Timmins although Mr Timmins did apparently endeavour to reach him by

telephone on the afternoon of 8 May 1984 while Mr Lockhart admitted to telephoning Mr Timmins on the morning of 9 May 1984 but without success.

In any event, Mr Timmins did not appear at the hearing of the motion for judgment on 9 May 1984 and the plaintiff was represented by Mr Bartlett. Had the Court been informed of what had occurred the day before, it may have materially altered the whole situation and had the Official Assignee's application for leave to defend been brought to the attention of the Court together with the affidavits which were on that file, the Court would have been put on enquiry to investigate what the true position actually then was. However, not being aware of the settlement proposals or of the action which had been taken by the Official Assignee, the Court was faced with a position where there was on the face of it, nothing being done by the defendant or the Official Assignee and that in the circumstances it was appropriate to enter judgment by default.

In view of the circumstances as now disclosed, it is little wonder that the present application has been made. The principles upon which the Court will act on applications for leave to set aside a judgment obtained by default, have been well laid down for many years and are reflected in the decisions in such cases as Watson v. Briscoe 1966 N.Z.L.R. 35; Edwards v. Edwards 1966 N.Z.L.R. 783; O'Shannessy v. Dasun Hair Designers Limited (1980) 2 N.Z.L.R. 652 and Russell v. Cox 1983 N.Z.L.R. 654.

From O'Shannessy's case, it is quite clear that the Court acted on the principle that the deciding factor must be as to what the justice of the case required in the particular circumstances under consideration, but the Court went on to point out that justice must be applied to both parties because on the one hand there was the question of the justice or injustice which would arise in depriving the plaintiff of his judgment which had been regularly obtained, while on the other hand there was the question of injustice in refusing to give the defendant the opportunity to have his case put and the matter dealt with by way of a full hearing.

In Russell v. Cox (supra), the Court of Appeal referred to, with approval, the English decision of Evans v. Bartlam 1937 A.C. 473 and quoted from the decision of Lord Russell of Killowen at p.431. The passage quoted reads as follows:-

> "'It was argued by counsel for the respondent that before the Court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (a) that he had some serious defence to the action and (b) that he had some satisfactory explanation for his failure to enter an appearance to the writ. It was said that until those two matters had been proved the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence or (what amounts to the same thing) to the exercise of the judicial discretion.
>
> For myself I can find no justification for this view in any of the authorities which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose.

> The contention no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (b) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance.'"

There is a further quotation from the speech of Lord Wright at p.489 which reads as follows:-

> "'A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows ex debito justitiae once the facts are ascertained. In a case like the present there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication.'"

When one applies those principles to the present case, it seems to me that in all the circumstances this is a case where the Court to ensure that justice is done to both sides, ought to grant the application and set aside the judgment obtained by the plaintiff. I come to that conclusion because it now appears from what is before the Court, that the defendant may well have a substantial defence to the proceedings and it

would be quite wrong in the circumstances as now disclosed, to permit the judgment to remain. I gathered from argument put forward by counsel that there may well be further proceedings in relation to the amount involved in this particular claim as against the shareholders of the defendant company as in some way they may be liable as guarantors. That could result in an incongruous situation arising if in their action they were able to avoid liability by establishing the very facts which the defendant was prevented from establishing in the present proceedings by reason of the Court's refusal to set aside the judgment by default. However, in the light of the knowledge which the Court now has and which I have referred to above, I have no hesitation whatever in coming to the conclusion that the justice of the case requires as I have said, the setting aside of the judgment.

The plaintiff has indicated that it is already under some pressure from its bankers, but even so, I do not think that that is a consideration which ought to be taken into account in deciding what this Court should do on the present application. The interests of the parties can be controlled to a certain degree by the Court setting forth a timetable which I will refer to shortly, but in any event I note that there are other proceedings between the same parties and commenced by the defendant as against the plaintiff and which involve a sum of $67,681. It is probably desirable that all the proceedings be got out of the way as soon as possible.

In so far as the motion for leave to defend is concerned, it was argued by the plaintiff that it was not competent for this Court to entertain that application because on 9 May 1984 when the judgment by default was entered, a similar motion was then dismissed and there has been no appeal against that decision. However, the dismissal of that motion did not involve a judgment of the Court at all and it is not open to the plaintiff to raise the issue of res judicata in respect of the present motion for leave to defend. The notation on the earlier motion filed by the Official Assignee under M.1858/83 reads as follows:-

> "As judgment has now been entered, this motion becomes superfluous and is dismissed."

I record that no argument was ever submitted by either party in relation to that motion and it was merely a procedural step taken in consequence of the entry of judgment. Accordingly, I do not consider it to be a bar to the present motion.

However, there is on the file a motion to set aside the judgment which was filed by Mr Howard-Smith and as he had no authority to act on behalf of the defendant, that motion must be dismissed and accordingly an order is made dismissing it.

On the present motion to set aside the judgment, an order is made so setting it aside and the defendant is allowed a period of 14 days from the date of delivery of this judgment

to file its defence.

To keep some control over the proceedings, I direct that all discovery on both sides is to be completed within 28 days of the filing and service of the statement of defence and that after discovery has been completed, the parties can see me with a view to my attempting to arrange a fixture for the disposal of this action. If, at the same time, the other action between the same parties can be disposed of, then an attempt would be made to include that in any fixture which is made for the present action.

The motion for leave to defend is granted and in the circumstances, I intend to reserve the question of costs until such time as there has been a resolution of this litigation. I simply comment that now the parties ought to co-operate with a view to adhering to the timetable I have fixed and that they should galvanise themselves into action and get these proceedings disposed of without there being any further fuel added to the flames which have hitherto generated so much heat.

P.D. Ieving J.

Solicitors for Defendant in Support:	Official Assignee, Auckland
Solicitors for Plaintiff to Oppose:	Messrs Sheffield, Young and Ellis, Auckland