14/9

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A. 448/77

NZLR 1091

BETWEEN RAYNA ELLEN BRUDENELL-BRUCE of Auckland, Widow

Plaintiff

AND FRANK PETER O'NEILL of Auckland, Company Director

First Defendant

AND ALLAN RICHARD COWAN of Auckland

Second Defendant

Hearing: 10th August, 1984

Counsel: Foote for First Defendant in Support
Lawson for Plaintiff to Oppose

Judgment: 16 AUG 1984

JUDGMENT OF SINCLAIR, J.

This is an application by the First Defendant to set aside a judgment obtained by default where the proceedings had never been served upon the First Defendant, but service had been effected by advertisement.

On the 7th September, 1981 judgment for the Plaintiff was entered against both Defendants in the sum of $30,000 with interest at 11% on that sum from the 31st July, 1974 to the 7th September, 1981, and costs were fixed at $1,000 and disbursements. To enable judgment to be given it was necessary to hear evidence from the Plaintiff and one other witness, but there was no appearance on behalf of either Defendant and as it is now alleged in the First Defendant's affidavit he did not become aware of the proceedings until the

18th October, 1982 I will comment on that aspect later in this judgment.

The history of the matter is that the action was based upon a contract entered into on or about, according to the statement of claim, the 18th April, 1974 and it related to the purchase of shares owned by the two defendants in three un-named companies.

The statement of claim alleges that the amount involved was $30,000 and that representations were made that the liabilities of the companies consisted of a bank overdraft of $7,000 and a trade debt of $2,000, whereas in fact it was alleged that the Defendant O'Neill knew that at that time the liabilities of the companies exceeded $20,000. In fact the statement of claim goes on to allege that O'Neill represented that the companies were solvent, profitable and viable business enterprises, whereas in fact they were insolvent.

The statement of claim further alleges that O'Neill represented that he personally owned shares in the three companies referred to and that he did not disclose that the consideration of $30,000 was for the sale and purchase of shares in a holding company named Warrank Distributors Ltd. It was the shares in that company which were later transferred to the Plaintiff.

According to the evidence which was adduced at the hearing, shortly after the Plaintiff acquired the shares it became obvious that the companies were in difficulties and within a short time the companies failed. However, the present writ was not issued until 27th April, 1977 and while

it may be said that some time was necessary to investigate the real reason for the failure of the companies, there was some considerable delay in my mind before the writ was issued.

The second Defendant, Cowan, was served on 22nd July, 1977 and he subsequently went bankrupt. O'Neill was not served and the writ was renewed on the 27th April, 1978 and service was effected by advertising in the New Zealand Herald on the 23th October, 1978. Judgment was not entered until 7th October, 1981 and according to O'Neill he did not become aware of the issue of the writ or the judgment until 18th October, 1982 when he was served with a notice of registration of a foreign judgment.

The present motion was filed on the 14th December, 1982 with the affidavit of the First Defendant being filed the same day and affidavits in opposition were filed by or on behalf of the Plaintiff by the end of March, 1983, she at that time having gone to Sydney to live.

A further affidavit from the First Defendant and made by his solicitor was filed on 11th August, 1983, by which date all affidavits had been filed. However, it was not until the 12th April, 1984 that any attempt was made to obtain a fixture for the hearing of this motion and even then a request for a fixture was made under cover of a letter forwarded by the Plaintiff's solicitors.

The principles to be applied are those which are referred to in the decision in Young v. MacDonald (1940) N.Z.L.R. 360. That case decided that a Defendant should be allowed, in circumstances such as these, to defend if he satisfies the

Court that he had no notice of the proceedings and that prima facie he has a good ground of defence.

There is no argument between the parties that the above case correctly sets forth the principles to be applied and, indeed, it is a principle which was laid down many years ago in England in a case of Watt v. Barnett (1878)3 Q.B.D. 363.

The Plaintiff in her affidavits relates to various attempts made to locate O'Neill to serve him and reference is made to certain communications with O'Neill's solicitor on this particular topic. The solicitor concerned has made an affidavit in which he states that he cannot recall any such conversations as have been attributed to him by the Plaintiff. That solicitor likewise denies that the advertisement in relation to the proceedings ever came to his notice.

While I accept Mr Lawson's submission that the circumstances surrounding the whole matter lead one to believe that O'Neill had knowledge of the existence of the Plaintiff's claim, there is not that degree of proof present which would enable one to categorically come to a finding on that aspect of the matter and I must therefore conclude that in the instant case O'Neill has established on a balance of probabilities that he did not, until the notice of registration of judgment was served upon him, have knowledge of the proceedings. The question is: has he shown, prima facie, a defence? Attached to his solicitor's affidavit is a purported contract which is dated 26th June, 1974 and which is signed by the Plaintiff, in which she purports to purchase from O'Neill 980

shares in Warrank Distributors Ltd. If that is the contract document as is alleged it bears a date somewhat later than that referred to in the statement of claim and there is no reference in that document to the three companies referred to in the statement of claim. Indeed, the only company mentioned is Warrank Distributors Ltd and whilst certain conditions are imposed on the offer made by the Plaintiff, none of those conditions refers to the financial viability of the three companies above referred to. The only condition which may have some application is one where O'Neill was required to guarantee to indemnify Warrank Distributors Ltd against all claims, "charges, debts, liabilities of any nature whatsoever rising out of trading prior to the transfer date". At the foot of the offer which purports to bear the Plaintiff's signature there is an acceptance signed by somebody whose signature is completely indecipherable, but who the deponent to the affidavit identifies as Mr O'Neill's. There is no affidavit from the Plaintiff denying that that document is the contract and in those circumstances it seems to me that there is some basis for the contention of O'Neill that all he was concerned with was the sale of the shares in Warrank; he maintains that while that company had originally been somewhat run down he had resuscitated it and that its subsequent failure resulted from the handling of the company's affairs by the Plaintiff and to some degree by the Second Defendant, Cowan.

In all the circumstances I consider that a case has been made out for the exercise of the Court's discretion in favour of O'Neill and the judgment by default entered on the 7th September, 1981 is set aside. The First Defendant is allowed a period of 40 days from the date of delivery of this judgment

to file and serve his statement of defence.

However, the above orders are subject to one further and overriding condition. I am disturbed that such a long period should have been allowed by the First Defendant to have gone by since the date when the motion under consideration was first filed. It is obvious that this action ought to be put out of the way promptly and as a condition of the setting aside of the judgment and of the granting of leave to file a statement of defence, the First Defendant is to pay into this Court within the above period of 40 days from the date of delivery of this decision the sum of $10,000, that amount to remain in Court until this action is disposed of. The payment of such a sum will also provide an incentive to the First Defendant to ensure that these proceedings are disposed of promptly and without further delay.

In the meantime the costs of and incidental to this order are reserved.

P.D.H.J.

SOLICITORS:

Elwarth Penney & Edwards, Auckland for Plaintiff
Kendall Sturm & Strong, Auckland for First Defendant