

THIRSTY -v- EAGON RESOURCES DEVELOPMENT AND OTHER

High Court of Solomon Islands

(Palmer J.)

Civil Case No. **339 of 1994**

Hearing: **13 April 1994**

Ruling: **14 April 1994**

J. Corrin for 1st Defendant

A. Radclyffe for the Plaintiff

PALMER J: A Writ of Summons was filed in this action on the 1st of September 1993 together with a Statement of Claim. The Writ was indorsed by Steve Blundy as being served on the 5th of October 1993 and marked indorsed on the same date.

On the 17th of November 1993 a judgement in default was filed. No affidavit of service however was filed until the 24th of November 1993.

From the correspondence of Mr Radclyffe, (Letter dated 9/12/93 - exhibit 'JC3' in affidavit of Jennifer C Corrin filed on the 11/3/94) he states that the Judgment in Default of Appearance was sealed on the 30th November 1993 and received by him on the same date.

Order 13 Rule 2 of the High Court (Civil Procedure) Rules, 1964 provides:

"Where any defendant fails to appear to a Writ of Summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order...., he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be."

Order 13 Rule 5 then provides for the entering of an interlocutory judgment, whereby the value of damages in this particular case shall be determined by a Judge in chambers.

Order 9 Rule 12, of which Ms Corrin relies on as one of the grounds for setting aside the Judgment in Default of appearance, provides:

"The person serving a writ of summon shall, within three days at most after such service, indorse on the writ the day of the month and week of the service thereof, otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default, and every affidavit of service of such writ shall mention the day on which such indorsement was made...."

The irregularity relied on by Ms Corrin is that the affidavit of service did not mention the day on which the indorsement on the Writ was made. Mr Radclyffe submits that this is a mere technical defect. Unfortunately, there is no discretion involved about that. Rule 12 of Order 9 requires that such affidavit for service shall mention the day of indorsement. As filed, the affidavit of service is defective; that is, not in strict compliance with the rules, and therefore the defendant may have it set aside as of right. I might point out too that the affidavit of service in the file was also not dated.

The second ground relied on was that the judgment entered did not follow the writ. I accept that that is also an irregularity, as the Writ specifically stated that damages shall be limited to \$10,000.00.

A judgment in default so worded without any qualifications easily gives the impression that judgment is given on the action and therefore if damages exceed \$10,000.00, it would be granted. I note Mr Radclyffe has acknowledged that it is limited to \$10,000.00. Nevertheless it is still irregular and is a ground for setting aside judgment ex debito justitiae.

Finally, Ms Corrin relies on the open statements of Mr Radclyffe that an extension would be allowed. Mr Radclyffe counters that it was a mistake. However that mistake must lie where it has fallen, as each party is deemed to be aware of what is going on in respect of each case and therefore in this case, the Defendant is entitled to rely on what the plaintiff's Solicitor had written. I appreciate that this ground is not a very strong ground and the court could easily exercise its discretion otherwise.

For the reasons given, the application is granted with costs. I direct the Defence be filed within 7 days.

(A.R. Palmer)

JUDGE