

ENTERING DEFAULT JUDGMENT - A CAUTION

A number of my instructors have recently had issues with the entry of default judgment against one defendant operating as a bar to later entering judgment against another defendant. It is an issue that can potentially arise on a regular basis and caution should therefore be exercised before entering default judgment in certain circumstances.

Many of the relevant cases on this topic arise in the context of an agent and an undisclosed principal. For example, **A** sues **B** to judgment. It then comes to light that **B** was acting as an agent for **C**. In these circumstances, the judgment entered against **B** will prevent the plaintiff proceeding and entering judgment against **C** while the judgment entered against **B** remains on the record. It could not be said that there was any error on the part of the practitioner in these circumstances. They weren't aware of the undisclosed principal at the time judgment was entered.

However, the same principle can potentially apply where there are two defendants sued in the same proceeding and default judgment is entered against one. For example, **A** sues **B** and **C** in the same proceeding alleging they are alternatively liable under a contract. As is often the case, where it isn't clear whether **B** was the contracting party or acting as an agent on behalf of **C** the proper course when issuing proceedings would normally be to join both parties as defendants and allege that they are alternately liable under the contract. Assume then that **B** fails to file an

appearance or defence in accordance with the relevant court rules. At this point in the litigation it may seem prudent to simply enter default judgment against **B** to tie off that part of the litigation. However, if the proceeding was then continued against **C**, the plaintiff would be barred from entering judgment against **C** while the default judgment against **B** remained on the record.

In *Sunray Irrigation Services Pty Ltd v Hortulan Pty Ltd (in liq)* (1993) 2 VR 40 Tadgell J summarised the principle:

[W]hen a plaintiff sues upon a contractual obligation under which only one or the other of two persons is liable, and obtains judgment against one, he is barred from recovering later against the other so long as the judgment stands.

In stating this principle Tadgell J relied upon the High Court case of *Petersen v Moloney* (1951) 84 CLR 91 which is authority for the proposition that there must not be more than one judgment where there is only one antecedent obligation. *Petersen v Moloney* was a case where there was both joint and several liability, however, the *Wrongs Act* in Victoria has been amended to alter the law regarding joint liability.

Section 24AA of the *Wrongs Act* provides –

Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with the first-mentioned person in respect of the same debt or damage.

Moreover, the rules of the Magistrates', County and Supreme Courts permit a plaintiff to continue against other defendants despite default judgment being entered against one defendant.¹

But care needs to be taken not to be confused by these provisions. They do not apply to cases where only one defendant can ultimately be liable; where there is only one antecedent obligation. A practitioner must consider whether the other defendant or even a potential defendant is both jointly and severally liable or simply alternatively liable. If they are only alternatively liable then default judgment should normally not be entered against that party unless the client intends that only that party will be pursued.

The consequences can be severe for a client, especially in circumstances where it can be said that the client has made an election in entering the default judgment. In these circumstances the judgment will not normally be set aside on the plaintiff's application simply so that they can pursue another defendant or potential defendant:

So, if the plaintiff sues two defendants claiming that they are alternatively liable, a default judgment obtained against one will usually not, it would seem, be set aside in order that the claim against the other may be pursued. Moreover, if a plaintiff sues one defendant only, and obtains judgment, knowing that another is liable alternatively to the defendant sued, the plaintiff ought not ordinarily to be capable of having the judgment set aside in order to pursue a claim against the other. In either of these cases the plaintiff is likely to be held to his election.²

¹ See Magistrates', County and Supreme Court Rules r 21.05

² *Sunray Irrigation Services v Hortulan Pty Ltd* [1993] 2 VR 40, 44

But if a practitioner inadvertently enters judgment not all is lost. There is some limited scope to have the default judgment set aside on the plaintiff's application. In *Sunray Irrigation Services* the Supreme Court of Victoria recognised that a court has jurisdiction to set aside and remove from the record a judgment which, unless set aside, may stand in the way of a later suit against another defendant. Tadgell J went on to caveat this power and state the general rule:

Clearly, however, the jurisdiction is discretionary and limited. It will not be exercised simply because the plaintiff who has obtained judgment finds the judgment inconvenient. The general rule is that: "...a perfected judgment cannot be recalled or varied, for the public interest requires that the judgment when it is entered should conclude the litigation: *interest reipublicae ut sit finis litium*. Until the final judgment is entered, the court retains a power to reconsider the matter, but, when entered, the jurisdiction to reconsider is gone..."³

Relevantly Tadgell J went on to identify an exception to the general principle:

Nevertheless, it remains correct to say that a court has jurisdiction to set aside a judgment upon the plaintiff's application if the plaintiff shows a case on the merits – that is to say, shows cause – for doing so.⁴

* * *

There is no decided authority that a default judgment may not be set aside on the plaintiff's application not by consent but 'on the merits' – ie, as being wrong or because there is some other sound basis for setting it aside – merely because another

³ Ibid, 42; but also see *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461, 465 (per Ormiston J) which may be authority for a less restrictive test.

⁴ Ibid

person might thereby be deprived of a defence if sued by the plaintiff. On the contrary, removal of a potential defence by way of bar as against the plaintiff might well provide a reason for the setting aside of a judgment if it is otherwise appropriate to do so.⁵

The following considerations were held to be relevant:

- (a) Any injustice that would result to the plaintiff from a refusal to set aside a judgment;
- (b) The principle that the public interest ordinarily requires a judgment when entered to conclude the litigation; and
- (c) Any relevant injustice to third parties in setting aside of the judgment, including any violation of a right established in the public interest that would do particular injury to a third party.⁶

But is important to remember the exercise of discretion to set aside the default judgment on the plaintiff's application is the exception. In *Sunray Irrigation Services* the default judgment was set aside. However, in that case the plaintiff had sued and entered judgment without any knowledge or means of knowledge of an alternative claim against the undisclosed principle. It is very unlikely indeed (in fact the authorities weigh against it) that a plaintiff who enters default judgment against one of two alternatively liable defendants, knowing or with the means of knowing that they have inconsistent alternative rights, will have that default judgment set aside. It

⁵ Ibid, 45

⁶ Ibid

follows therefore that caution must be exercised in respect of entering default judgment where there is potential for it to stifle litigation against an alternatively liable defendant.

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Greens' List