

AUSTRALIA / JUDGMENT

Multi Modal Ltd v Polakow, N. [1987] FCA 633

COURT

Federal Court Rules 0.20 r.11, 0.4 rr.8, 9, 11, 12, 0.9
r.2

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"JUDGMENT No. Lf. 8 Tan

PRACTICE AND PROCEDURE - default judgment - default of appearance

- application as served showing directions hearing on a date of
service - facility to file appearance thereafter - 0.9 r.2(2) - no
appearance filed after 5 months - default of appearance - notice
of motion for default judgment and supporting affidavits served -
evidence in support of motion ~ evidentiary implications of
failure to answer affidavit in support of motion - some hearsay
evidence - admitted under s.79C of the Evidence Act 1906 (WA) -
application of s.79 Judiciary Act - whether business records
provisions of Evidence Act 1905 (Cwth) "otherwise provide".

Trade Practices Act 1974 s.52

Judiciary Act 1903 s.79

Evidence Act (WA) (1906)

Federal Court Rules 0.20 r.11, 0.4 rr.8, 9, 11, 12, 0.9 r.2
0.33

Woolworths Ltd v Crotty (1942) 66 CLR 603

Warea Pty Ltd v Waterloo Industries Pty Ltd (1986) 12 FCR 146

O'Brien v Randy's Motor Wreckers Pty Ltd (unrep. 18.3.87,
French J.)

Pearce v Button (1986) 8 FCR 408

Trade Practices Commission v TNT Management (Rulings) (1984) 56
ALR 647

MULTI MODAL LTD v NICHOLAS POLAKOW

NO. WAG 27 of 1987

FRENCH J.

PERTH

19 NOVEMBER 1987

IN THE FEDERAL COURT

OF AUSTRALIA

WESTERN AUSTRALIA

DISTRICT REGISTRY

GENERAL DIVISION

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NO. WAG 27 of 1987

BETWEEN: MULTI MODAL LTD

Applicant

and

NICHOLAS POLAKOW

Respondent

JUDGE MAKING ORDER: FRENCH J.

DATE OF ORDER: 19 November 1987

WHERE MADE: PERTH

THE COURT ORDERS
THAT:

1. The respondent is to pay to the applicant the sum of : \$206,590.51.
 2. The respondent is to pay the applicant's costs of the action.
 3. Liberty to apply in relation to the applicant's name.
- Note: Settlement and entry of orders
Order 36 of the Federal Court Rules.
is dealt with in
IN THE FEDERAL COURT)
OF AUSTRALIA)
WESTERN AUSTRALIA)
DISTRICT REGISTRY)
GENERAL DIVISION)
NO. WAG 27 of 1987
BETWEEN: MULTI MODAL LTD
Applicant
and
NICHOLAS POLAKOW
Respondent
CORAM: FRENCH J.
19 November 1987

REASONS FOR JUDGMENT

This is a motion for default judgment on an application for damages arising out of alleged contraventions of s.52 of the

Trade Practices Act 1974, breach of contract and fraud.

A copy of the application and the statement of claim were served on the respondent on 18 March 1987, as appears from the affidavit of Paul William Drought. No appearance has been

filed. On 18 August 1987 copies of the notice of motion for default judgment and supporting affidavits were also served on the respondent.

The return date for the motion was 1 September 1987.

2.

On that date the respondent did not appear although a memorandum on the Court file indicates that he telephoned the Registry and complained that he had only just received the notice on 24 August and did not have sufficient time to instruct his solicitors in the matter. However no adjournment was sought nor is there a record of any further communication between the respondent and the Court.

The motion seeks a default judgment under 0.20 r.1(1)(c) of the Federal Court Rules. Order 20 r. 1 provides:-

"(1) Where, in relation to the whole or any part of the applicant's claim for relief, there is evidence of the facts on which the claim or part is based, and -

- (a) there is evidence given by the applicant or by some responsible person that, in the belief of the person giving the evidence, the respondent has no defence to the claim or part;
- (b) the respondent's defence discloses no answer to the applicant's claim or part; or
- (c) the respondent is in default of appearance, the applicant may move on notice for such judgment for the applicant on that claim or part and the Court may

pronounce such judgment and make such orders as the nature of the case requires."

Order 4 r.8 requires that "Subject to rule 9, an application shall state a date for a directions hearing". Rule 9 deals with claims for interlocutory relief and is not relevant for present purposes.

3.

Order 4 r. 11 then provides for filing an appearance:-

"The time to be limited for a respondent to enter an appearance shall be not later than the date for hearing stated in the application pursuant to rule 8 or rule 9 of this Order."

Order 4 r.12 is also relevant for present purposes:-

"An application and affidavit or statement of claim shall, unless the Court otherwise orders, be served upon the respondent named in the application in accordance with Order 7, not less than 5 days before the date appointed for hearing pursuant to rule 8 or rule 9 of this Order."

Order 9 also provides for entry of an appearance in rule

"(1) Subject to these Rules a respondent shall enter an appearance before the date appointed for a directions hearing and before filing any document.

(2) Notwithstanding sub-rule (1) a respondent who has not entered an appearance by the date appointed for

a directions hearing, may enter an appearance after that date without leave."

The application served on the respondent on 18 March

1987 showed a directions hearing date of the same day.

The application as served was therefore not served in accordance with the requirements of 0.4 r.12. The directions hearing which was fixed for that day was adjourned to 15 April and thereafter again adjourned to 15 June and 20 July.

4.

While it was not possible for the respondent to file any appearance as required by 0.4 r.11 or 0.9 r.2, it has been open to

him without leave to file a late appearance under 0.9 r.2(2).

In the special context of these rules and the circumstances of this case, his failure to file an appearance notwithstanding a lapse of some 5 months, can be classed as a default. To so characterise this conduct or lack of it, is to do no more than apply the ordinary English meaning of the word

"default" which extends to neglect or failure to act.

In *Woolworths Ltd v Crotty* (1942) 66 CLR 603, Rich J. referred to the meaning of the word "default", albeit in the collocation "wrongful act, neglect or default" in Lord Campbell's

Act, and observed at 620:-

"In *Doe d. Dacre v Dacre* [126 ER 887 at pp. 891, 892] Eyre CJ said: "I do not know a larger or looser word than "default"... In its largest and most general sense it seems to mean, failing". It is a relative term and takes its colour from the context...."Default" means not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. (In *Re Bayley - Worthington and Cohen's Contract* (1909) 1 Ch. 648 at p.

658) ."

The failure to file an appearance in spite of being served with a motion for judgment in default of appearance can

also be regarded as a default in that sense.

In my opinion therefore, the respondent is in default of

appearance within the meaning of 0.20 r.1(l)(c).

5.

In the present case the applicant seeks to support its motion for default judgment by submitting to the court affidavit evidence "of the facts on which the claim is based" within the meaning of 0.20 r.1l.

The evidence is contained principally in the affidavit of Barrie Adrian Payne, who was, until 14 June 1987, a director of the applicant.

The claim as disclosed in the statement of claim arises from an agreement entered into between the applicant and the respondent on 9 September 1986 for the purchase by the applicant from the respondent of the exclusive right to distribute in Australia a device known as the "Aqua Scooter". This is otherwise described as a "motorised submersible propelled means. of conveyance or transport". The distribution rights were supposedly held by the respondent from an Italian company called "Arkos Spa" which manufactured the units under licence from an American company, Aqua Scooter Incorporated. Aqua Scooter Incorporated is

said to be the repository of patent, marketing and distribution rights.

The applicant complains of pre-contractual misrepresentations by the respondent. These were said to have been made by telephone and through the post, thus attracting the extended operation of the Trade Practices Act, under s.6 of that

Act. A number of them are to be found in a letter from the

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respondent dated 2 September 1986 and exhibited to Payne's affidavit.

The applicant alleges that contrary to those representations:-

1. The respondent did not at any material time enjoy sole or exclusive rights to distribute Aqua Scooters in Australia.
2. The Aqua Scooter was not the subject of any patent rights in Australia.
3. The Aqua Scooter was available in retail or wholesale supply.
4. The respondent had not, at any time, placed 300 Aqua Scooter units in commercial hire outlets.

5. The respondent did not propose nor have arrangements to supply Aqua Scooters to the operators of commercial hire outlets in the claimed or any quantities.
6. The respondent had not received numerous telephone enquiries from persons interested in the right to distribute Aqua Scooters.
7. The Aqua Scooter was not mechanically sound, it was defective and the units suffered a propensity to break down in spite of regular servicing and had an operational life of less than 200 hours against a represented 700-800 hours.

The applicant says it paid \$150,000.00 to acquire the non-existent "exclusive rights" and incurred various other expenses.

On the motion for judgment it seeks damages of \$206,590.51 calculated as follows:-

7.
 - (a) \$150,000.00 being the difference between the amount paid for the alleged exclusive rights and their actual value said to be nil.
 - (b) Wasted travelling and accommodation expenses of \$13,912.00.
 - (c) Other wasted expenditure of \$19,226.02.
 - (d) Further wasted expenditure of \$22,320.89.
 - (e) \$1,132.00 in consequential losses incurred by rectifying mechanically defective Aqua Scooters.

Payne's affidavit verified from his own knowledge, the allegations contained in the statement of claim so far as they relate to the making of the representations by the respondent, the applicant's reliance upon them, the execution of the agreement to acquire exclusive rights to distribute the Aqua Scooter, the terms of the agreement and the payment of \$150,000.00 to the respondent pursuant to it. A copy of the agreement was exhibited.

He verified that travel expenses were incurred amounting to \$13,912.00, being \$1,000.00 to bring the respondent to Perth to execute the agreement and \$12,912.00 for the respondent and himself to fly to New York and negotiate with Aqua Scooter

Incorporated for sole rights to distribute the product in Australia.

He deposed to expenditure of \$19,226.02 in connection with the first air shipment of 100 scooters and \$18,745.00 on a second shipment by sea of a further 1,300 scooters. Further

wasted expenditure of \$3,575.89 was incurred by way of freight

a

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costs and ancillary costs involved in reselling otherwise unsaleable units to Aqua Scooter Incorporated for a price which

was less than the original purchase price.

The latter sum together with the amount of \$18,745.00 incurred on the second sea shipment, makes up the total of

\$22,320.89 claimed in para. (d) of the motion.

The figure of \$1,132.00 claimed in para. (e), relates to expenditure incurred in respect of the return airfare and accommodation for a technician to visit Sydney to attend to the

repair of Aqua Scooters distributed by the applicant.

As to the falsity of the alleged representations, Payne deposed to the non-exclusivity of the respondent's rights to sell the product by reference to publications advertising the sale of Aqua Scooters by Monkel Marine Pty Ltd of New South Wales. This material was also relied upon to falsify the representations that the Aqua Scooter was not available in Australia through retail or wholesale outlets.

Although two of the publications post-date the representations by a couple of months, they can, given the shortness of the elapsed time, support the inference contended for. It is, of course, possible that the respondent was given exclusive rights to distribute and that Monkel Marine Pty Ltd has

been supplied in breach of those rights.

9.

In my opinion however, and given the absence of any answer by the respondent to the evidence of which he was given notice, the Court may accept that the inference for which the applicant contends is correct - namely, that contrary to his representation, he was not the repository of exclusive rights of

distribution in Australia.

A search conducted at the Australian Patents Office disclosed no current patent protection for the product in this

country.

At no time since his involvement in the matter did Payne hear of any commercial hire outlets operating with Aqua Scooter

units owned by the respondent.

The representations that the respondent proposed to supply Aqua Scooters to various commercial hire outlets at 17 tourist locations and that arrangements were on foot with a number of them are contained in a letter from the respondent dated 11 September 1986 and exhibited to Payne's affidavit. Payne simply observed that he had received no orders from the respondent for any Aqua Scooters and was unaware of any other supplier of the units to him.

As to the represented minimum sales of 1200 per year with a potential of 5,000 sales over 4 years, Payne offered the inference from the lack of actual sales that this representation was also untrue.

10.

The respondent claimed, in his letter of 2 September, to have had numerous inquiries from companies interested in acquiring distributorship rights in relation to the product. A list he subsequently provided to the applicant disclosed some 7 companies and firms said to have expressed interest. One of these, Wylap Pty Ltd, actually purchased 100 units and another, Willers and

Co., purchased some units from Wylap.

With respect to the mechanical soundness of the Aqua Scooters, Payne was able to speak of defects which appeared a short time after delivery of the machines to customers. Cogs stripped, starter hooks bent so as to be unable to engage to start the units, spindles stripped and springs broke.

In the end when it became apparent that the applicant would have difficulty in selling any of the units, Payne decided

to dispose of 650 of them to Aqua Scooters Incorporated.

These were sold for less than the cost to the applicant and on the basis that the applicant would meet freight and ancillary expenses. The expenses amounted to the sum of \$3,575.89, which has been referred to above.

The applicant presently retains some 575 units unsold. No credit needs to be given for these as no claim has been made in respect of their purchase price.

11.

Although the bulk of Payne's evidence related to matters within his own knowledge, some aspects were of a hearsay

character.

This was so in respect of the publications advertising the sale of Aqua Scooter by Monkel Marine Pty Ltd, the results of the Patent Office search in respect of which he exhibited the report of a firm of patent attorneys, and the list of potential

distributors passed to him by an employee. This list was also exhibited to the affidavit.

The applicant seeks leave to admit these parts of the affidavit and associated exhibits under 0.33 of the Federal Court

Rules.

Order 33 r.2 has been held not to apply in proceedings

under 0.20 r.1 - Warea Pty Ltd v Waterloo Industries Pty Ltd

(1986) 12 FCR 146, O'Brien v Randy's Motor Wreckers Pty Ltd (Unrep. 18/3/87, French J.).

Order 33 r.3 provides:-

"The Court may at any stage of the proceedings -

{a) dispense with compliance with the rules of evidence for proving any matter which is not bona fide in dispute; or

(bd) dispense with compliance with the rules of evidence where such compliance might occasion or involve unnecessary or unreasonable expense or delay, including, but without

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limiting the generality of this power, compliance with the rules relating to proof of handwriting or of documents and the proof of the identity of parties or of authority."

In Warea Pty Ltd v Waterloo Industries Pty Ltd (supra)

at 154 Pincus J. was not prepared to admit hearsay evidence under the provisions of this rule and referred to the judgment of the

Full Court in Pearce v Button (1986) 8 FCR 408.

It is notable however that in the application before Pincus J. the hearsay evidence sought to be admitted was in dispute and the respondents were represented before him and contested its admissibility. As Lockhart J. said in Pearce v Button (supra), a judge should be slow to invoke the rule where

there is a real dispute about matters which go to the heart of the case.

The evidence in question is not disputed in this case, for the respondent has not appeared. In my opinion, the evidence in question can be admitted under this sub-rule notwithstanding

its hearsay character. In any event where the hearsay evidence comes in the form of a documentary statement, it may attract the application in

Western Australia of s.79C of the Evidence Act 1906.

That section provides, inter alia:~

13.

"79C(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish the fact shall, on production of the document, be admissible as evidence of that fact -

(a) if the maker of the statement either ~

{1} had personal knowledge of the matters dealt with by the statement; or

(1i) made the statement (in so far as the

matters dealt with thereby are not

within his personal knowledge in the performance of a duty to record information supplied whether directly or indirectly by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt

with in the information they supplied; and

(b) if the maker of the statement is called as a witness.

(2) The condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is out of the State and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to identify or find him have been made without success, or where no party to the proceedings who would have the right to cross-examine him requires him to be called as a witness.

(3) The court may at any stage of the proceedings order that the statement shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence, notwithstanding -

(a) that the statement is tendered by the party calling the maker of the statement;

{b} that the maker of the statement is available but is not called as a witness;

(c) that the original document is lost or mislaid or destroyed, or is not produced, if in lieu of it there is produced a copy of it or of the material part of it certified to be a true copy in such a manner as may be specified in

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the order or as the court may approve, as the case may be.

- (4) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

The application of s.79C to proceedings in this Court

sitting in Western Australia will depend upon the application of

s.79 of the Judiciary Act 1903 which provides:-

"79. The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

Section 79C of the Evidence Act is plainly a law of the State relating to evidence. The only question affecting its application is whether there is any law of the Commonwealth that

"otherwise provides" within the meaning of the section.

The relevant provisions of the Evidence Act 1905 (Cwth) are those to be found in Part IIIA dealing with admissibility of

business records. In my opinion, none of the documents in

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question fall within the description of a business" record.

Applying the reasoning adopted by Franki J. in Trade Practices

Commission v TNT Management Pty Ltd (Rulings) (1984) 56 ALR 647 at

700, the provisions of the Commonwealth Evidence Act do not cover the field in relation to documents which are not business records

and do not, therefore, "otherwise provide" within the meaning of

s.79 of the Judiciary Act.

The report from the patent attorneys and the list of interested companies plainly fall within s.79C. The advertisement from Monkel Marine constitutes statements which, in so far as they are made by their publisher, are made in the performance of a duty to record information supplied by persons who may reasonably be supposed to have had personal knowledge of the matters dealt with

in the information supplied.

In drawing the inference that I do in relation to the

advertisements, I rely upon sub-s.79C(4) of the Act.

I therefore would exercise the discretion to admit these documents under sub-s.79C(3) having regard to the fact that the respondent, who has had notice of the applicant's intention to rely upon these materials since 18 August, has taken no steps to

challenge or otherwise respond to them.

In my opinion, the applicant has, in the terms of O. 20, shown evidence of the facts on which its claim is based and that

it is entitled to judgment in the sum claimed, namely \$206,590.51.

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I certify that the preceding

fifteen (15) pages are a true

copy of the Reasons for Judgment

of his Honour Justice French.

Associate: GDelovabky UTR AKL

1 Nevevmres 1987

Date;

Counsel for the Applicant: Mr D. Solomon

Solicitors for the Applicant: Phillips Fox

No appearance for the Respondent.

Date of Hearing: 1 September 1987

Date of Judgment: 19 November 1987

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