
JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CHAMBERS

LOCATION : PERTH

CITATION : CICIRELLO -v- CARTER [2023] WADC 130

CORAM : PRINCIPAL REGISTRAR MCGIVERN

HEARD : 2 NOVEMBER 2023

DELIVERED : Ex tempore

FILE NO/S : CIV 4897 of 2022

BETWEEN : VANESSA AND MICHEAL CICIRELLO
Plaintiff

AND

BROCK CARTER
Defendant

Catchwords:

Practice and procedure - Judgment entered in default of appearance - Irregularity
- Wilful failure to engage in the process - Turns on own facts

Legislation:

Civil Judgments Enforcement Act 2004 (WA), pt 4 div 2
District Court Rules 2005 (WA), r 6, r 20
Rules of the Supreme Court 1971 (WA), O 2 r 1, O 2 r 2, O 5 r 11, O 9 r 1,
O 12 r 1, O 12 r 2, O 12 r 5, O 13 r 1, O 13 r 2, O 13 r 12, O 13 r 14

Result:

Default judgment stands

Representation:

Counsel:

Plaintiff : Mr T Lethbridge
Defendant : In person

Solicitors:

Plaintiff : Croftbridge
Defendant : Not applicable

Case(s) referred to in decision(s):

ACN 076 676 438 Pty Ltd (in liq) v A-Comms Teledata Pty Ltd [2000] WASC
214
Arnold v Forsythe [2012] NSWCA 18
Cheney v Moore [2020] WASC 227
Collie v Merlaw Nominees Pty Ltd [2003] VSC 424
Glew v Frank Jasper Pty Ltd [2010] WASCA 87
Hall v Hall [2007] WASC 198
Jones v Harvey Industries Group Pty Ltd [2019] WADC 14
Metroinvest Ansalt v Commercial Union Assurance Co Ltd [1985] 1 WLR 513
Moleirinho v Talbot & Olivier Lawyers Pty Ltd [2014] WASCA 65
Murcia & Associates (a firm) v Grey [2001] WASCA 240; (2001) 25 WAR 209
Polodna v Mattiaccio [2019] WASCA 21
RT Company Pty Ltd v Minister of State for the Interior [1957] HCA 39; (1957)
98 CLR 168
Scott v Baring [2019] WASC 278
Starrs v Retravisio (WA) Ltd [2012] WASCA 67
The Pilbara Infrastructure Pty Ltd v BGC Contracting Pty Ltd [2007] WASCA
257
Wildflower Electrical Refrigeration Service (WA) v Refrigid Pty Ltd [2014]
WASC 382

PRINCIPAL REGISTRAR MCGIVERN:

[These reasons were delivered orally on 2 November 2023. They have been edited to correct matters of grammar and infelicity of expression, and to include footnotes.]

Introduction

1 On 10 January 2023, judgment in default of an appearance was entered against the defendant.¹ It later became apparent that the defendant had attempted to enter an appearance by emailing it to the court, but that was, unfortunately, not discovered until some time after default judgment had been entered.²

2 The court, of its own motion, brought the matter on for a hearing to determine whether the default judgment was irregularly entered and, if so, what orders should be made.

3 For the reasons that follow, although I am satisfied that the default judgment was irregularly entered, I am not satisfied that it should be set aside.

Relevant procedural history

4 Because of its relevance to the determination of the questions in [2] above,³ the procedural history is set out in greater detail than might usually be the case.

5 The plaintiffs are legally represented; the defendant is not.

6 The action was commenced by a writ of summons filed on 9 November 2022. The indorsement of claim is, broadly, to the effect that:

- (a) the plaintiffs entered into a 'costs plus' building contract (**Contract**) with the defendant, which obliged the plaintiffs to pay the defendant the 'actual costs' of the building works the subject of the Contract, plus a further 15% by way of a 'builder's fee';

¹ For convenience, in these reasons I refer to the parties respectively as the 'plaintiffs' (rather than 'judgment creditors') and 'defendant' (rather than 'judgment debtor').

² As to which, see [8], [18] of these reasons.

³ As to which, see [53] - [62] of these reasons.

- (b) the defendant issued invoices to the plaintiffs totalling \$377,799.24 (**Invoiced Sum**), which the plaintiffs paid;
- (c) the defendant incurred actual costs of \$145,550.80, entitling him under the Contract to charge the plaintiffs a total of \$167,383.42 (**Contested Sum**); and
- (d) the plaintiffs claim against the defendant, the sum of \$210,415.82 (being the difference between the Invoiced Sum and the Contested Sum) by way of damages (**Damages Sum**), either in common law or pursuant to s 236 of the *Australian Consumer Law*,⁴ plus interest on that amount.

7 The writ was personally served on the defendant on 17 November 2022.⁵

8 On 5 December 2022, the defendant sought to enter an appearance by attaching a memorandum of appearance to an email which he sent to the District Court.⁶ Unfortunately, the email went to 'junk mail' and the appearance was not lodged in the action in the electronic case management system (**ECMS**).

9 In the absence of the court or the plaintiffs being aware that the defendant had sought to enter an appearance,⁷ default judgment for the Damages Sum plus costs was entered against the defendant on 10 January 2022 (**Default Judgment**).

10 The Default Judgment was personally served on the defendant on 19 January 2023.⁸

11 Pursuant to an application made on 23 January 2023 by the plaintiffs (as judgment creditors), on 31 January 2023 a means inquiry was listed to be heard on 16 March 2023, and a summons was issued for the defendant to attend and give evidence at that hearing.⁹ The summons was personally served on the defendant on 3 February 2023.¹⁰

⁴ Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

⁵ Affidavit of service of writ of summons of Steven John Walker sworn 19 December 2022.

⁶ At the court's accepted email address for this purpose.

⁷ I accept the evidence in relation to the plaintiffs' lack of knowledge contained in the affidavit of Timothy Lethbridge made 18 August 2023.

⁸ Affidavit of service of Steven John Walker sworn 24 January 2023.

⁹ Pursuant to *Civil Judgments Enforcement Act 2004* (WA) pt 4 div 2 (**CJEA**).

¹⁰ Affidavit of service of Steven John Walker sworn 13 February 2023.

12 The defendant did not attend the means inquiry hearing on
16 March 2023.¹¹

13 On 23 March 2023, the plaintiffs filed an application for orders
that included leave to issue an arrest warrant to the defendant.¹²
That application was listed to be heard before a judge on 11 April 2023,
and the Form 7 notice was personally served on the defendant on
8 April 2023.¹³

14 The application was heard by his Honour Judge Troy on 11 April
2023, and the defendant attended that hearing. In the event, the means
inquiry was relisted for hearing on 6 June 2023, and the application for
the issue of a warrant was adjourned.

15 The defendant attended the hearing on 6 June 2023, and the
application for the issue of a warrant was vacated. The means inquiry
itself, however, was adjourned by consent to 15 June 2023 (apparently
to allow the defendant to gather additional financial information).¹⁴

16 The defendant did not attend the means inquiry hearing on 15 June
2023.

17 The defendant did not, at the hearings he attended on 11 April
2023 or 6 June 2023, make mention of having filed, or having
attempted to file, an appearance.

18 However, on or about 9 August 2023, the defendant contacted the
court to enquire about, and the court located, the defendant's email
referred to in [8] above.

19 On 11 August 2023, I wrote to the parties:

- (a) in terms of [1] - [2] above;
- (b) advising that the matter was provisionally listed for a hearing in
chambers on 21 August 2023; and
- (c) requiring that, by 15 August 2023, each party provide any
unavailable dates for the forthcoming month and notify the
court if they were unable to make the hearing on 21 August
2023.

¹¹ I accept the evidence of the plaintiffs' lawyer that the defendant did not advise them of any inability to attend a hearing on that date: affidavit of Timothy Lethbridge made 23 March 2023 (**First TL Affidavit**).

¹² Pursuant to CJEAS s 29(3).

¹³ Affidavit of service of Steven John Walker sworn 11 April 2023.

¹⁴ Affidavit of Timothy Lethbridge made 18 August 2023 (**Second TL Affidavit**).

20 No party gave notice of any unavailability prior to 21 August
2023.

21 On 18 August 2023, the plaintiffs filed an outline of submissions
(**Plaintiffs' Submissions**) in opposition to the Default Judgment being
set aside, and an affidavit in support of that position.¹⁵

22 On 21 August 2023:

- (a) shortly before the hearing, the defendant contacted the court by email (from a different email address to that used in [8] above) to advise that he was unable to attend the hearing in person or by telephone;
- (b) in the event, the plaintiffs attended, but the defendant did not attend, the hearing; and
- (c) I made orders (**August Orders**) which included that:
 - (i) by 4 pm on 22 August 2023, the plaintiffs were to send to the defendant's email address (used to communicate with the court that morning) a copy of the materials in [21] and a copy of my orders;
 - (ii) the hearing was to be adjourned to a date to be listed, with the parties to provide unavailable dates for that purpose by 25 August 2023; and
 - (iii) by no later than 5 September 2023, the defendant was to notify the court in writing (and send a copy to the plaintiffs) whether he sought to have the Default Judgment set aside.

23 By letter dated 28 August 2023, the parties were advised that the
matter was listed to a further hearing on 19 September 2023.

24 The defendant did not comply with the order at [22(c)(iii)] above.

25 On 15 September 2023, the plaintiffs filed an affidavit to the effect
that they had complied with the order at [22(c)(i)].¹⁶ There is no
evidence to the contrary and I accept that evidence.

¹⁵ The Second TL Affidavit.

¹⁶ Affidavit of Timothy Lethbridge made 15 September 2023 (**Third TL Affidavit**).

26 The hearing on 19 September 2023 was attended by the plaintiffs (by their legal representative), and the defendant in person. At that hearing:

- (a) the defendant indicated orally that he was 'hoping to have the default judgments set aside';¹⁷ and
- (b) in the circumstances, I:¹⁸
 - (i) indicated that I would allow a further period for him to make application to set aside the Default Judgment, and to file any affidavit or other material in support;
 - (ii) sought the defendant's clarification of the address at which service could be effected, and explained that the court would treat correspondence sent to that address as having been received by him;
 - (iii) outlined some of the key issues (in particular, those of prejudice and waiver) and authorities raised in the Plaintiffs' Submissions, and indicated that the defendant should read those submissions carefully and consider (including by obtaining legal advice, if possible) how he might address the issues raised; and
 - (iv) indicated that, the defendant should at least address the question of timing (why his position was put for the first time orally at the hearing, and whether and why he was not in a position to comply with the August Orders) in his affidavit evidence. Further, the defendant should identify in broad terms that there was a defence he intended to run (and therefore, if the Default Judgment were not set aside, he would lose the chance of running).

27 I made orders (**September Orders**) that:

- (a) by 4 pm on 20 September 2023, the plaintiffs were to send to the defendant's nominated email address for service a copy of the materials in [21] and a copy of the Third TL Affidavit;

¹⁷ ts 8, 19 September 2023.

¹⁸ ts 10 - ts 18, 19 September 2023.

- (b) by no later than 4 pm on 18 October 2023, the defendant must file and serve any application to set aside the Default Judgment and any affidavit in support of that application;
- (c) the hearing be adjourned to 2 November 2023; and
- (d) each party to file any written submissions by 4 pm on 30 October 2023.

28 On 13 October 2023, the plaintiffs filed an affidavit to the effect that they had complied with the order at [27(a)].¹⁹ There is no evidence to the contrary and I accept that evidence.

29 On 26 October 2023, the plaintiffs filed a further outline of submissions (Plaintiffs' Further Submissions).

30 The defendant has not complied with the orders at [27(b)] or [27(d)] above.

31 At the hearing on 2 November 2023:

- (a) the plaintiffs, by their solicitor, and the defendant appeared;
- (b) the defendant advised that, although no lawyer is on the record, he had spoken with a lawyer who had advised him to ask for a further extension of time; and
- (c) said words to the effect, by way of explanation for not advising the court of his position earlier, that he has had a lot on.

Was the default judgment irregularly entered?

32 Pursuant to O 2 r 1 of the *Rules of the Supreme Court 1971 (WA) (RSC)*,²⁰ any failure, at any stage in proceedings, to comply with the rules of court is treated as an irregularity.

33 In this case, the question of whether the Default Judgment was irregularly entered falls to be determined on whether RSC O 13 r 1(2) is engaged.

¹⁹ Affidavit of Timothy Lethbridge made 13 October 2023 (**Fourth TL Affidavit**).

²⁰ Except insofar as they are inconsistent with the *District Court Rules 2005 (WA) (DCR)*, the RSC apply to actions in the District Court: DCR r 6.

34 There is no suggestion that any other ground for irregularity is in issue. More specifically:

- (a) there is nothing to suggest that the plaintiffs acted unreasonably or in bad faith in entering judgment;²¹ and
- (b) I am satisfied that the other relevant requirements of RSC O 13 are met because:
 - (i) before entering judgment, the plaintiffs filed an affidavit proving service of the writ on the defendant and indorsement of service in accordance with RSC O 9 r 1(4) and O 13 r 1(3);²² and
 - (ii) the Default Judgment is for the Damages Sum plus costs, being a sum not exceeding that claimed by the writ: RSC O 13 r 2.

35 This leaves for determination whether the threshold requirements in RSC O 13 r 1(2) are met, which are in terms that:

If a defendant does not enter an appearance within the time limited for appearing, the plaintiff may enter judgment against that defendant in accordance with this Order.

Did the defendant 'enter an appearance'?

36 A defendant may enter an appearance in person, by filing an appearance in the prescribed form.²³

37 DCR r 20 has the effect that:

- (a) if an appearance is filed by a lawyer on behalf of a client, then it must be filed electronically using the ECMS; and
- (b) a person filing an appearance on their own behalf may, but is not required to, file the document electronically.

²¹ As to which see: *Starrs v Retravision (WA) Ltd* [2012] WASCA 67 [38] - [43] (*Starrs*); *ACN 076 676 438 Pty Ltd (in liq) v A-Comms Teledata Pty Ltd* [2000] WASC 214 [17] (*A-Comms*) and the authorities cited therein. The plaintiffs' absence of awareness of the defendant's attempt to enter an appearance is supported by the Second TL Affidavit.

²² Affidavit of service of writ of summons of Steven John Walker sworn 19 December 2022, annexing the sealed writ with indorsement of service dated 17 January 2022.

²³ RSC O 12 r 1, O12 r 2.

38 This court permits unrepresented litigants who are not registered users of the ECMS to file most documents by emailing them to a nominated email address.²⁴

39 As noted in [8], the defendant emailed the requisite form to the court using the nominated email address. Accordingly, he is taken to have filed an appearance on 5 December 2022.

Was the appearance 'within the time limited for appearing'?

40 In accordance with RSC O 5 r 11, the writ in this case stated that the defendant was to enter an appearance within 10 days after service - that is, by 28 November 2022.²⁵ The defendant filed an appearance after that date, on 5 December 2022.

41 However, RSC O 12 r 5 provides:

5. Late appearance

- (1) A defendant may not enter an appearance in an action after judgment has been entered therein except with the leave of the court.
- (2) Except as provided by subrule (1), nothing in these rules or any writ or order thereunder shall be construed as preventing a defendant from entering an appearance in an action after the time limited for appearing, but if a defendant enters an appearance after that time, he shall not, unless the Court otherwise orders, be entitled to serve a defence or do any other thing later than if he had appeared within that time.

42 Accordingly, RSC O 13 r 1(2) read together with RSC O 12 r 5, has the effect that:

- (a) if and only to the extent that judgment (in default or otherwise) has been entered, then an appearance may not be entered; and
- (b) default judgment may be entered only after the time limited on the writ for entering an appearance if, and only if, at the time of entry, an appearance has not been entered.

²⁴ *Circulars to Practitioners - Civil*, 1.2.

²⁵ See [7] above.

43 In this case, notwithstanding that the time allowed on the writ for entering an appearance had expired, default judgment had not been entered by 5 December 2022 and so the defendant's appearance was filed 'within the time limited for appearing'.

Conclusion as to irregularity

44 It follows that, since the defendant had filed an appearance before 10 January 2023, the Default Judgment is irregular.

What orders should be made?

45 Pursuant to RSC O 2 r 1:

- (a) a judgment that is entered other than in accordance with the rules of court is irregular, but is not a nullity (that is, it has effect unless and until varied or set aside); and
- (b) the court may, because of the irregularity, and on such terms as to costs or otherwise as it thinks just:
 - (i) set aside (either wholly or in part) or amend such judgment; and
 - (ii) make any order dealing with the proceedings generally as it thinks fit.

46 RSC O 2 r 2 has the effect that:

- (a) a party may apply to set aside an irregular judgment, within a reasonable time of becoming aware of its irregularity; and
- (b) such application must be made by summons or motion, and grounds of objection must be stated in the summons or notice of motion.

47 More particularly:

- (a) RSC O 13 r 12 requires that any default judgment must include a statement informing the defendant of the defendant's right 'to apply to have the default judgment set aside or varied'; and
- (b) RSC O 13 r 14 confers on the court the discretion to set aside or vary any default judgment, whether or not it is irregular.

Defendant's position

48 The defendant has not set out his position beyond a broad statement, made at the hearing on 19 September 2023, to the effect that he would like to have the Default Judgment set aside because he does not feel he has 'had a chance to present everything' or to 'actually sit down and go through ... the details'.²⁶

Plaintiffs' position

49 The plaintiffs advance the position that:

- (a) the defendant has waived any irregularity in the Default Judgment; and
- (b) the plaintiffs have acted in reliance on the Default Judgment and will suffer prejudice if it is set aside.

50 As to the defendant waiving the irregularity, the plaintiffs:

- (a) point to case law in support of the proposition that a party can waive an irregularity²⁷ including, more particularly, where default judgment has been entered where:
 - (i) the party, with knowledge of the irregularity, takes an intentional position that is consistent with waiving the irregularity; and
 - (ii) the other party acts to their detriment in reliance on the decision;²⁸
- (b) argue that the defendant has intentionally and with knowledge waived the irregularity in the Default Judgment by:
 - (i) for an 8 month period following 19 January 2023 (when the defendant was served with the Default Judgment), raising no issue with the Default Judgment;
 - (ii) at the hearing before Judge Troy on 11 April 2023, consenting to orders that a means inquiry be relisted;

²⁶ ts 8, ts 14, 19 September 2023.

²⁷ *Polodna v Mattiaccio* [2019] WASCA 21 [41] - [46].

²⁸ *Arnold v Forsythe* [2012] NSWCA 18 [61] - [63].

- (iii) at the means inquiry on 6 June 2023 before Registrar Harman, consenting to orders that the means inquiry be relisted and the plaintiffs' application for an arrest warrant be vacated; and
- (iv) despite the August Orders and September Orders, failing without explanation to apply to have the Default Judgment set aside or to lead any evidence.

51 As to having acting in reliance and suffering prejudice, the plaintiffs argue that they have:

- (a) incurred significant cost in pursuing a means inquiry, including by applying for an arrest warrant; and
- (b) suffered a delay of at least eight months.

52 The plaintiffs contend that:

- (a) the Default Judgment should not be set aside; and further
- (b) the irregularity in the Default Judgment should be 'resolved' by an order affirming it and, by a minute filed on 1 November 2023, by an order 'curing' the irregularity.²⁹

Consideration

53 I do not consider that I am precluded, by the absence of any application on the part of the defendant, from setting aside the Default Judgment. In my view, RSC O 2 r 2 and O 13 r 12 are enabling provisions. They do not limit the court's ability to deal with an irregularity on its own motion. The court has, as an incident of its statutory jurisdiction, an inherent power to regulate its own proceedings, including by:

- (a) correcting irregularities in its own procedures and rules;³⁰ and
- (b) preventing abuses of its process.³¹

²⁹ Citing, in support of the latter contention: *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513, 520; *The Pilbara Infrastructure Pty Ltd v BGC Contracting Pty Ltd* [2007] WASCA 257 [50] - [52]; *Cheney v Moore* [2020] WASC 227 [13] - [17].

³⁰ *Murcia & Associates (a firm) v Grey* [2001] WASCA 240; (2001) 25 WAR 209 (*Murcia*) [16].

³¹ *Murcia* [16]; *Jones v Harvey Industries Group Pty Ltd* [2019] WADC 14 [20] - [23].

54 Nevertheless, the absence of any such application is relevant to the exercise of discretion in this case - particularly in the context of the procedural history, notably including the making of the August Orders and the September Orders.

55 The discretion of the court to make orders dealing with irregularities generally, and with default judgments in particular, is conferred in the broadest terms and is not qualified.³² That said, the case law provides the following guidance:

- (a) as a general rule, an irregular judgment 'ought not be on the records of the court' and will therefore usually be set aside;³³
- (b) not every irregularity in the means by which a judgment in default is obtained will necessarily entitle a defendant to have the judgment set aside;³⁴ and
- (c) ultimately, the court's discretion should be exercised 'to do justice between the parties, having regard to the particular circumstances of the case'.³⁵

56 It has previously been observed that factors relevant to the question of whether default judgment should be set aside include the length of any delay between the judgment being entered and the application to set it aside, and the defendant's explanation for that delay.³⁶

57 In this case, the defendant has not merely delayed making an application to set aside the Default Judgment; rather, despite the August Orders and the September Orders, he has not made any (or any adequate)³⁷ application at all.

³² See, for example, *Starrs* [36]; *Hall v Hall* [2007] WASC 198 (*Hall*) [63].

³³ *Starrs* [36], citing *Collie v Merlaw Nominees Pty Ltd* [2003] VSC 424 [37]; *RT Company Pty Ltd v Minister of State for the Interior* [1957] HCA 39; (1957) 98 CLR 168, 170.

³⁴ *A-Comms* [17] - [19].

³⁵ *Hall* [63].

³⁶ *Starrs* [48]; *Wildflower Electrical Refrigeration Service (WA) v Refrigid Pty Ltd* [2014] WASC 382 [11] (*Wildflower*). I note that the latter case involved the distinguishable context of, on the one hand, a regularly entered judgment and, on the other hand, an application having in fact been made (albeit with some delay).

³⁷ In the sense of his position being put in writing and supported by an affidavit. This is not unduly onerous for an unrepresented litigant. See [60] of these reasons.

58 In addition to the authorities cited above, I have had regard to the decision and reasoning in *Scott v Baring*,³⁸ in which Master Sanderson:

- (a) observed³⁹ that 'there was a time when there were two separate and distinct grounds upon which a default judgment could be set aside':
 - (i) the first being irregularity in the process that led to judgment, in which case the judgment would be set aside without consideration of the merits of the parties' respective positions; and
 - (ii) the second being that, despite the judgment being regular (that is, not 'tainted by any error of process'), the defendant had a good defence on the merits;
- (b) noted that that dichotomy:
 - (i) is not reflected in the rules of court, but rather 'grew up as a matter of practice'; and
 - (ii) is not reflected in the reasoning and approach in *Starrs*, in which the Court of Appeal took into account the merits of the defendant's position in refusing to set aside an irregular default judgment;⁴⁰
- (c) opined that, following *Starrs*:
 - (i) 'a rigid demarcation between the principles applicable to regular and irregular judgments' no longer stands;
 - (ii) rather, the interests of justice is the single touchstone of the discretion exercised in relation to setting aside any default judgment; and
 - (iii) when considering the interests of justice, it is appropriate to look holistically at the position of the defendant;⁴¹
- (d) accepted that, in the case before him, the defendants had a good prima facie defence on the merits; and

³⁸ *Scott v Baring* [2019] WASC 278 (*Scott*).

³⁹ *Scott* [24].

⁴⁰ *Scott* [25], [53] - [54].

⁴¹ *Scott* [54] - [55].

- (e) nevertheless refused to set aside the default judgment because:
 - (i) the defendants, once served, had demonstrated a 'wilful default in engaging with the process';
 - (ii) the explanation proffered for not engaging in the process was 'limp and unsatisfactory'; and
 - (iii) against this, while the plaintiff could not demonstrate specific prejudice, there was no doubt that she suffered 'the general prejudice which always comes with delay'.⁴²

59 That approach and reasoning is, with respect, instructive in the context of this case. Of note:

- (a) the procedural history at [7] - [30] points to the defendant not having engaged in various ways in the proceedings generally;
- (b) although that general disengagement is noted for context, I place most weight on the defendant's conduct after 11 August 2023, when the particular issues relevant to the Default Judgment were the subject of explicit notice;
- (c) in particular, the defendant has, despite notice and explanation of the issues to him, not complied with the August Orders or the September Orders, and has thereby failed to engage with the opportunities afforded to him to make application to have the Default Judgment set aside, to explain his delay and to raise any issues as to the merits of his position;
- (d) there is no indication from defendant, even in broad terms, as to whether he takes issue with the existence of the Contract and/or with the nature and effect of its terms and/or with the Damages Sum. Accordingly, I can make no assessment of the merits of the defendant's substantive position;
- (e) of particular relevance, the defendant has offered no adequate reason for his failure to comply with the August Orders or the September Orders; and
- (f) by way of contrast, the plaintiffs have taken numerous steps and incurred associated costs following entry of the Default Judgment and, since the notice issued to both parties on

⁴² *Scott* [43] - [47], [49], [51], [54].

11 August 2023, have complied with the orders of the court, including by attending to service on the defendant and by filing submissions and affidavit evidence.

60 Although I am mindful that the defendant is unrepresented and, as such, is entitled to some leniency, the latitude properly afforded to him is not unlimited and does not extend to affording him a positive advantage over the plaintiffs.⁴³

61 I am satisfied that the defendant has been afforded ample opportunity to engage with the question before me and has, without any meaningful explanation, not done so. I do not find it necessary to determine whether that amounts to waiver in the sense advanced by the plaintiffs. Rather, in line with the reasoning in *Starrs* and *Scott*, I am satisfied that by reason of the matters outlined in [59] the interests of justice do not require that the Default Judgment be set aside, or that the determination of the matter be further delayed.

62 As noted in *Scott*:⁴⁴

Put simply, the [defendant] here must bear the consequences of [his] decision not to participate in the litigation process.

Conclusion

63 There being no application before me to set it aside, I will order that the Default Judgment stands.⁴⁵

64 I also accept the submissions of the plaintiffs that it is appropriate that the defendant pay the plaintiffs' costs from 20 September 2023 to today, insofar as those costs relate to the issues in [2], to be taxed if not agreed.

⁴³ See, for example, *Glew v Frank Jasper Pty Ltd* [2010] WASCA 87 [10]; *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [2014] WASCA 65 [51].

⁴⁴ *Scott* [51].

⁴⁵ I am not satisfied that it is necessary or appropriate for me to go as far as positively making orders affirming the Default Judgment and 'curing' the irregularity, as moved by the plaintiffs.

PRINCIPAL REGISTRAR MCGIVERN

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

MB

Associate to Registrar

3 NOVEMBER 2023