[HIGH COURT OF AUSTRALIA.]

R. T. COMPANY PROPRIETARY LIMITED AND OTHERS . . . . . } APPLICANTS;

AND

MINISTER OF STATE FOR THE INTERIOR . RESPONDENT.

H. C. OF A. 1957.

MELBOURNE, *June* 26.

DIXON C.J. (In Chambers)

High Court—Practice—Judgment by default—Setting aside—Claim against defendants in alternative—Judgment against them jointly—Reliance by defendants in other proceedings on judgment—Delay in application to set aside—High Court Rules (*S.R.* 1952 *No.* 23), *O.* 28, *r.* 2.

A writ was issued in respect of a claim arising out of the continued occupation by four defendants, or one of them, of land which had been compulsorily acquired by the Commonwealth. The claim was expressed against each of the defendants in the alternative. None of the defendants having delivered a defence judgment in default was entered that the plaintiff recover against the defendants the amount in question and costs.

Held, that the judgment was irregular in that it was against the defendants jointly whereas the claim had been against them in the alternative.

Currie v. *May* (1914) V.L.R. 17, distinguished.

The irregular judgment was entered on 10th September 1956. In subsequent other proceedings between the parties the defendants relied on the existence of the judgment as establishing a tenancy of the land in the defendants as lessees from the Commonwealth. In June 1957 the defendants first applied to set aside the judgment.

Held, that these were matters for the imposition of conditions but not for refusing to set aside the judgment.

SUMMONS.

R. T. Company Proprietary Limited, Radio Programme Proprietary Limited, Radio City Proprietary Limited and Henry Drysdale, applied on summons to *Dixon* C.J. in chambers to set aside a judgment entered against them in default of pleading on 10th September 1956. The respondent to the summons was the Minister of State for the Interior.

The facts are fully set out in the judgment of *Dixon* C.J. hereunder.

R. M. Northrop, for the applicants.

L. Voumard Q.C. and *J. A. Nimmo* Q.C., for the respondent.

DIXON C.J. delivered the following oral judgment :—

This is an application on the part of the defendants in an action to set aside a judgment entered in default of delivery of a defence as required by the Rules. The judgment is for a large sum of money and is entered as for default of defence under O. 28, r. 2 to a claim for a debt or liquidated demand. The writ was issued by the Minister for the Interior suing on behalf of the Commonwealth in respect of a claim arising out of the continued occupation by the defendants, or one of them, of land which had been compulsorily acquired by the Commonwealth. The claim, however, against the defendants of whom there are four, one natural person and three companies incorporated under the *Companies Act* of Victoria, was expressed in the alternative. There are really three alternative claims made against the defendants. Firstly for a sum of money, and alternatively for the same sum of money as damages and again alternatively for an account of rents and profits received by the defendants in respect of the possession of the premises and payment of the amount found to be due. But besides alternatives as between claims according to their nature, the claims are made against the defendants in the alternative. The claim for the debt or liquidated demand was expressed as a claim against each of the defendants in the alternative. But the judgment which was entered in default of pleading is a judgment that the plaintiff do recover against the said defendants the amount in question and costs to be taxed. That is a judgment against the defendants jointly. In my opinion the judgment is irregular. The claim having been against the defendants in the alternative, it was not in my view lawful to enter judgment against them all jointly, a judgment which operates to make them liable jointly and severally for the full amount. Rule 2 of O. 28 says :—" Where—(*a*) the plaintiff's claim is for a debt or liquidated demand only ; and (*b*) the defendant is bound to deliver a defence and he does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of that time, upon filing an affidavit showing the facts referred to in paragraph (*a*) and (*b*) of this subrule, enter final judgment for the amount claimed, with costs."

In Victoria the corresponding rule has been construed as enabling a plaintiff where alternative claims are made against the same defendant to enter judgment on one alternative claim on the footing that he thus abandons the others. That was so decided by *Hodges* J.

H. C. OF A. 1957.

R. T. CO. PTY. LTD. v. MINISTER OF STATE FOR THE INTERIOR.

Dixon C.J.

in the case of *Currie* v. *May* (1). But that was a case where alternative relief was claimed and was not a case where the same relief was claimed against alternative defendants. Moreover in this case the relief which has been obtained by the judgment is not that which is claimed in the statement of claim; because the judgment is for the recovery of the money sum against all the defendants jointly whereas the statement of claim sought relief against them alternatively only. In these circumstances I think there is, to say the least of it, a prima facie case made by the defendants for an order setting the judgment aside. Considerable delay, however, has occurred since the date of the entry of judgment, viz. 10th September 1956, and no step was taken by the defendants until the summons now before me was issued. It seems likely that the point was not present to the defendants' minds until *Fullagar* J. drew attention to it in the judgment which he delivered in a matter between the same parties on 20th May 1957. Furthermore an argument for the defendants was relied upon before his Honour based on the very existence of the judgment, an argument that it showed that a tenancy of the land by the defendants from the Commonwealth had been established. However, the argument was rejected. I have had some doubt as to the course I should take having regard to the delay and to the attempted use made of the existence of the judgment in the proceedings before *Fullagar* J. But I think that I ought not to allow the delay or the course taken by the defendants before *Fullagar* J. to operate to keep on foot against the defendants an irregular judgment imposing on them a liability jointly to which the claim did not extend. It is an irregular judgment and ought not to be on the records of the Court notwithstanding that I can see that the imposition of a joint liability is probably a matter which has no great practical importance. But I think that so far as the delay affected the course afterwards taken by the plaintiff I may take it into account in imposing terms and that I will proceed to do. A bill of costs was taxed under the judgment, although an allocatur was not signed, and from that bill of costs it appears that some costs were incurred after the date of judgment. I shall say that the defendants must as a condition of judgment being set aside pay all the costs which were incurred by the plaintiff in taxing costs or in any other respect after the signing of the judgment. They must also file a defence at once. I give the plaintiff liberty to amend the statement of claim and the defence must be filed within seven days of the delivery of the amended statement of claim.

(1) (1914) V.L.R. 17.

The order will be—Judgment of 10th September 1956 set aside as irregular, on condition of the defendants paying the taxed costs of the plaintiff incurred in or incidental to the taxing of costs under the judgment or otherwise in the action after the date of the judgment except the costs of this summons. There will be no order for costs of this application except that there will be a certificate of counsel.

There will be a further order that the plaintiff have liberty to amend his statement of claim and that the defendants deliver their defence or defences within seven days of the delivery of the plaintiff's amended statement of claim.

Judgment of 10th September 1956 set aside as irregular, on condition of the defendants paying the taxed costs of the plaintiff incurred in or incidental to the taxing of costs under the judgment or otherwise in the action after the date of the judgment except the costs of this summons. There will be no order for costs of this application except that there will be a certificate for counsel.

There will be a further order that the plaintiff have liberty to amend his statement of claim and that the defendants deliver their defence or defences within seven days of the delivery of the plaintiff's amended statement of claim.

Solicitor for the applicants, *K. A. Ness.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.