In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: 274

MICHAEL EDWARD SMITH

V

RON PHAROAH SIDDHARTHA MELCHIZEDEK MAGNUM

EX TEMPORE RULING

(in Chambers)

Application to set aside order made in absence of party-Order 32 rule 5 (3) of the Rules of the Supreme Court 1985-scope of discretion to order a rehearing

Date of hearing: March 31, 2016

Mr. Keivon Simons, Smith & Co., for the Plaintiff
Ms Lauren Sadler-Best, Trott & Duncan Limited, for the Defendant

Introductory

1. The Court on 14th January of this year granted a strike-out application made by way of a Summons issued by the Plaintiff with regard to the Defence on 22nd September 2015. In addition to striking-out the Defence, the Court entered judgment against the Defendant in the amount of $35,809.72 with interest together with costs to be taxed. This formed part of the prayer for relief in the Plaintiff's relevant Summons.

2. The circumstances of that hearing on 14th January 2016, as I recall them, was that it was represented to me (and it has been confirmed today) that the hearing was in fact fixed on notice to both parties in the ordinary Chambers List at 10am. The Defendant's Counsel failed to appear. The Plaintiff, Mr. Smith himself, did in fact inform the Court that the Defendant's Counsel was overseas and the Court, forming the view that this was perhaps a debtor who was simply not properly instructing his counsel, encouraged the Plaintiff to proceed with the application and granted the order sought.

3. It appears that the Order was submitted for my signature and was accordingly perfected on or about 15th January 2016 the day following the hearing. Mr Simons, appearing today for the Plaintiff, confirmed that the Order was submitted to the Court without a draft of it being served on the Defendant's Counsel and, further, that the Defendant's Counsel only received a formal notice of the fact that the Order had been made when served with the perfected version of the order.

4. Thereafter the Defendant sprang to life and filed issued a Summons on the 17th February 2016 which sought to set aside the strike-out ruling and the entry of judgment. The application presupposed that this Court had jurisdiction to set aside the Order made in the absence of the Defendant.

Jurisdiction to set aside inter partes orders made against an absent party

5. The jurisdiction to deal with this matter is somewhat obscure in that the Court is more frequently required to consider its jurisdiction to set aside an ex parte order when it is common ground that an ex parte order can be set aside by the judge who made it or indeed a judge of the same rank.

6. As far as a judgment entered in the absence of a party who had notice of a hearing is concerned, the relevant rule is found in Order 32 rule 5(3), which is headed "***Proceeding in absence of party failing to attend***". It bears reflecting on what the first three sub-paragraphs of rule 5 say:

> "*(1) Where any party to a summons fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it expedient so to do.*
>
> *(2)Before proceeding in the absence of any party the Court may require to be satisfied that the summons or, as the case may be, notice of the time appointed for the resumed hearing was duly served on that party.*

(3)Where the Court hearing a summons proceeds in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may re-hear the summons. "

7. Looking at the plain words of the rule (rule 5(3)), Mr. Simons was entitled to submit that the Defendant is unable to avail himself of a rehearing and could only appeal because in this case the Order was perfected before the application was made for a rehearing (or in this case, more strictly, an application was made to set aside the Order was made). That result Ms Sadler-Best contended would be unjust having regard to the unusual circumstances in which the Order of 14th January 2016 came to be made.

8. In brief the matter was sent down for mention in the Chambers List, and not for a substantive hearing on the merits/ on a contested basis. And, more than that, there was genuine confusion on the part of the Defendant's attorneys as to whether or not the matter was in fact going to proceed on that date. Part of the confusion arose because there had been some slippage in the directions agreed by the parties for the filing of evidence. Secondly, Ms William-Smith, the attorney having conduct of the matter for the Defendant, was overseas on medical grounds for an extended period. And, thirdly, enquiries were made of the Court in the week preceding the hearing as to whether the matter was in fact proceeding on the 14th January 2016 and the Defendant's attorneys were told that the matter was not in the List[1].

9. Looking at the matter broadly, it seems to me that it would be an odd practical result if in circumstances such as those in the present case, the only remedy left for a Defendant faced with an Order made in his absence was to pursue the appeal route as Mr. Simons contented he was bound to do.

10. The issue that is pivotal to the disposition of this application is whether or not one gives Order 32 rule 5(3) a very rigid and inflexible interpretation, or whether one gives it a more fluid one designed to do justice in all the circumstances of the present case. There are not seemingly many authorities dealing with the relevant rule[2] and during a short adjournment I was able to identify two[3].

11. The earliest authority was *Fulcher-v-Berthon Boat Company Limited* [1984] EWCA Civ J0521-2 (Akner, Kerr and Dillon LLJ). And in this case, there is a

[1] I observed in the course of argument that a more reliable enquiry would have been to confirm the position with the Plaintiff's attorneys. The Chambers List is typically finalized a day or two before each Chambers day.
[2] There is no commentary at all on rule 5(3) under Order 32 in the 1999 White Book.
[3] At www.justis.com.

short statement which suggests that the rule should be applied flexibly. Ackner LJ (at page 4 of the transcript) says this:

> "*The Plaintiff's present solicitors came formally on the record on 5th August and, in due course, they made an application, which was heard by the Vacation Judge, Mr. Justice Popplewell, on 12th August, under Order 32 Rule 5(3) for a re-hearing of the summons, that order giving power for there to be a re-hearing where the order has been made in the absence of a party and it is just to have a re-hearing.*" [Emphasis added]

12. That is reading the terms of Order 32 rule 5(3) in a very purposive and generous manner. A later case with an equally strong English Court of Appeal panel (chaired by the Master of the Rolls Lord Woolf) is *Hytec Information Systems Limited-v- The Council of the City of Coventry* [1996] EWCA Civ J1204-11. In *Hytec*, Ward LJ said this (at page 7 of the transcript):

> "*Within that test this was a final order. If one then looks to the rules, one finds a power provided by Order 32 rule 5(3) in these terms:*
>
> > *'Where the Court hearing a summons [in chambers] proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may rehear the summons.'*
>
> *There would be two questions to answer. Firstly, were the proceedings on 9 June 1995 in the absence of the defendant? The answer to that has been given by this court recently in Ley v Augustus Ltd unreported on 16 May 1966 . Peter Gibson LJ dealing with the County Court Rules said:*
>
> > *'But when a party deliberately chooses either to be in court but not to make representation at the hearing or to depart from the court so as to avoid being there when the order is made, I cannot see how that party can bring himself within the purpose of the rule.'*
>
> *I adopt that for this case. Secondly, this order was perfected and for both those reasons the case does not fall within that rule.*"

13. The *ratio* of that case was that the hearing had not taken place in the absence of the party because they had in fact attended the hearing, but declined to actively

participate. In my view that somewhat weakens the force of the secondary finding that, because the order had been perfected, it was not possible to seek relief under the rule.

14. Ms Sadler-Best pointed the way to analysing this rule in a practical manner by referring the Court to the local case of *BDC Limited-v-DE Mortimore Limited* [2006] Bda LR 33, a judgement of Richard Ground J (as he then was), where he described the broad power that the Court has to extend the time for doing anything under the Rules[4]. Order 3 is the governing rule and Order 3 rule 5(1) provides as follows:

> "*(1)The Court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*"

Adjudication

15. In the present case therefore, the Defendant is entitled to invite the Court to extend the time for seeking a rehearing under order 32 rule 5(3) beyond the time when the Order was perfected because it would be just in the circumstances to do so. An alternative basis on which one could also consider granting relief is under Order 2 rule 1, which says this:

> "*(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*"

16. It is well recognised that the Court will not, save in exceptional circumstances, set aside a procedurally defective application unless substantial injustice has been caused. In this case there has been an unusual combination of factors which make it clear that it would be grossly unjust for the Defendant to be required to appeal the Order of 14 January 2016 which was made in his absence. And in these circumstances, in the exercise of the Court's discretion under Order 32 rule 5(3) as

[4] The power was extended so as to allow the delinquent party from escaping the consequences of an "unless" order after the time for compliance had expired.

read with Order 3 rule 5 and Order 2 rule 1, I set aside the order of January 14, 2016 and direct that matter the strike-out application be set down for hearing on a date convenient to counsel and the Court for a contested hearing.

17. The Defendant also sought a stay pending the determination of a fee complaint by a consensual process through the Bar Council. But that process is something which the Plaintiff has, within his rights, not consented to participate in and that application is therefore refused.

Costs

18. I shall hear the parties on costs.

[After hearing counsel]

19. Costs in the Plaintiff's strike-out application.

Dated this 31st day of March 2016 _____

IAN RC KAWALEY CJ