[2016] SC 33 Civ (30 March 2016)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 131

BETWEEN:

PEIRCE CAPITAL LTD

Plaintiff

-v-

WILLIAM PEIRCE STEWART

1st Defendant

-and-

BARBARA K STEWART

2nd Defendant

REASONS FOR DECISION

(in Chambers)

Default Judgment-application to set aside-defence with real prospects of success-re-litigation of issues decided in New York divorce proceedings between the Defendants-undertaking by plaintiff to enforce local judgment in conformity with New York equitable distribution order

Date of hearing: February 10, March 17, 2016

Date of Reasons: March 30, 2016

Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Plaintiff

Mr Henry Tucker, Appleby (Bermuda) Limited, for the 1st Defendant ("D1")

Mr Bruce Swan, Apex Law Limited, for the 2nd Defendant ("D2")

Introductory

1. By a Specially Endorsed Writ of Summons issued on March 30, 2015, the Plaintiff, a Bermudian company controlled by D1, sought to recover sums lent to the Defendants in connection with their purchase of a property known as 'Chelston' by way of two sets of transactions. The amounts claimed were US$24,200,000 and US$ 19,485,628.60, together with statutory interest and costs.

2. D2 entered an appearance on May 27, 2015 and D1 entered an appearance on June 30, 2015. Under Order 18 rule 2(1), the Defendants had 14 days after they entered an appearance to file a defence. Under Order 19 rule 2 of the Rules, the Plaintiff was entitled to enter judgment in default of defence for its liquidated claim should no defence be filed within the requisite period assuming no extension of time was granted by the Court. D2's Defence was accordingly due on June 10, 2015. D1's Defence was due on 14 July 2015.

3. On July 6, 2015, the Plaintiff entered Judgment in Default of Defence against D2 for the sums of US$ 24,200,000 and US$19,485,628.60, together with costs to be taxed. On July 20, 2015, the Plaintiff entered Judgment in Default of Defence against D1 for the sums of US$ 24,200,000 and US$19,485,628.60, together with costs to be taxed.

4. On July 20, 2015, D1 ineffectively filed her Defence, two weeks after judgment had already been entered against her and almost six weeks after it was due to be filed. A Summons seeking to set aside the Judgment in Default of Defence against D2 was issued on September 9, 2015. Directions were given in respect of this application on September 17, 2015.

5. The application was substantively heard on February 10, 2016, but adjourned to afford the Plaintiff an opportunity to furnish undertakings to meet concerns expressed by D2 that the Plaintiff might seek to recover the full judgment debt of approximately US$43.6 million from D2. These concerns, which were based on a background of acrimonious divorce proceedings and the fact that D1 controlled the Plaintiff, seemed to me to have more substance than D2's proposed Defence. The Plaintiff, supported by D1, gave the undertakings sought by the Court on March 17, 2016, essentially that the Default Judgment would be enforced in the same proportions that each Defendant

was held in their divorce proceedings to be liable for the loans related to Chelston (70% D1 and 30% D2).

6. On March 17, 2016 I dismissed the Summons to set aside the Default Judgment and made the following costs awards:

    (a) the Plaintiff's costs of the application to be paid by D2 and taxed if not agreed;

    (b) D1's costs after March 9, 2016 when the undertaking was offered to be paid by D2 and taxed if not agreed.

7. I now give reasons for my said decision.

The legal test for setting aside a regular default judgment

8. In the 'Plaintiff's Skeleton Argument', Mr Kessaram submitted:

> "*8. It is insufficient to show a merely 'arguable' defence such as would justify leave to defend under Order 14. The defence must have a real prospect of success and 'carry some degree of conviction': Alpine Bulk Transport Co. Inc.-v-Saudi Eagle Shipping Co. Inc., The Saudi Eagle (1986) 2 Lloyds Rep. 221 at 223…*

9. *In those cases where the defence relies upon an assessment of facts, this requirement involves forming a provisional view of the probable outcome of a trial of the defendant's factual allegations: Allen v Taylor (1992) P.I.Q.R. 255. The editors of the White Book suggest that the test will not be satisfied unless the defendant has produced credible affidavit evidence which demonstrates a real likelihood that he/she will succeed in proving the facts essential to his/her defence: see p. 160 1999 White Book.*"

10. Mr Swan did not challenge these principles. They have been applied in the local courts on numerous occasions: e.g. *Interinvest (Bermuda Ltd) Ltd-v-Dobie* [2010] Bda LR 41(CA); *Wakefield and Accardo-v- Marshall and others* [2010] Bda LR 53 (Wade-Miller J); *Ball-v-Lambert* [2001] Bda LR 81 (Simmons AJ). I applied the principles approved in the aforementioned cases in *Bridgewater-v-Accounting and Management Services* [2015] Bda LR 2. In *Interinvest (Bermuda Ltd) Ltd-v-Dobie* an application to adduce fresh evidence on appeal with a view to challenging a summary judgment entered by way of default was refused by the Court of Appeal for Bermuda.

Ward JA (having approved the defence with "*real prospects for success*" test for setting aside a default judgment (at paragraph 2) stated:

> "13…*The advancement of technical points which have more value as student examination questions should not be encouraged where the result would be to produce more delay and would defeat the ends of justice.*"

11. The Bermudian Courts have never apparently applied the more diluted test for setting aside suggested by *dicta* in *Allen v Taylor* (1992) P.I.Q.R. 255. I accordingly applied the principles set out in the passage of the 1999 White Book (at page 160) upon which Mr Kessaram relied:

> "*The preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no 'real prospect of success' is shown and relief should be refused.*"

The proposed defence in outline

12. The key elements of the proposed Defence filed by D2 after Judgment in Default was entered against her are as follows:

    (1) liability for the sum of $24,200,00, a claim based on a 1999 $5 million mortgage and a 2005 deed of further charge is denied on the grounds that the power of attorney used to enter into the agreements on D2's behalf had at all material times been revoked;

    (2) liability for $19,485,628 is denied on the grounds that D2 never entered into any agreement in 2011 with the Plaintiff;

    (3) she had no personal knowledge of the relevant transactions which were all entered into by D1 acting alone.

13. The Plaintiff's case was that these issues had been determined against D2 in her divorce proceedings against D1 in the New York State Court and that although these findings were not strictly binding on the Plaintiff, it was improbable that this Court would reach a different conclusion. D2 only formally sought to re-litigate these issues. However, in the course of argument, as an aside, Mr Swan complained that even if she was bound by the findings made by the New York Court in her divorce proceedings, she would suffer prejudice because the Plaintiff (not bound by the

apportionment of liabilities ordered in New York) might seek to enforce the entire judgment debt against her. This fear was to my mind made more tangible by the fact that the Plaintiff was not a third party judgment creditor, but a company controlled by D1, her hostile divorce court adversary.

The New York Divorce Proceedings

14. The divorce proceedings were heard at first instance in the Supreme Court of the State of New York, County of New York ("the New York Court") by the Hon. Ellen Gesmer. The judge referred various issues, including "equitable distribution", to the Special Referee. Special Referee Louis Crespo prepared a 243 page report on October 23, 2012, following 18 days of hearings at which over 160 exhibits were produced ("the Report"). At page 169 of the Report, the Special Referee states:

> "*75. As to Chelston, the proof demonstrates it too is marital property…*
>
> *76. The dispute between the parties is whether financing for purchasing Chelston as well as loans from Peirce used to pay for renovation, maintenance and upkeep constitute marital debt.*"

15. This was very obviously precisely the same dispute which D2 wished to re-join before this Court. The key elements of her proposed Defence in the present proceedings were not only raised before the New York Court but expressly rejected by the Special Referee:

(a) "*85. The credible proof is that Russell attended the Chelston closing on behalf of both parties and under the Power of Attorney had authority to execute closing papers for Chelston, including the mortgage by Peirce. Plaintiff's testimony that he had no such authority is rejected in view of the documentary proof….86. The plaintiff concedes that the Power of Attorney was in place from the time of the Purchase of Chelston in 1999…and was only 'revoked' after Russell executed the consolidation mortgage*…";

(b) "*89. There is overwhelming and credible documentary proof of the recording of Peirce funds for both the initial financing and subsequent repair/renovations. Plaintiff's current accountant…reports on plaintiff's 2006-ledger 'liabilities to Peirce Capital'…103. The credible testimony supports the conclusion that plaintiff was actively involved in the renovation work done at Chelston; she was assisted and kept informed by Gregory…Furthermore the plaintiff knew monies used to cover the costs*

came from loans from Peirce and she never objected to having Peirce provide loans for paying for expenses…";

(c) *"103…plaintiff was aware that Peirce continued to loan monies to cover the operating expenses for Chelston and also aware of the procedure in place for paying expenses as well as the Bermuda Mortgage and she never voiced any objection…*"

16. In all material respects, D2's controversial evidence was rejected. The Special Referee then ruled (paragraph 370) that although the 'Chelston Net Sale Proceeds' should be divided equally, the 'Chelston Marital Debt' (which includes the sums awarded to the Plaintiff in the present proceedings) should be borne 70% by D1 and 30% by D2. The matter did not rest there, however.

17. D2 applied to the Hon. Ellen Gerber for the Report to be rejected. In a 35 page judgment dated January 10, 2014, the New York Court confirmed all material aspects of the Report ("the NY Order"). The relevant test applied by Gerber J (at page 1) suggests that the confirmation hearing was comparable to an appeal by way of rehearing on the record:

> "*A Special Referee's Report should be confirmed when the Referee has clearly defined and addressed all issues, resolved matters of credibility, and made findings that are substantiated by the record…*"

18. Gerber J crucially found (at page 30):

> "*The court confirms the Report's recommendation as to equitable distribution to the extent that it results in… a higher award to the Husband than to the Wife of marital debt (as a result of the Husband's secreting of marital assets*[1] *and the court's finding that he has greater control over, and will retain his ownership interest in, Peirce's interest in the Chelston debt).*"

19. D2's recommended liability for 30% of the loans due to the Plaintiff herein free of interest was explicitly confirmed at page 32 of Hon. Ellen Gerber's judgment. The judge also noted (at pages 2, 23-24) in reaching these conclusions:

> "*The wife was not a credible witness. Her testimony frequently contradicted itself, and was also contradicted by the testimony of other witnesses and by documentary evidence…The Referee's factual finding* [on equitable distribution] *is supported by the evidence at trial, and, in particular, his findings as to the credibility of the Wife and other witnesses. It is axiomatic*

[1] The Court confirmed a similar secreting finding made against D2 which was taken into account in relation to the apportionment of assets.

that courts generally defer to the Referee's findings as to credibility, since the Referee is in the best position to determine credibility…"

20. On November 17, 2015, the Appellate Division of the of the New York State Supreme Court, in dismissing D2's appeal against the first instance decision, described Gerber J's judgment as "*a careful, comprehensive decision addressing all relevant factors*". On February 23, 2016, D2's application for leave to pursue a further appeal was refused by the Court of Appeals for the State of New York.

Findings: merits of application to set aside

21. In light of these clearly articulated findings by the New York Court, reflecting a forensic approach quite similar to what would be deployed in this Court, I found that D2's evidence in support of her application to set aside the Default Judgment palpably failed to demonstrate a real likelihood that she would succeed in defending the claims underpinning the Default Judgment. The application could only properly be dismissed.

22. In reaching this conclusion I placed no material reliance on the conduct of D2 in allowing the default to occur as the time involved was not so great as to justify refusing the application to set aside without regard to the merits. The general rule is that the Court should pay primary regard to whether the applicant can demonstrate a real prospect of success on the merits of the proposed defence.

23. I should add that D2's reliance on essentially the same evidence in the present proceedings that had been rejected by the New York seriously undermined the weight to be attached to her proposed Defence. Had the Default Judgment not been entered and the Plaintiff applied for summary judgment, D2 would have in any event had considerable difficulty of meeting the lower threshold of demonstrating a triable issue.

24. However, these findings by the New York Court also made it clear that the Plaintiff (as a corporate entity controlled by D1) could not justly:

    (a) rely on the foundational factual findings made by the New York Court as a basis for demonstrating that D2's proposed Defence lacked real prospects of success; and

    (b) stand on its strict legal rights to enforce the Default Judgment without regard to the equitable distribution directed by the New York Court, thereby assisting D1 to evade compliance with the Order of the NY Order.

25. This lent substance to Mr Swan's submission (wholly invalid in terms of making out a case for setting aside the default Judgment) that D2 did have a legitimate basis for concern about the Plaintiff being left free to enforce the Default Judgment, at D1's

direction, in a manner which was inconsistent with the NY Order. Permitting D1 through the agency of the Plaintiff to potentially breach the NY Order would be a misuse of the processes of this Court. For this reason, in the exercise of the Court's inherent jurisdiction to manage its processes, I adjourned the hearing on February 10, 2016 to afford Mr Kessaram an opportunity to take instructions on whether some form of undertaking could be given by P to allay these concerns.

Undertakings and costs

26. On March 9, 2016, D1's attorneys confirmed through correspondence that he would supplement an undertaking offered by the Plaintiff by undertaking not to cause the Plaintiff to take enforcement steps beyond D2's 30% share of the judgment debt. I found those undertakings, which D2 refused to accept, to be satisfactory. The undertakings were, it must be remembered, requested by the Court of its own motion, not by D2.

27. As between the Plaintiff and D2, it was clear that costs should follow the event. The Plaintiff had obviously succeeded overall. As between D1 and D2, it appeared to me that there would be an element of double recovery of D1 was to be awarded his costs. There was no need for him to do more than to file evidence in support of the Plaintiff's case on D2's Summons. He did not strictly need to appear through separate counsel from the outset. On the other hand, on March 9, 2016 D1 did need to become involved to support the undertaking sought from the Plaintiff by the Court. The undertaking refused by D2 was on March 17, 2016 accepted by the Court at a hearing which D2's counsel was compelled to attend. I accordingly ordered D2 to pay the costs of D1 after March 9, 2016.

Conclusion

28. For the above reasons, in March 17, 2016, I dismissed D1's application to set aside the Default Judgment entered in favour of the Plaintiff on July 6, 2015.

Dated this 30th day of March 2016 _____

IAN RC KAWALEY CJ