[2016] SC (Bda) 16 Com (19 February 2016)

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
(COMMERCIAL COURT)

2015: No 420

B E TWEEN:

PAR-LA-VILLE HOTEL AND RESIDENCES LTD (in liquidation)

Plaintiff

—v—

(1)SHANE MORA

(2)MATTHEW HOLLIS

(as Trustees of the Skyline Trust)

Defendants

RULING ON APLICATION TO RECONSIDER

(on the papers)

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

Mr Eugene Johnston, J2 Chambers, for the 2nd Defendant

Background

1. At a hearing in Chambers yesterday, I granted the Plaintiff's application for Summary Judgment pursuant to Order 14 of the Rules of the Supreme Court. The present proceedings were commenced by Specially Endorsed Writ and no Statement of Claim was filed.

2. The application was not opposed by the 1st Defendant who did not appear. The application was not opposed on its merits by the 2nd Defendant, who did appear through Mr Johnston. The 2nd Defendant's counsel only advanced (without making any formal application in the present proceedings) an argument that Cox Hallett Wilkinson Limited should be restrained from acting for the Plaintiff because of conflicting interests between parties he did not represent.

3. I declined to entertain this application on the basis that it was not properly before the Court and that, in addition to the fact that the complaint appeared to lack substance, the 2nd Defendant lacked the standing to protect third parties' confidentiality rights.

4. I say the application was not opposed on its merits, because no evidence was filed in opposition to the merits of the application and so there was no evidential basis for the Court to find that there was a triable issue. A Skeleton Argument was filed by Mr Johnston, but it solely addressed the conflict issue which was not formally before the Court. In the course of oral argument it was suggested that the result of an application filed in other proceedings might be that the entire basis of the winding-up proceedings pursuant to which the Joint Provisional Liquidators ("JPLs") have commenced the present proceedings would fall away. This outcome presently seems improbable and the determination of the proposed applications will obviously not be soon.

5. Crucially, no or no coherent basis for refusing the application on its merits was advanced and no point was taken on the obvious absence of a Statement of Claim. The lack of any substantive opposition was unsurprising, because all the present proceedings sought was to clothe the JPLs with authority to exercise the rights conferred upon the Defendants under a pre-liquidation contract with a view to recovering assets which very arguably belong to the Plaintiff (in law if not in equity). To the extent that the Plaintiff's shareholders retain any contingent economic interest in the Company, recovering the assets the JPLs presently seek with a view to subsequently deciding how to distribute them in no way prejudices the shareholders' putative rights.

The application to reconsider

6. This morning by email sent at 10.27 am to the Registrar, the 2nd Defendant's counsel invited the Court to reconsider its decision because of the failure to comply with the requirements of Order 14 rule 1 as regards the filing of a Statement of Claim. The Plaintiff's responded to this argument by letter emailed to the Registrar just over 2 hours later. It was primarily submitted that no prejudice flowed from the irregularity which was wholly technical and that the objection should be ignored. Reliance was placed on Order 2 rule 1 of the Rules which state that non-compliance with the Rules does not nullify any steps in a civil action.

Governing principles

7. What principles govern the exercise of the Court's inherent discretion to reconsider a decision rather than leaving the aggrieved party to their appeal rights? The English Court of Appeal in *R (Compton)-v-Wiltshire Primary Care Trust* [2008] EWCA Civ 749 has approved the following approach to the jurisdiction to reconsider a decision which in England finds expression in a statutory rule. Waller LJ held as follows:

> "*33. Mr Opperman for Mrs Compton, in order to bring paragraph 79 into line with the rules, submitted that the PCT's application was in fact being made under Rule 3.1(7) and he relied on the fact that the very general power given by that rule had been held to be somewhat circumscribed. McCombe J*

accurately put the matter this way:-

> *'This apparently quite general power in the court to vary or revoke an order has been held not to be available as a simple tool for an aggrieved party to mount a disguised appeal against an order with which he is dissatisfied. As is noted in 'Civil Procedure 2007'* • *in Lloyd's Investment (Scandinavia) Ltd. v Ager-Hanssen[2003] EWHC 1740 Mr Justice Patten said that*
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> *"in his opinion, for the court to revisit one of its earlier orders, the applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done in the context of an appeal. Similarly it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ." (See Civil Procedure 2007 Vol. 1 paragraph 3.1.9 p.92).'*
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> *This is an approach which was endorsed in the Court of Appeal in Collier v Williams [2006] EWCA Civ 20, a case to which I shall have to return hereafter." [Emphasis added]* •

Decision

8. I was aware that no Statement of Claim had been filed and saw no need, in the circumstances of an application which was not opposed on its merits, to require strict compliance with the Rules in this regard. The 2nd Defendant did not oppose the application on the grounds that, as he actually or constructively knew, no Statement of

Claim had been served as required by the Rules. This argument could have been advanced at yesterday's hearing and was not. It is now too late to take the point.

9. As Patten J (as he then was) observed in *Lloyd's Investment (Scandinavia) Ltd. v Ager-Hanssen*[2003] EWHC 1740 in the passage quoted above:

> "*it is not open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ.*"

10. I decline to reconsider my decision of yesterday's date.

Dated this 19th day of February 2016 _____
IAN RC KAWALEY CJ