IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2000 No. 195

BETWEEN:

HAROLD DARRELL

1st Plaintiff

and

HARDELL ENTERTAINMENT LIMITED

2nd Plaintiff

- and -

THE BANK OF BERMUDA LIMITED

Defendant

Date of hearing: 30th July 2007 at 2.30 p.m.
Date of ruling: 31st July 2007 at 4.00 p.m.

Mr. Horseman for the first plaintiff;
Mr. Elkinson and Mr. Adamson for the defendant.

RULING

BACKGROUND

1. This ruling is made on the first plaintiff's application for leave to appeal out of time against final judgment given on the defendant's counterclaim. By way of very brief background, the first plaintiff ('Mr. Darrell') brought an action for breach of banking confidence against the defendant bank ('the Bank'), and the Bank counterclaimed for the sums due on various loan and other bank accounts. In October 2005 Mr. Darrell decided to abandon his action for breach of confidence, and an attorney purported to discontinue it on is behalf. That attorney was, at the time, not the attorney of record and the purported discontinuance without leave was contrary to RSC Ord. 21, r. 3(1). In an attempt to regularize this, the Bank applied by summons of 20th October 2005 in the following terms:

> "1. The Notice of Discontinuance dated 17 October 2005 and served upon the defendant without leave is a nullity
>
> 2. Any application to discontinue by the Plaintiffs shall be through its attorneys of record and be in accordance with Order 21(3);
>
> 3. Such further or other Directions as the Court deems fit;
>
> 4. The costs of the application be the Defendants in any event on an indemnity basis."

2. That summons came before me on 27th October, when Mr. Darrell was represented, albeit in an irregular way which I deal with further below. At the hearing, and notwithstanding the terms of the summons, Mr. Elkinson for the Bank proposed the following 'directions':

"1. The purported Notice of Discontinuance served by Messrs. Peniston & Associates on the Defendant's attorney on the 17th October 2005, which Notice is irregular and fails to comply with Order 21 of the Rules of the Supreme Court 1985 has such irregularity waived by this court pursuant to Order 2, rule 1(2);

2. The Plaintiff's claim is hereby discontinued with costs to the Defendant.

3. The Reply and defence to the Counterclaim is hereby struck-out.

4. Final Judgment is to be entered in favour of the Defendant on its Counterclaim together with costs.

5. The trial date of the 28th November 2005 is hereby vacated.

6. The costs of this application to the defendant in any event."

3. I made an order in those terms, which was then drawn up and signed, and judgment on the counterclaim was separately drawn up, and entered on 2nd November 2005 in the following terms:

". . . it is this day adjudged that the 1st Plaintiff do pay the Defendant the sum claimed in the Counterclaim, namely $851,588.63 as of 8th November 2000, together with $544,528.59 in additional interest and administration charges from 9th November 2000 to the date of this Judgment, totaling $1,396,117.22 . . . "

4. Mr. Darrell now seeks to appeal out of time against "the decision of the Supreme Court dated the 27th October 2005". Notwithstanding the breadth of that it is plain that it is the judgment on the counterclaim which is the subject of the appeal. The application for leave was made by *ex parte* motion of 19th April 2007, some 16 months out of time. The motion came on before me on 1st May. On that date I ordered an *inter partes* hearing[1]. Amazingly, given the delay up to that date, Mr. Darrell's attorney then took a further three months to bring on the *inter partes* hearing.

THE ENFORCEMENT PROCEEDINGS

5. The leave application had been running in parallel with a judgment summons to enforce the judgment on the Bank's counterclaim. The judgment summons was issued on 6th February 2007. It was returnable on 1st March before Bell J. On that date Mr. Darrell applied to the learned judge to set aside the judgment and he entertained that in part. He recognized that the judgment itself, having been made in the presence of counsel for Mr. Darrell, could not be set aside by another Supreme Court judge, but he considered that the calculation of interest on the principal sum claimed in the counterclaim was subject to

[1] When drawn up and signed that order was dated 9th May, but that was an error on my part, for it was made on the 1st May.

review. He therefore took the sum in the counterclaim, added simple interest at 7% p.a. and arrived at a sum of $1,150,000. He gave Mr. Darrell leave to contest the amount of the judgment above that sum, being $246,117.22, provided that he paid the $1,150,000, plus a further $271,319 for the taxed costs of the action, into court within 28 days of the order.

6. Bell J was under the impression that Mr. Darrell's counsel had agreed to that course as a fair one. Mr. Darrell, however, did not make the payment in. It seems that he wished to argue not only that the interest computation on the sum in the counterclaim is unsupported by evidence, but that that sum itself – the $851,588.63 - is comprised of (i) improper interest, and (ii) the debts of a company, for which he says he is not liable beyond a personal guarantee capped at $100,000. However, Mr. Darrell did not seek to appeal Bell J's order, recognizing (so his counsel says) that the only way he could effectively pursue his complaints about the judgment on the counterclaim was by appealing that judgment itself.

7. The judgment summons was then back before the court on 5th April, when Mr. Darrell failed to appear. It was adjourned to 20th April, when the judgment creditor was ordered to file an affidavit of his means and appear. On that date he failed to do either and a warrant was issued. However, when I directed an *inter partes* hearing of the application for an extension of time to appeal, the judgment summons then went back before Bell J who, on 3rd May, adjourned the warrant and judgment summons until this application for leave to appeal was resolved.

ISSUES ON THE PROPOSED APPEAL

8. The proposed grounds of appeal are:

> **"**3.1 The learned Judge erred in law in striking out the defence to the counterclaim as there existed triable issues in respect of the counterclaim particularly considering that there had been an unsuccessful application for summary judgment made by the Respondent.
>
> 3.2 The Appellants were not adequately represented a the hearing of the 27th October 2005 by counsel for the Appellants who failed to bring to the attention of the learned judge that a dispute still existed in respect of the counterclaim.
>
> 3.3 The counterclaim was for an amount that the Respondent must have known was not a legitimate amount due and owing by the Appellants to the Respondent."

9. It seems that the substantive case on appeal is that the Bank did not include a claim for judgment on the counterclaim in their summons of 20th October 2007 concerning the discontinuance. It is said that I should not, therefore, have given that judgment. Although Mr. Darrell was represented at the hearing by two sets of counsel, he says that neither was properly instructed. Moreover, it was not brought to my attention that there had been an earlier Ord. 14 hearing at which Meerabux J had held that there were triable issues on the counterclaim over and above the issues raised by Mr. Darrell's claim for breach of

confidence. Meerabux J had identified those other issues as the calculation of interest, and Mr. Darrell's liability for the debts of Darrell Contracting Services Limited[2].

THE HEARING ON 27TH OCTOBER 2005

10. At the hearing on 27th October 2005 there was considerable confusion as to Mr. Darrell's representation, which was compounded by the fact that he himself was not present. Mr. Duncan, of Trott and Duncan, who were the attorneys of record, was present but took no part, saying that he was not instructed, but was only present as Mr. Darrell's new firm of attorneys, Peniston & Associates, had filed an ambiguous notice of appointment, dated 18th October 2005, which stated that they had been appointed to act "together with the firm of "Trott & Duncan". Mr. Peniston of the firm bearing his name was also present at the hearing, but he proclaimed that he personally did not have conduct of the matter, which was entrusted to one of his colleagues (whom he did not name). He said however, that he had some familiarity with the matter albeit "skeletal".

11. I should say, in passing, that it is not possible to have two firms on the record at the same time. The rules require a party, if he sues by an attorney, to identify that attorney at the outset: see RSC Ord. 6, r. 5(1)(a). The Rules make no provision for more than one attorney of record, the reason being that the court, and the other parties, have to know with certainty with whom they can deal, and upon whom they can serve documents. It seems to me, therefore, that at that point Peniston & Co's notice was wholly bad, and the Bank were entitled to continue to treat Trott & Duncan as attorneys of record.

12. At the hearing on 27th October 2005, Mr. Elkinson, for the Bank, applied for an order that the Reply and Defence to the Counterclaim be struck out, and that final judgment be entered on the Counterclaim, with costs. This was notwithstanding that his summons had not sought any such order or judgment. At that point the transcript of the hearing shows the following exchange (at pages 9 & 10):

> **"The Court:** I can see that you may, under the Rules at least, be entitled to costs, but can I make these other orders about the Counterclaim? Because the normal rule is that, on a discontinuance, the counterclaim survives and continues as an independent action.
>
> **Mr. Elkinson:** Well, I think, my Lord, on a hearing such as this, you can give whatever orders you deem appropriate in all the circumstances, and obviously you have to hear from Mr. Peniston. But what is important, my Lord, is that the Defence to the Counterclaim is inextricably tied into the actual claim. They are essentially related, my Lord, because the reason that the - - the essential reason that Mr. Darrell says he didn't pay his money to the Bank is because of the alleged breach of confidentiality and, as my Lord knows, the action itself, which is set out in Tab 1, centers on this alleged breach of confidentiality which occurred by an agent of the Bank and destroying the business opportunity - -
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> **The Court:** Yes. So you say, in essence that to continue with the Counterclaim would still involve litigating the issues in the main action.

[2] See his considered judgment of 25th April 2002.

> **Mr. Elkinson:** Indeed, my Lord. Indeed. And not least, my Lord, we have the letter from Mr. Cottle of Peniston & Associates, of the 13th of October 2005, which is at page 5 of the exhibit - - page 4 of the exhibit. And on page 5 we see, my Lord: "Our client has for some time indicated his firm intention to discharge that indebtedness and the costs". So, on the Counterclaim itself, it appears there is no issue and that we should be proceeding to resolve this matter in its totality today.
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> **The Court:** Yes. Mr. - - -
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> **Mr. Peniston:** My Lord, I would suggest that the complexion of the order that my learned friend's proposed, I don't see any great difficulty with it, based on prior correspondence, but I do not have instructions on the matter of the Counterclaim and I would be in your Lordship's hands on that subject."

THE DELAY IN APPEALING

13. There has been an immense delay in this matter. Mr. Darrell explains it by deposing that he was unaware of the order of 27th October 2005 or the subsequent formal judgment entered on 2nd November 2005 until served with the judgment summons of 6th February 2007[3]. He maintains that neither of his lawyers told him about the judgment. Mr. Peniston swears an affidavit in support, although, rather than saying that he never told Mr. Darrell, he deposes that he was not himself served with the judgment. However, that is contradicted by evidence of service, and in any event Mr. Peniston was present when the judgment was given. While I think it unlikely in all the circumstances that Mr. Darrell was unaware of at least the existence of a judgment, I am hesitant to come to a firm finding of fact that he is not telling the truth without an evidential hearing and cross-examination. However, in view of the conclusions which I have come to on the overall justice of the case, I think that a satellite trial of that nature is undesirable.

THE SUMS ADMITTED

14. Mr. Darrell admits that some money is due: see e.g. paragraph 5 of his affidavit of 28th February 2007, and paragraph 19 of his affidavit of 20th April 2007. When I adjourned the matter for an *inter partes* hearing I required that he quantify the precise sum admitted. Although he was not then present at the hearing, Mr. Horseman quantified the amount admitted as $644,691.67[4], and told me that that was on instructions from his client.

15. In order to understand the sum admitted I need briefly to analyse the counterclaim, which is dated 14th November 2000. It comprised sums due on four separate accounts as follows:

(i) Bda $ Loan a/c # 4301 192 64103

Principal	$260,006.23
Interest to 8.11.00	$246,006.77
Late Charges	$ 1,025.00

[3] See paragraph 6 of his affidavit of 20th April 2007.
[4] The calculation is set out as an annexe to paragraph 16 of his written submissions.

(ii) US $ Demand Loan a/c # 4310 1926 4101

Principal	$ 63,023.24
Interest to 8.11.00	$ 47,584.81
Late Charges	$ 630.00

(iii) Visa Gold Credit Card a/c # ********268

Delinquency Amount	$ 3,315.20

(iv) unauthorized overdraft on a/c # 1001 674638 (i.n.o. Darrell Contracting)

Overdrawn amount	$229,997.38

16. Mr. Darrell appears to admit the principal sums for (i) and (ii) (with minor differences). He then admits simple interest on that at 5% p.a. in accordance, he says, with section 3 of the Interest and Credit Charges (Regulation) Act 1975[5]. Finally he admits $100,000 in respect of item (iv) pursuant to a guarantee, but allows for no interest on that. That is how he arrives at the total of $644,691.67.

CONCLUSIONS

17. Against that background I think that Mr. Darrell has a good arguable case that judgment should not have been given on the counterclaim when that relief had not been claimed in the summons, and that the judgment is, therefore, irregular. It is not necessarily an answer to that to say that Mr. Darrell was represented by attorneys who did not object. Had the relief been properly claimed, they would have had an opportunity to take proper instructions on it. As it was Mr. Peniston made it plain he was not instructed on that point, and no-one drew my attention to the judgment of Meerabux J on the Ord. 14 application. Had I been made aware of that judgment, it is unlikely that I would have given an outright judgment in the way I did, although it is likely that I would have ascertained the uncontested sum and given judgment for that, with trial directions as to the balance. Given that Mr. Darrell now admits the sum of $644,691.67, it seems to me that any leave to appeal should only extend to the balance.

18. The problem is Mr. Darrell's persistent delay, including the three months since I ordered an *inter partes* hearing, and the chaos he has caused by changing attorneys and by failing to attend significant court hearings. However, balancing the delay against the difficulties which arise from the way in which the judgment was obtained, I think that the proper course is for me to give leave to appeal the balance of the counterclaim over the amount admitted, on condition that Mr. Darrell pay the admitted amount – being $644,691.67 – to the Bank within 28 days. As to Mr. Darrell's ability to comply with such a condition, I inquired and was told by Mr. Horseman, whose firm is now properly on the record, that Mr. Darrell could meet that. I accepted that from him, and am not

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[5] That sections provides:

> **"Interest rate where none provided**
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> 3 Whenever any interest is payable —
>
> (a) by agreement of the parties under a contract governed by Bermuda law; or
>
> (b) by law,
>
> and no rate is fixed by such contract or by law, the rate of interest shall be 2% per annum below the statutory rate."

prepared to re-open that question or inquire into it further. I therefore give conditional leave to appeal out of time, subject to the payment of $644,691.67 by 5 p.m. on Tuesday 28th August 2007.

19. I will hear the parties as to costs.

Dated this 31st day of July 2007

Richard Ground
Chief Justice