In The Supreme Court of Bermuda

CIVIL JURISDICTION

2001: No. 232

BETWEEN:

BRITISH AMERICAN INSURANCE COMPANY

Plaintiff

-v-

KAREN CROSS

Defendant

RULING

(Defendant's application to set aside Default Judgment)

Date of Hearing: March 5, 2010
Date of Ruling: March 29, 2010

Mr. Kevin Taylor, Marshall Diel & Myers,
for the Plaintiff
Mr. Jaymo Durham, Amicus Chambers,
for the Defendant

Procedural history

1. On July 16, 2001, the Plaintiff issued its Writ for damages in excess of $300,000 allegedly stolen by the Defendant while in the Plaintiff's employ. On December 19, 2001, the Defendant filed a Re-Amended Defence and Counterclaim admitting in paragraph 1 that she owed the Plaintiff "*approximately $200,000*". She asserted the right to set off various sums claimed in her Counterclaim totalling in excess of $175,000, most of which was a pension claim.

2. The action was eventually stayed pending a criminal trial which resulted in the Defendant being convicted of stealing some $31,675.60 from the Plaintiff in the course of her employment. This amount was determined by the Chief Justice on August 23, 2004, following a Newton hearing, after the Defendant pleaded guilty to three counts on a six count indictment in which a general deficiency was relied upon rather than specific amounts. Trial was initially fixed for October 16, 2006 on which date the matter was adjourned pending determination of the admissibility of admissions made by the Defendant in her contempt of court committal proceedings.

3. It does not appear to me from the record that these admissions in the civil committal proceedings played any part in the pleaded cases on which the Default Judgment was crucially based. The Defendant applied to re-amend her Defence in the form of a draft pleading which admitted owing the Plaintiff "*approximately $200,000*". This application was granted, over the Plaintiff's opposition, by Wade-Miller J on December 13, 2001on the grounds that "*it is clear that the Defendant has an arguable case*" (Ruling, page 2). It is this pleaded admission that the Plaintiff has relied upon in the present application, not any other admissions made in the course of the contempt application. The only other admission relied upon, which was admittedly less explicit, was the Defendant's implied admission when first told by her employer that she had stolen sums in excess of $300,000. This occurred before the present proceedings had even been commenced.

4. It had long become clear that the only issues in dispute in the present action were (a) the quantum of the Plaintiff's claim, and (b) the merits and quantum of the Defendant's Counterclaim. After early skirmishes around discovery and quantum and access to pension monies, the action seemingly went to sleep between 2007 and 2008. On February 5, 2009, the action was ordered to be tried. By the same Order, I directed the Plaintiff to produce "*route supplementary and cash turning sheets created during the period the period of the Defendant's employment and relevant to the Plaintiff's claim*". This was to enable the Defendant to substantiate her claim that the sums that she misappropriated were not as great as the Plaintiff alleged. I also directed the Defendant to supply (a) particulars of the sums she admitted owing within 28 days of the Plaintiff's production and (b) particulars of her counterclaim for medical expenses on or before March 31, 2009. On February 12, 2009 the Defendant's initial attorneys ceased acting. Shortly thereafter, the Defendant retained her second set of attorneys.

5. It is accepted by the Defendant that she attended the Plaintiff's offices on or about April 29, 2009 to inspect certain documents after she had attended the Plaintiff's attorneys offices with her then lawyer on March 19, 2009 to review documents produced pursuant to the February 5, 2009 Order. No complaints were made about the adequacy of the disclosure made. On March 31, 2009, the Plaintiff applied for an Order striking out the Defence for non-compliance with the February 5, 2009 Order. This application was initially heard on April 23, 2009 when the Defendant's counsel was unable to appear. Mr. Taylor advised the Court that his opponent had on April 2, 2009 promised to supply the requisite particulars by the first return date of the Plaintiff's Summons.

6. On April 23, 2009, I ordered that unless the Defendant complied with paragraphs 2 and 3 of the February 5, 2009 Order on or before May 7, 2009, her Defence would be struck out. On May 15, 2009, I entered judgment by default in favour of the Plaintiff in the amount $307,259.38 together with statutory interest and costs. On May 20, 2009, I granted an Ex Parte Order extending the July 17, 2001 Mareva injunction in aid of execution and modifying the amount of the Judgment to $367, 259.38 under the slip rule to correct a typographical error in the prayer as regards the true amount claimed in the Appendix to the Statement of Claim. By Summons dated June 3, 2009, the Plaintiff applied for an Order that the $135,624.76 paid into Court be paid out of Court to the Plaintiff. On the June 11, 2009 first return date, Mr. Taylor very properly sought an adjournment having notified the Court that the Defendant's counsel was abroad on medical grounds. I adjourned the application until July 2, 2009 and directed the Plaintiff's counsel to notify both the Defendant personally and her attorneys of the fresh date.

7. On July 2, 2009 Mr. Crockwell, holding for the Defendant's counsel who was by then on convalescence leave, sought a stay of execution for four weeks. The Plaintiff's counsel had submitted a skeleton argument and authorities in support of the proposition that the relevant funds (previously held by the Plaintiff under an old pension scheme) were available to the meet the claims of employees' general creditors. I ordered that the Plaintiff would be entitled to pay out the monies in Court unless the Defendant filed an application to set aside the Default Judgment together with affidavits in support by September 30, 2009. This was intended to afford the Defendant the best possible opportunity to challenge the Default Judgment, having regard to the fact that her counsel was a sole practitioner likely to be swamped with work after a lengthy period of forced medical leave. In addition, I stayed execution until further Order. On September 28, 2009, the Defendant personally filed an Affidavit seeking to set aside the Default Judgment on the grounds that she had no knowledge of the circumstances under which it had been obtained. No evidence setting out the merits of her Defence or Counterclaim were filed within the September 30, 2009 deadline.

8. With hindsight, bearing mind the history of the action described above, at the July 2, 2009 hearing I ought to have directed the Defendant's temporary counsel to ensure that any material filed in support of the application to set aside the Default Judgment should clarify whether or not the Defendant was also challenging the striking-out of her Counterclaim. The Defendant's principal defence was her assertion of a right to set-off against whatever sums might be due to the Plaintiff the amounts due to her under her Counterclaim. The assertion that the Plaintiff's calculations of what she had taken were simply wrong, first raised in 2001, had never been given any substance over the course of the next eight years and were unlikely to be concretised over the three month period afforded to her to apply to set aside the Default Judgment. The failure to identify the separate issue of the Defendant's right to apply to set aside the striking-out of her Counterclaim and the July 2, 2009 hearing when the Defendant was represented by temporary counsel is noteworthy because it explains why on March 5, 2010 I felt it essential to give her and her new counsel an opportunity to make an application which

ought to have been directed to be made within the September 30, 2009 deadline fixed for applying to set aside the Default Judgment.

9. By Summons dated October 9, 2009, the Plaintiff sought to lift the stay and obtain payment out pursuant to the July 2, 2009 Order. On October 12, 2009 the Defendant's second attorneys applied to cease acting, which application was granted on October 29, 2009. Meanwhile on October 21, 2009, the Defendant filed her Second Affidavit. In this Affidavit she complained for the first time that (a) the discovery provided by the Plaintiff's attorneys on March 19, 2009 was incomplete and inconveniently collated, and (b) that no reasonable opportunity to obtain proper discovery was afforded before the Default Judgment was obtained.

10. On November 3, 2009, I ordered that the Plaintiff could pay out the monies paid into Court and gave directions for the filing of evidence in relation to the Defendant's application to set aside. This decision was made because the Plaintiff's counsel had filed legal submissions for use at the July 2, 2009 hearing which clearly demonstrated that the relevant funds were available to meet the claims of the Defendant's creditors, assuming they were due to her on the basis asserted in her Counterclaim. Bearing in mind that the Plaintiff's Default Judgment was for an amount in excess of $350,000 and the Defendant had formally admitted owing some $200,000, it seemed highly implausible that the Defendant would be able to establish computation errors amounting to more than the roughly $135,000 paid out to the Plaintiff.

11. On December 3, 2009, Amicus Law Chambers, the Defendant's third set of attorneys came onto the record. The present application was heard on March 5, 2010.

The respective submissions

12. The Defendant's case on the application to set aside was comprehensively set out in Mr. Durham's Skeleton Argument. Reliance was placed on the following principal points: (a) Wade-Miller J 's December 13, 2001 determination in the context of the re-amendment application that the defence was arguable; (b) the absence of any defence to the Counterclaim; (c) breach of the Defendant's fundamental fair trial rights by the Plaintiff's failure to give adequate disclosure; (d) the weakness of the Plaintiff's case which had never adequately particularized the amounts alleged to be stolen; and (e) the impropriety of the Plaintiff's heavy reliance on admissions made by her in the quasi-criminal contempt committal proceedings.

13. Mr. Durham, who was creditably acting on a *pro bono* basis, had with him in Court a binder of documents supporting the Defendant's Counterclaim which were available for service. In respect of the Plaintiff's alleged failure to supply documents, he submitted that this was in breach of section 6(8) of the Bermuda Constitution. This section embodied the equality of arms doctrine established by the European Convention of Human Rights in cases such as *Gijsels-v-Belgium* (1998) 25 EHRR 1. In respect of the admissions made during contempt proceedings, it was submitted with reference to various cases that the relevant questioning was in breach of the rule against self-incrimination: *Blunt-v-Park*

Lane Hotel [1942] 2 K.B. 253 at 257; *A. T. & T. Istel –v-Tully* [1993] A.C. 45 at 57; *Memory Corporation plc –v- Sidhu* [2000] Ch. 645 (per Arden J, at paragraph 22); *Bank of Bermuda Ltd.-v- Todd* [1992] Bda LR 42 (per L.A. Ward J at page 4).

14. Mr. Taylor's Skeleton Argument emphasised the more prosaic aspects of the case. He submitted that the Defendant's evidence and that of her three witnesses did little to support her case in substantive terms. On the other hand, the Plaintiff's evidence explained in great detail how the misappropriations occurred. He submitted that the test for setting aside a default judgment required the Defendant to demonstrate not just an arguable defence, but one which had "*real prospects of success*" and must also "*carry some conviction*": *Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc.* [1986] Lloyd's Rep. 221 (per Sir Roger Ormrod at 223).

Reasons for decision: grant of leave to Defendant to file application for leave to set aside striking-out of Counterclaim

15. On March 5, 2010, I decided to grant the Defendant leave to formally apply by Summons within 14 days for leave to set aside the Order striking-out the Counterclaim, filing her evidence in support. The Plaintiff was granted 14 days to file its evidence in response and the parties were directed (within 14 days of March 5, 2009) to submit agreed or convenient dates to the Registrar for a half-day hearing in Chambers.

16. Although the Plaintiff had filed evidence in support of its claim, it seemed unjust to me to refuse the Defendant an opportunity to demonstrate that her Counterclaim had real prospects of success in circumstances where the Plaintiff had never positively challenged her claims. Mr. Durham rightly argued that this was the strongest part of his client's case. I considered that a clear distinction could be made between whether or not the Defendant had an arguable Counterclaim (and, through no fault of the Defendant herself, no evidence had been filed as to this issue at the hearing date) and whether or not the Defendant had an arguable Defence. There was never a serious defence to the liability aspects of the Plaintiff's claim. Issue was really joined on (a) quantum, and (b) set-off arising out of the Counterclaim. Judgment ought properly to have been entered in the Plaintiff's favour with damages to be assessed years ago. In finding that the Defendant had an arguable Defence in the context of the Defendant's December 2001 application for leave to re-amend, Wade-Miller J in substance found that on its face her Counterclaim was arguable, because the re-amended pleading admitted that the Defendant had taken approximately $200,000. There was no complete defence to liability pleaded at all.

17. In my judgment justice would not have been seen to be done if the Court were to deny the Defendant an opportunity to make a formal application to set aside the striking-out of her Counterclaim without consideration of any evidence against the unhappy legal representation background of the Defendant's case over the last 12 months. Nevertheless, the Plaintiff was in provisional liquidation and restoring the Counterclaim might constitute "the commencement of" proceedings against the company which requires further leave under section 167(4) of the Companies Act 1981. So any application to

restore the Defendant's Counterclaim required careful consideration and could not be dealt with summarily.

18. By March 5, 2010, it must also be noted, the largest element of the Defendant's Counterclaim had for all practical purposes seemingly been resolved. Assuming the monies were due from the Plaintiff to the Defendant but had been notionally paid by the Defendant in partial satisfaction of the judgment debt, no question of set-off would remain to be determined. Mr. Durham was in a position to serve documents in support of the Defendant's medical expenses claim, and this aspect of the Counterclaim remained a potentially live issue.

Findings: application to set aside Default Judgement

19. I reject the complaint that the Plaintiff has failed to provide adequate disclosure to allow the Defendant to investigate the quantum issue. The documents this Court ordered to be produced were admittedly made available for inspection on March 19, 2009 at the offices of Marshall Diel & Myers. The Defendant attended with her lawyer and left without lodging any complaint that the documents were incomplete or difficult to inspect. These complaints were first made by the Defendant herself in paragraph 2 of her October 21, 2009 Second Affidavit.

20. The parties' respective attorneys had years earlier arranged for an inspection of other documents which took place with the Defendant herself visiting the Defendant's offices on October 14-15, 2004 and April 29, 2005. The nature of the Plaintiff's case is that the thefts took place through the Defendant, an insurance agent, submitting false returns about the amount of premiums she had collected and depositing only a portion of what she received from clients. She was in the best position to inspect and identify relevant documents rather than her lawyers and there is no credible suggestion that the Plaintiff obstructed her or her attorneys to any or any material extent. After all, she had between 2003 (when she was first charged) and 2004 (when she was convicted on her own plea) to access documents through the criminal trial process. But her civil discovery efforts began as early as the Autumn of 2004, over 5 years ago.

21. The Defendant has failed to exercise due diligence over an extended period of time, long before it is clear that she encountered representation problems, to obtain the documents which she has contended would show that she took less than the total sum claimed. The Fourth Wenda Krupp Affidavit clearly explains how the amount said to have been stolen was calculated. It also deposes to a May 29, 2001 meeting which was recorded by the deponent when the Defendant was told that she had taken more than $300,000 and responded by undertaking to seek assistance to repay the sums in question. The same Affidavit also explains why the suggestions (made by the Defendant's witnesses) that other employees may have taken the money or the Plaintiff's calculations may be compromised by computer deficiencies simply make no sense.

22. Accepting Mr. Taylor's submissions as to the legal test on applications to set aside default judgments, I find that the Defendant's challenge to the amount due has no real

prospect of success and is entirely lacking in conviction. Bearing in mind her implied admission in May 2001 to stealing in excess of $300,000, her pleaded admission of December 2001 that she owes the Plaintiff approximately $200,000 and her persistent failure to seriously pursue a quantum challenge over the last 5 years, I refuse the application to set aside the Default Judgment. The need to inspect documents argument seems to me to be a delaying tactic used to frustrate the Plaintiff's legitimate judgment enforcement efforts. No realistic prospect of the Defendant discovering errors in the quantification of the Plaintiff's claim exists on the basis of the material before this Court and the history of this litigation which began almost nine years ago.

23. I reject as wholly lacking in substance the suggestion that the Plaintiff's case relies on admissions improperly extracted during the contempt of court hearing. That issue is now *res judicata* in any event. The privilege against self-incrimination ought to have been invoked at the relevant hearing in 2001 or at the soonest possible opportunity thereafter. It is too late to raise this issue now. But factually, the point does not appear to me to get off the ground because the only admissions relied upon in the present application were the admission made in the Defendant's own pleading and the other ones made before these proceedings even commenced.

Summary

24. The Defendant's application to set aside the Default Judgment is refused.

25. The Defendant was on March 5, 2010 granted leave to formally apply within fourteen days for leave to apply to set aside this Court's Order of May 15, 2009 striking-out her Counterclaim. It is possible that she may still be able to still substantiate a basis for setting-off some amounts due to her against what she owes the Plaintiff. Since (a) the medical expenses element of the Defendant's Counterclaim is stated to be less than $100,000 and (b) the original judgment debt was for an amount of $367, 259.38 together with interest and costs, it seems highly unlikely that the Plaintiff will ultimately be entitled less than the sum of $135, 624.76 paid out to it from Court.

26. If such an application has been duly filed, further execution is stayed until its determination. If no such application has been filed, no need for a stay arises and the Plaintiff's partially satisfied judgment can be enforced.

27. Unless either party applies to be heard as to costs within 14 days, the costs of the present application (which substantially was resolved in the Plaintiff's favour) are awarded to the Plaintiff to be taxed if not agreed on the standard basis.

Dated this 29th day of March, 2010 _____
KAWALEY J