In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 221

BETWEEN:

JOSEPH EDWARD WAKEFIELD
and
DONNA JEAN ACCARDO
(Executors of the estate of the late Hazel Jean Crozier)
PLAINTIFFS

and

JOHN G. MARSHALL FIRST DEFENDANT

and

COUNTRY SQUIRE INTERNATIONAL CORPORATION
("CSIC") SECOND DEFENDANT

and

HOSPEL HOLDINGS S.A. THIRD DEFENDANT

and

JOHN L. SAMCOE FOURTH DEFENDANT

Dates of Hearing: 19 and 20 July 2010

Date of Judgment: 9 August 2010

Mr. Jai Pachai of Wakefield Quinn, for the Plaintiffs;
Mr. Paul Harshaw, of Harshaw & Co. for the First Defendant

Ruling

1. On 3rd December 2009, the First Defendant applied by summons to set aside a Judgment in default of Defence which was entered against him on 5th November 2008 for the sum of $3,827,027 on the basis that:

   (a) it was entered irregularly, and/or
   (b) that the First Defendant has a defence to the cause to which the court should pay heed.

FACTUAL BACKGROUND

2. On 23rd September 2008, a Specially Endorsed Writ of Summons was filed by the Plaintiffs who are the Executors of the estate of the late Hazel Jean Crozier, a Canadian citizen and a long term resident of Bermuda who had her principal place of residence at No. 6 Mizzentop, Warwick Parish. Mrs. Crozier died on the 8th April 2007. The First Defendant, John G. Marshall who resides at No. 39 Mizzentop knew Mrs. Crozier.

3. The Plaintiffs contend that over a number of years – between October 1997 and 30th March 2007 – Mr. Marshall induced Mrs. Crozier to invest monies into the Second Defendant, Country Squire International Corporation ("CSIC"), which is managed by the Fourth Defendant, Mr. John C. Samcoe, who is resident in Canada and the President of CSIC.

   Mrs. Crozier's first investment was ostensibly for a development of an Industrial Park in Russia. The second investment and all subsequent investments were purportedly for an oil refinery in Russia.

4. Eventually, Mrs. Crozier was advised by Mr. Marshall and Samcoe through CSIC that she held 23,078 shares regarding both investments. It was also represented to her that she would be paid 10% interest annually calculated on the capital value on her investments.

5. Over the course of time – from July 1999 to May 2006 – Mr. Marshall and Samcoe made numerous promises to Mrs. Crozier of re-payment.

6. In April 2007, Mr. Marshall indicated that a payment, to the estate of the various investments, would be made on 2nd May 2007. Subsequently, numerous promises of payment were made by Mr. Marshall to the Plaintiffs. The Plaintiffs alleged that in breach of the representation no amounts were paid to Mrs. Crozier or to her representatives.

7. The Plaintiffs contend that the representation of payment and financing for the projects were made by or on behalf of the Defendants fraudulently, the Defendants well knowing that they were false and, untrue or recklessly not caring whether they were true or false.

8. On the 23rd September 2008, the Plaintiffs by a Specially Endorsed Writ claim inter alia an amount not less than US$3,827,027.

9. On 5th November 2008, the Plaintiffs obtained judgment in default of Defence inter alia against the 1st Defendant John G. Marshall, the 3rd Defendant Hospel Holdings S.A. on the sum of $3,827,027 with interest and cost to be agreed or taxed.

10. First, I deal with the submission that the Judgment in Default of Defence should be set aside if the Plaintiffs have not complied with the provision of *Order 10 rule 1 (4). This order* stipulates that the original writ must be endorsed as to service within three (3) days of service otherwise the Plaintiffs in the action begun by the writ shall not be entitled to enter judgment in default of defence.

11. Mr. Harshaw submits that if the court looks at the file and this condition precedent is not satisfied the Registrar had no power to grant judgment and it must be set aside as it was entered without jurisdiction. The court has no authority to waive a condition

precedent without specific power to do so: *Anlaby v Praetorious (1888)20 Q.B.D. 764.*

12. Mr. Harshaw stressed that if there has been a failure in relation to indorsing the original writ, as the First Defendant believes, the court need only look on the file and if the requirement is not met the Default Judgment must be set aside.

13. The Court's inspection of the file revealed that the Plaintiffs had fulfilled the requirement of Order 10 rule 1 (4) – i.e. there was nothing irregular about the judgment which was obtained on 5th November 2008, the original writ was properly endorsed and filed. Mr. Harshaw accepted that once the provision was met that is the end of this aspect of the matter.

14. Mr. Harshaw submitted further that the Plaintiffs' case is that money was invested in CSIC and they want that money back. Mr. Harshaw maintained that the First Defendant does not dispute that, but says that he has no control over CSIC. In cases of fraud, the allegations of fraud must be distinctly pleaded and proved. Mr. Harshaw cited the words of DaCosta J.A. in Intercontinental Natural Resources Ltd. v. Sir Bayard Dill and Others, Civil Appeal 14 of 1981 at page 22:

    'it is a principle of justice that no one should be brought before "the seat of justice" to account for his conduct unless he is adequately informed of the case he has to meet.'

    Mr. Harshaw submits that the First Defendant is hardly a man who was a fraudster. He is not an investor; he was merely a go between. It cannot be proved that he made his assertion knowing that they were false. He must be cross-examined.

15. Counsel for the parties are in agreement on the relevant law which is applicable in this case.

The Impact of Delay

16. Mr. Pachai submits pursuant to order 2 rule (2) that the application to set aside the order should be refused as the application was not made within a reasonable time.

17. An application to set aside a default judgment should be made promptly and within a reasonable time. He submits that even though the Court can in a fit case disregard lapse of time, an excess of one year before the application is made is simply too late. See Harley v Sampson: The Times Law Reports, Friday, May 1, 1914 p450.

18. Mr. Pachai submits that the First Defendant has always been represented by Mr. Harshaw who acted for him in connection with action No. 202 of 2007 where the claim was under a Promissory Note. On 2nd April 2001 Mrs. Crozier loaned the First Defendant the sum of $315,000. The Defendant agreed to repay the loan to Mrs. Crozier with accrued interest at a rate of 6%. The First Defendant drafted and executed a promissory note in favour of Mrs. Crozier recording the terms of the loan. On the 18th May 2007 and on 14th June 2007, the Plaintiffs demanded that the First Defendant repay the loan or satisfy the promissory note with accrued interest. The Defendant failed to repay and a writ of summons was filed on 25th July 2007. A judgement in Default of Defence was entered in that action as well.

19. Despite a threat to set that judgment aside payment was settled by a loan obtained by the First Defendant from First Bermuda Group.

20. Mr. Pachai said that during the course of that action the First Defendant was put on notice of Mrs. Crozier's investment claim.

21. In connection with a judgment summons in No. 202 of 2007 which came on before Greaves J. on 10th January 2008 the First Defendant who appeared in person specifically agreed to make payment of the judgment debt as well as the investment claim of about $4 million by 15th January 2008 and that he would consent to a judgment in the sum of $4 million in respect of the Plaintiff's further claim.

22. The First Defendant did not make payment as promised by 15th January 2008. Consequently on 23rd September 2008 the Plaintiffs commenced the action No. 221 of 2008. Now, 14 months after Judgment in Default was entered the First Defendant applies to set the Judgment aside.

23. Mr. Pachai maintains that the First Defendant's true motive in making this application is to stop a sale of the property, which he jointly owns with his wife, at Mizzentop Warwick. The First Defendant's motive in making this application is a factor of some importance in the court's exercise of its discretion.

24. Mrs. Greta Marshall the First Defendant's wife with whom he resides, through Mr. Harshaw, instituted proceedings seeking an injunction to restrain the Plaintiffs from enforcing its Writ of Execution against the jointly owned Mizzentop apartment.

25. On 25th February 2009 Mrs. Marshall secured an ex parte injunction to restrain the sale of the property.

26. On 27th March 2009 the Plaintiffs in this action issued proceedings to have a contested hearing before Kawaley J. to set aside the injunction which was secured ex parte. The matter was heard on 8th April 2009 and a ruling was issued on 24th April 2009 in which Kawaley J. held that Mrs. Marshall had no right to restrain the Plaintiffs from seeking to enforce the judgment against the Mizzentop apartment which she jointly owned with her husband, the Judgment Debtor. He discharged the injunction and ordered costs against Mrs. Marshall.

27. Thereafter, the Plaintiffs proceeded with their Writ of Execution and instructed the Provost Marshall to proceed with the sale of Mizzentop, which was scheduled for auction on 18th June 2009.

28. Mr. Pachai submits *"Astonishingly, Mrs. Marshall through Mrs. Jacqueline MacLellan, applied for a further ex parte injunction on 18 June 2009 to restrain the sale of the property in spite of [Counsel for the Plaintiffs clear request] to Mrs. MacLellan that any application for a further injunction should be made on an inter partes basis"*.

29. The further ex parte injunction was granted by Greaves J. on 18th June 2009. Apparently, Greaves J., was not told of the ruling by Kawaley J. on 24th April 2009. It should be noted that the basis of the further injunction was exactly the same as the first application, namely, that Mrs. Marshall would be left without a roof over her head if the auction were to proceed.

30. Thereafter, the Plaintiffs applied for a further Order that the ex parte injunction granted on 18th June 2009 be set aside. The matter came before Kawaley J. on 23rd October 2009 when he made directions for Mrs. Marshall to file her Writ of Summons and for a further hearing to be held before Greaves J. on an expedited basis.

31. The Writ of Summons in action No. 400 of 2009 by Mrs. Marshall was filed on 24th November 2009 and the same relief is sought as in action No. 44 of 2008, namely, an injunction to restrain the Plaintiffs from selling the jointly owned property at 39 Mizzentop. In fact, the Writ was not filed in compliance with Kawaley J's Order of 23rd October 2009 in that it should have been filed by 19th November 2009. Mrs. MacLellan was put on notice by letter of 18th November 2009, that an ex parte application would be made to Greaves J to discharge Mrs. Marshall's second injunction on that basis alone.

32. Mr Pachai urged that there can be no doubt that Mrs. Marshall's second ex parte injunction was misconceived and liable to be set aside based upon Kawaley's J's Judgment of 24th April 2009.

33. Around the same time as the second Writ of Summons was filed on 24th November 2009 it was, for the very first time that the First Defendant made his application to set aside the Judgment of 5th November 2008 simply because, Mr. Pachai submits, Mrs. Marshall was bound to fail in upholding her second injunction and this was the Marshalls only option in preventing a sale of their property at 39 Mizzentop. In exercising the Court's discretion, the First Defendant's motivation in making this application is of some importance.

34. Mr. Pachai submits that after the judgment was entered on 5th November 2008 the Plaintiffs applied for a writ of execution which was granted on 26th November 2008. The Plaintiffs issued a judgment summons on 9th December 2008 returnable on 5th January 2009. The Judge's note of the hearing records that the First Defendant indicated that "I am not disputing the debt." An order was made for an examination of the First Defendant before the Registrar. This examination was conducted on 5th February 2009. At no time during the course of the examination did the First Defendant dispute the debt nor indicated any intention to set aside the judgment. Indeed, on 6th April 2009 Counsel Mr. Harshaw who has had conduct of this matter throughout wrote to the Plaintiffs, referred to the judgment of $3,827,027 together with interest and costs and made an offer of payment of $2,900,000. Mr. Pachai urges that this type of correspondence is in conflict with any individual having a meritorious defence to the action.

35. Mr. Pachai submits that the First Defendant has admitted the debt on a number of occasions including a joint and several declarations made with the Fourth Defendant, John L. Samcoe on 12th April 2005 setting out Mrs. Crozier's various investments and promising "full repayment of your investment very soon from this date." There is a note in the First Defendant's own handwriting setting out individuals to whom he is indebted including "Hazel J. Crozier" for an amount of "$4,128,799". There is a further note from the First Defendant to one of the two Executors setting out his indebtedness to Mrs. Crozier. Similarly, there exist letters from CSIC dated 12th July

1999 and 12th April 2005 promising repayment of a significant part of Mrs. Crozier's investment. There are other instances of promises to pay but none of these promises of repayment materialised.

36. Mr. Pachai submits that again, there … is an email dated 31st May 2006 confirming a payment to Mrs. Crozier's account *"in approximately 7 days"* of an amount no less than $400,000. None of these promises of repayment ever materialized.

Mr. Harshaw submits that in Vann v Awford [1986] Times Law Report 23rd April, the court held that the major consideration in an application to set a judgment aside was whether the Defendant had disclosed a defence on the merits and this transcended any reason given by him for the delay in making the application even if the explanation given by him was not credible

Court

37. Counsel for the parties agree that the relevant law as to the determination of an application for setting aside a regular judgment is to be found in the leading case of Evans v Bartlam [1937] A.C. 473 at p 479 which stipulates that the applicable rules give "*a* discretionary *power to the judge in Chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of the discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there*

should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction'

38. In Alpine Transport Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's Law Rep 221 at 223 Sir Rodger Ormrod said:

"The following general indications to help the court in exercising the discretion" per Lord Wright at p. 488) can be extracted from the speeches in Evans v Bartlam, [1937] A.C. 473, bearing in mind that "in matters of discretion no one case can be authority for another" (ibid.p.488):

(i) a judgment signed in default is a regular judgment from which , subject to (ii) below, the plaintiff derives rights of property;

(ii) the Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the Court should not "lay down rigid rules which deprive it of jurisdiction" (per Lord Atkin at p. 486);

(iii) The purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;

(iv) The primary consideration is whether the defendant "has merits to which the Court should pay heed" (per Lord Wright at p.489), not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown "merits" ...the Court will not, prima facie, desire to let a judgment pass on which there has been no proper adjudication [ibid. p.489) and per Lord Russell of Killowen at p.482]

(v) Again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about the defendant —

...found himself bound by a judgment regularly obtained to which he could have set up some serious defence [per Lord Russell of Killowen at p. 482].

In applying these "general indications" it is important in our judgment to be clear what the "primary consideration" really means. In the course of his argument Mr. Clarke, Q.C., used the phrase "an arguable case" and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v. Kendel, [1977] 1 Lloyd's Rep. 554 and Vann v Awford). This phrase is commonly used in relation to R.S.C., O.14, to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standards indicated by each of their Lordships in Evans v. Bartlam. All of them clearly contemplated that the defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success. (In Evans v. Bartlam there was an obvious defence under the Gaming Act and in Vann v. Awford a reasonable prospect of reducing the quantum of the claim.) Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to

be set aside and the defence developed. The "arguable" defence must carry some degree of conviction.

39. I have analysed this case and based on the material before the court in order for the First Defendant to satisfy the court that the judgment in Default of Defence ought to be set aside and the First Defendant given leave to defend, he must show that he has a defence which has a real prospect of success. Additionally, in arriving at a decision the court is entitled to look at the First Defendants conduct and statements and ascertain if in the circumstances it should disentitle him from proceeding. Delay in itself is not a bar to proceedings but the nature of the delay and any disadvantage to the other side caused by the delay can be taken into account.

40. Standing alone it might reasonably have been argued that the draft defence might just have had some reasonable prospect of success. I cannot, however, ignore the various admissions made by the First Defendant at various times over an extended period, personally and through his Counsel. See paragraphs 18 to 21 and 34 to 36 of this decision. The draft defence viewed in that context hardly carries any degree of conviction.

41. In my judgment, the prospective defence is a sham with no reasonable prospects of success in all the circumstances. Further the delay in putting the draft defence forward either personally or through his Counsel only serves to emphasize that reality.

42. Leave to dismiss the Judgment in Default of Defence is refused. Cost of the application to be the Plaintiffs.

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Norma Wade-Miller
Puisne Judge