In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 337

BETWEEN:

JOHN WARWICK

Plaintiff

-v-

MICHAEL LIGHTBOURNE

Defendant

JUDGMENT

(In Court)

Date of Hearing: July 11, 2011
Date of Judgment: July 22, 2011

Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Plaintiff
Mr. Eugene Johnston, J2 Chambers, for the Defendant

BACKGROUND

1. On October 6, 2009, the Plaintiff, a retired architect, issued a Specially Endorsed Writ of Summons claiming $60,000 for breach of contract. This sum was said to represent the price for which the Defendant, a businessman, purchased his Grady White boat ("the Boat"). The Defendant was personally served on October 10, 2009 and, no appearance having been entered, Judgment in Default was entered against the Defendant on November 13, 2009.

2. On January 29, 2010, the Defendant applied by Summons to set aside the Default Judgment and for leave to file a Defence which was prospectively filed on the same date. This application was effectively heard on March 16, 2010 when Justice Simmons, *inter alia*:

   > (1) varied the Judgment in Default for $60,000 by substituting the amount of $24,000 based on admissions contained in the proposed Defence;
   > (2) gave the Defendant leave to defend the balance of the Plaintiff's claim (implicitly) on the condition that the Defendant paid $12,000 into Court within 29 days.

3. The Defendant's Defence had two incarnations. Firstly, as filed by his previous attorneys, deposed to himself and relied upon at the application to set aside the Default Judgment, the Defendant admitted that he (a) purchased the Boat from the Plaintiff in consideration for the Plaintiff residing on the Defendant's boat 'Brightside' for $3000 per month, and (b) traded the Boat for three jet skis for the price of $60,000.

4. The Plaintiff on July 27, 2010 obtained an oral examination order, and was eventually ordered to pay $2000 per month towards the Judgment debt by the Chief Justice on October 28, 2010. On the same date the Chief Justice granted an "unless" order compelling the Defendant to file Witness Statements pursuant to the directions previously ordered by the Court. On June 15, 2011 the Defendant was personally served with a Notice of Hearing for the trial of this action on June 28, 2011. On June 27, 2011, the Defendant's new attorneys came on the record, and the following day obtained an adjournment of the trial until July 11, 2011 and leave to file an Amended Defence. This pleading was filed on June 28, 2011.

5. The second incarnation of the Defence was radically different in its crucial averments. While the purchase of the Boat was admitted, it was now denied that (a) any monetary value placed on the accommodation the Defendant provided to the Plaintiff, and (b) any connection between the accommodation value and the value of the Boat existed. It was

simply agreed that the Plaintiff could live on the Defendant's Boat "as long as he wished" (Amended Defence, paragraph 3). Accordingly, since the Plaintiff had voluntarily left the accommodation when he did (albeit following more than one burglary and at least one assault), the Defendant's obligations to him in relation to the purchase were fully discharged. This dramatic transformation in the Defendant's case was purportedly explained in paragraph 16 of the Defendant's Witness Statement dated six days before the effective commencement of the trial.

6. When the Plaintiff opened his case, Mr. Rothwell explained that the amount in dispute could be as little as roughly $17,000, if the Court rejected the Plaintiff's primary case and accepted the Defendant's original defence that he agreed to pay the $60,000 in the form of accommodation at the rate of $3000. Giving credit for the value accommodation received, the Defendant contended that the Plaintiff stayed on his boat for 12 months ($36,000) while the Plaintiff contended he stayed for 189 days or 6.3 months ($18,900), a difference of $17,100. However, in his closing submissions, Mr. Johnston surprisingly indicated for the first time that he was inviting the Court (without any formal application or prior notice to the Plaintiff's counsel) to set aside the Judgment in favour of the Plaintiff for $24,000 granted by Justice Charles-Etta Simmons on March 16, 2010, so that the real dispute was whether any monies at all were payable by the Defendant to the Plaintiff.

SCOPE OF ISSUES IN DISPUTE: MAY THE COURT SET ASIDE THE PARTIAL JUDGMENT IN FAVOUR OF THE PLAINTIFF DATED MARCH 16, 2010?

7. Mr. Rothwell submitted that the only way in which the March 16, 2010 judgment could be challenged was by way of appeal. Mr. Johnston in answer to the Court denied that the issue was *res judicata*, and relied upon the following final two sentences in paragraph 13/9/18 of the 1999 White Book:

> "*Refusal by a Master to set aside a default judgment was an exercise of discretion and was a decision whether to grant a discretionary remedy. It was not a determination of the issues and could not be relied upon to found a plea of res judicata, (Mullen v. Conoca Ltd (1997) The Times, April 30).*"

8. In my judgment, the preceding portions of the White Book commentary cited by the Defendant's counsel are more apposite to the facts of the present case where the Default Judgment was varied and set aside in part:

"*A judgment may be set aside as to part only and allowed to stand as to the rest…Where, on the application to set aside a regular judgment, it is conceded or held by the court that there is no defence to part of a claim but an arguable defence as to the balance, the proper course is for the court to vary the default judgment to reduce it to the amount not in dispute…Where a judge allows an application to set aside a default judgment, he is obliged to give his reasons otherwise the Court of Appeal will exercise its discretion afresh in the matter…*"

9. In the present case Simmons J followed the recommended practice on applications to set aside default judgments flawless by (a) varying the judgment having decided on the evidence that it ought to be set aside in part, and (b) giving her reasons for so doing. She stated: "*On the Defendant's own evidence there is an admission that 12 months of charges @ $3000 per month are owed* [sic] *by the Defendant. Accordingly the Court may by virtue of Order 13 rule 9 vary the Judgment to $60,000 less $36,000-$24,000.On the basis that on the Plaintiff's evidence $36,000 may be due him the Defendant is hereby ordered to pay in the sum of $12,000 as security…*" In essence the Judge found that the Defendant had admitted that he owed the Plaintiff $24,000 because he had only provided consideration in the form of accommodation worth $36,000. This aspect of the decision was clearly made on the merits, was subject to an appeal and in the absence of an appeal entitles the Plaintiff to rely upon the issue decided as *res judicata* for the purposes of the present action.

10. *Mullen v. Conoca Ltd* (1997) The Times, April 30 was not directly referred to in argument at trial, but is the sole judicial basis for the passage relied upon by Mr. Johnston. It is an English Court of Appeal decision in which Evans LJ (now Evans JA of the Court of Appeal for Bermuda) gave the leading judgment. This was a case concerned with whether a plaintiff suing for a declaration that a contract was unenforceable in a fresh action after failing to set aside to any extent a judgment obtained against him under the same contract in earlier proceedings was debarred from pursuing the second action. According to the report of Evans LJ's judgment:

> "*His Lordship noted that the court's power to set aside a default judgment under Order 13, rule 9 was discretionary. If the court's power was exercised on a discretionary basis, such as delay, then it was difficult to say that any issue had been decided by the court's ruling.*
>
> *The circumstances in which an interlocutory ruling could give rise to an estoppel were always problematic. It might be a sine qua non of the power*

to set aside that it should be shown that the defendant had a prospect of success but the decision itself might be based at least partially on discretionary matters.

There might be cases under Order 13, rule 9 where a decision was so clear as to give rise to legal or discretionary grounds for barring a future action. His Lordship found the possibility difficult to imagine."

11. I do not find the above analysis has any persuasive force in the context of the present case. Firstly, what is in issue here is whether or not the (partial) Judgment entered can be set aside in the same action when it has not been challenged for 15 months and the Defendant has (a) participated in enforcement proceedings, and (b) given no notice prior to counsel's closing speech at trial that he intended to challenge the Judgment entered against him 15 months ago. No question of whether the Defendant could issue separate proceedings falls to be determined. But in any event it is clear as a matter of record that Simmons J's decision to vary the Default Judgment and to set it aside only in part was wholly based on an assessment of the merits in circumstances where no discretionary factors (such as delay) were brought into play. I find that for the purposes of the present action, if not for all purposes, the Judgment entered by Simmons J for $24,000 in favour of the Plaintiff cannot be reviewed by this Court.

12. The only issue open for determination at trial is whether the Plaintiff is entitled to recover more than the sum this Court has already awarded to him based upon the Defendant's admissions.

FACTUAL FINDINGS

Common ground

13. Certain facts evidenced by documentation created by third parties were not disputed by either party. On April 25, 2008 the Plaintiff purchased the Boat from AP Marine. He became the registered owner on the same date. He then decided he did not want to keep the Boat. On July 9, 2008, the Defendant became registered owner of the Boat. On October 15, 2008, the Defendant in the presence of the Plaintiff sold the Boat back to AP Marine in exchange for 3 jet skis.

14. It is also agreed or not in controversy that by July, 2008 the Plaintiff, who was not in poor health and drinking heavily, was living on the Defendant's boat 'Brightside' having previously occupied 'Brightside Apartments'. He routinely carried large amounts of cash. In September the Plaintiff was robbed and went to the Hamilton Princess to recover from

September 25-20, 2008. In October he was robbed a second time, and returned to the Hamilton Princess for the period October 9-18, 2008. He returned to the boat and, following a third robbery in which he was beaten, the Defendant's father took the Plaintiff to the Mid-Atlantic Wellness centre in late January 2009 where he was admitted due to his pre-existing manic depression condition. Upon his release he resumed living with his former wife.

What bargain was struck between the parties

15. Although the Plaintiff appeared in general terms to be a credible witness, I do not consider it would be safe to place sole reliance on his own recollections of the details of negotiations which took place during a period (throughout 2008) when by his own admission: (a) he was suffering from manic depression, and (b) "*did resort to drink very often*" (Witness Statement, paragraph 7). He testified that in April 2008, he was staying at the Brightside complex in flats when he sold the Boat and in around June rented the boat with the same name, which was moored adjacent to the Brightside property, from the Defendant. In June 2008 he also agreed to sell the Boat to the Defendant for $60,000.

16. According to the Plaintiff's Witness Statement, he believed that he paid the Defendant $10,000-$15,000 for rent during the time he stayed on the 'Brightside', but admitted he has no record of this (the records were stolen from him). However, at trial the Plaintiff produced copies of a notebook containing his financial jottings which appeared to show that he deposited $15,000 into the Brightside safe and gave $8000 to the Defendant. The Plaintiff in his Witness statement did not assert that any specific rental agreement was reached in June. The only specific mention of a rental amount is made when describing his making demand for payment of the $60,000 for the Boat from the defendant in November, 2008; at this juncture he says the Defendant agreed he could stay on the 'Brightside' for $100 per day. This incident was denied by the Defendant.

17. Under cross-examination the Plaintiff insisted that he had agreed to sell the Boat to the Plaintiff for $60,000 and was paying rent to stay on the Defendant's vessel at the rate of $120 per day. However, even in the Plaintiff's oral evidence, he gave no or no coherent account of the terms on which he contends the Defendant agreed to pay the $60,000 consideration for the Boat. He agreed that he likely started discussions about selling the Boat before he moved aboard in June.

18. Since the Defendant's case was a tale of two conflicting sworn stories, it is obvious that his evidence must be treated with great care. Having observed him giving evidence, it was difficult to avoid the reaching the view that he did not conceive of the truth as being

akin to a solid structure. Rather, he seemed to view the truth to be somewhat akin to clay, which he could quite legitimately mould into whatever shape suited his present purposes.

19. The Defendant's first version of the truth was set out in his Affidavit in Support of Application for Leave to Set Aside Judgment in Default sworn on January 27, 2010. He deposed in material respects as follows:

> "*3. THAT it was in/or around 2008, the Plaintiff was homeless and approached me, with a request that he rent my boat for accommodation at a rate of $2000 per month, plus an extra $1000 per month for domestic services.*
>
> *4. THAT the Plaintiff and I agreed these terms and he moved on board. It was shortly after moving on board, that I notice* [sic] *the Plaintiff had difficulty paying the rate as agreed, and offered an alternative solution to the non-payment.*
>
> *5. The Plaintiff stated that he had purchased a '22 foot Grady white Boat' from AP Marine in flats, together with a 250HP engine, and was unable to sell the boat, which at the material time was in the yard of AP Marine above.*
>
> *6. The Plaintiff agreed to sell the boat to me as a consideration for renting 'Brightside' on the terms as set out in para 3 of my Affidavit.*
>
> *7. That I agreed to the offer, and together the Plaintiff and I went over to AP marine, and, in the presence of the owner of AP Marine, the Plaintiff transferred the ownership to me, and similarly by way of a bill of sale executed for Marine & Ports registration requirements.*
>
> *8. That it was estimated the boat (Grady-White) had an original value of approximately $90,000.00, and after it was transferred by the Plaintiff to me as a consideration for the rental of 'Brightside', I than* [sic] *in the Plaintiff's presence, traded the boat for 3 jet ski's also purchased from AP Marine for $60,000.000 as full settlement.*"

20. This was a very carefully drafted Affidavit setting out a coherent, detailed and logical account of the terms upon which the parties agreed that the Defendant would acquire the Plaintiff's Boat and the Plaintiff would acquire the right to occupy the Defendant's vessel 'Brightside'. After the Defendant had been orally examined by counsel, I asked him to read paragraphs 2-3 to confirm that he was literate and asked whether he read the Affidavit before swearing it. He did not deny reading the Affidavit before he swore it but asserted that he did not understand what he was swearing to. The Defendant essentially

repeated the explanation for his change of story set out in the following paragraph of his Witness Statement dated July 5, 2011:

> "*16. I am aware that I mentioned renting Brightside to Warwick. I am also aware that I made the unfortunate mistake of signing my name to an affidavit which was not accurate in this respect. When I told the story recounted in this statement to my previous attorney, he said I should guess how much an average person-any person-would be made to pay per calendar month if they wanted to stay on Brightside. My guess was around $3000.00 a month. That explains why that turned up in my affidavit. My current understanding of the situation is that I should never have been concerned with what an 'average' person would have been charged, but have to consider the actual agreement reached between me and Warwick.*"

21. The explanation for swearing a false affidavit was, in effect, a plea of having been foolishly overcome by lawyerly charm: his former lawyer offered him the "forbidden fruit" and he simply ate it. A layman's trust in his lawyer might explain why the Defendant did not bother to read the Affidavit carefully to ensure the accuracy of each detail or to question portions of it which amounted more to legal argument than pure fact. It cannot explain why the Defendant would (a) allow his lawyer to advance a defence he now contends bears no relationship to the truth of the key facts in issue, and (b) would have no compunction about swearing before an independent commissioner of oaths that the Affidavit's contents were true. The Defendant's oral explanation for this "unfortunate mistake" was almost incoherent and wholly unconvincing. In effect, he admitted in the witness box to knowingly swearing a false affidavit simply because his lawyer advised him that this would assist his case.

22. I have no hesitation in concluding that his initial version of the terms of the bargain more accords to the truth than the version belated advanced on the eve of trial. The second version is essentially as follows. The Plaintiff moved aboard 'Brightside' without agreeing any rental terms at all and gave the Defendant an unspecified amount of cash towards maid service. After the parties agreed that the Defendant would purchase the Boat from the Plaintiff, it was then agreed that the consideration would be that the Plaintiff could occupy 'Brightside' for as long as he wished. Although the Defendant in re-examination explained that the Plaintiff did not look like he would live for very long, such a bargain on its face appears improbable. The Defendant's assertion that the Plaintiff was moved onto the Boat to make way for tourists in the standard visitor accommodation, by implication because he was a 'problem guest' is plausible; the idea that the Defendant would provide him accommodation initially for free on a commercial fishing vessel is simply not believable.

23. More significantly still, the Defendant contends that the result of the bargain that was actually reached was that once the Plaintiff vacated the 'Brightside' through no fault of either party, the Plaintiff had no right to further recompense for the Boat sold to the Defendant which was worth on any view $60,000. If this was the bargain struck, and what the Defendant instructed his former lawyer had actually occurred, it is impossible to believe that the Defendant's lawyer would have elected not to advance such a favourable case at all, opting instead to put forward (as the sole positive defence) a case which explicitly admitted that the parties agreed to link the price of the Boat to the value of accommodation the Plaintiff received. In other words, it would have been far more credible if the initial defence was an exaggerated version of what the Defendant subsequently suggested was the truth; it makes no sense that the Defendant would agree advance a false case which was obviously less favourable to him than what he knew to be the truth.

24. Accordingly, I find (based on the admissions made in the Defendant's January 27, 2010 Affidavit) that the Plaintiff sold the Boat to the Defendant for $60,000 to be paid by the Defendant not in cash but through the provision of accommodation at the rate of $3000 per month. More likely than not, the accommodation rate was agreed when the Plaintiff initially moved aboard 'Brightside', and the sale of the Boat and the provision of accommodation in lieu of cash was agreed later.

25. Although this detail is hardly central to the above primary finding, it is plausible that the Plaintiff is wrong in insisting that the $60,000 price was agreed up front and the Defendant is right in insisting that this figure derived from the value assigned to the jet-skis the Defendant subsequently exchanged for the Boat. This would explain why the Plaintiff was present when this transaction was consummated on or about October 10, 2008 and was seemingly given a copy of related documentation. The first demand for payment made by the Plaintiff dated November 13, 2008 (which the Defendant denied receiving) post-dated (a) the Defendant's jet-ski transaction, and (b) the Plaintiff's second robbery. It is difficult to see why, if the Plaintiff's version was right and a flat fee of $60,000 was agreed in June 2008, it was only after these significant events had occurred that he made his first written demand for payment.

What the Defendant owes

26. I reject the Defendant's suggestion that the Plaintiff stayed on his craft for as long as 12 months. The best available evidence suggests that when the Plaintiff was admitted to the Mid-Atlantic Wellness Centre in mid-January, 2009 following a second robbery and an assault it was clear that he was not intending to return to live on 'Brightside'. From June

2008 through January 2009 (8 months), the Plaintiff was in practical terms a tenant of the Defendant's even if his actual time on board was less than this.

27. The Plaintiff received 8 months worth of accommodation @$3000 per month= $24,000. The Defendant owes him in total $36,000. In other words, the Plaintiff is entitled to an additional $12,000 on top of the $24,000 already awarded in his favour. On the facts, no question of setting aside the partial judgment for $24,000 arises in any event. Although it is possible the Plaintiff in fact paid rent for some of this period of time as he suspects, there is no reliable evidence to support his suspicions.

Conclusion

28. The Plaintiff is entitled to judgment in the total amount of $36,000 (i.e. $12,000 in addition to the $24,000 awarded by Simmons J on March 16, 2010 together with, subject to hearing counsel, interest at the statutory rate from the date of the Writ (October 6, 2009) and costs to be taxed if not agreed.

Dated this 22nd day of July, 2011

KAWALEY J