In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2010: 405

BETWEEN:

M&M CONSTRUCTION LTD.

Plaintiff

-v-

CLAUDIO VIGILANTE

Defendant

RULING

(In Chambers)

Date of Hearing: January 17, 2012
Date of Ruling: January 25, 2012

Mr. Paul Harshaw, Harshaw & Co., for the Plaintiff
Mr. Craig Rothwell and Ms. Olga Rankin, Cox Hallett Wilkinson, for the Defendant

Background

1. The Defendant applies to set aside a judgment in default on the grounds that a limited company he was formerly employed by and not himself personally is truly indebted to the Plaintiff.

2. The present application falls to be determined against the following facts which are either undisputed or found by this Court to be facts for the purposes of the present application:

    - November 22, 2010, Plaintiff issues Generally Indorsed Writ claiming liquidated damages for renovation work done at the Port Royal Golf Course restaurant facilities in the amount of $267,985.86;
    - November 23, 2010, Points of Claim filed;

- December 6, 2010, Plaintiff serves Writ on Defendant;
- December 15, 2010, Defendant (by his previous attorneys) enters an appearance;
- January 6, 2011, Plaintiff files fresh Points of Claim seeking $282,558.06 plus interest;
- January 24, 2011, Harshaw & Co warn Wakefield Quin of Plaintiff's intention to proceed in default;
- January 28, 2011, Judgment in Default of Defence entered in favour of Plaintiff in the amount of $267,985.86;
- February 1, 2011, Defendant receives proposal for a company to assume responsibility for his judgment debt and on or after this date deliberately decides not to apply to set aside the Judgment in Default;
- February 11, 2011, the Defendant on Royal Cuisine Ltd. ("the Company") letterhead proposes a payment plan to the Plaintiff of $5000 per month;
- March 7, 2011, $5000 paid to the Plaintiff, apparently by an unidentified corporate member of the "Fresco Group";
- May 17, 2011, another $5000 similarly paid;
- May 31, 2011, Defendant sells 4000 shares in the Company;
- September 21, 2011, Plaintiff issues a Summons for oral examination of Defendant;
- October 3, 2011, CHW on record for Defendant;
- October 6, 2011, Order for Examination granted by Court;
- October 14, 2011, Defendant files application to set aside Judgment in Default and for leave to issue a Third Party Notice against the Company and swears Affidavit in support: (a) admitting that the Company was never identified to the Plaintiff prior to judgment being entered against the Defendant but asserting that the Plaintiff knew or ought to have known that it was orally contracting with a member of the Fresco Group; (b) asserting that all invoices were addressed by the Defendant to the "Fresco Group" and that $218,956.43 previously received by the Plaintiff was in fact paid by the Company, which at all material times employed the Defendant as its General Manager; (c) admitting that on or about February 2, 2011 the Defendant learned of the Judgment in default against him and that Wakefield Quin could no longer act because of a conflict of interest; and (d) admitting that the Defendant took no steps to set aside the Judgment because he hoped the Company would assume responsibility for it until he was dismissed as General Manager on September 23, 2011.

3. At the end of the hearing of the Defendant's application, I granted leave to him to issue a Third Party Notice against the Company but reserved judgment on the application to set aside the Judgment in Default. The disposition of this application appeared to turn in large part on a nice point of agency law not previously-to the knowledge of counsel or this Court- considered by the Bermudian courts.

Test applicable to setting aside a default judgment

4. Mr. Harshaw correctly submitted that the Defendant had to demonstrate more than an arguable defence and was required to make out a defence with a "*real prospect of success*": *Dobie-v-Interinvest (Bermuda) Ltd. and Black* [2009] Bda LR 31 (at paragraph 14), citing *Alpine Bulk Transport Co. Inc. v Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's LR 221 at 223. While the explanation as to how the default occurred is a subsidiary factor, Sir Roger Ormrod in the *Saudi Eagle* case (at page 225) concluded the English Court of Appeal's judgment with the following words:

> "*The conduct of the defendants …in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case. While it does not amount to an estoppel in law, the Court can and must consider it. The principle of election and the maxim about approbating and reprobating are, in origin, rules of equity and as such give some indication of where the justice of a case may lie.*"

Does the Defence have reasonable prospects of success?

5. The Defendant's evidence is very credible reflecting no attempt to exaggerate the crucial parts of his own case. He admits that the contract was an oral one and that the Plaintiff had no actual or constructive knowledge of the particular corporate entity that the Defendant considered he was acting as agent for. In these circumstances, Mr. Rothwell submitted that the Defendant was very arguably not liable to the Plaintiff at all; Mr. Harshaw countered that the Plaintiff was clearly entitled in law to sue the Defendant as the agent of an unidentified principal in any event.

6. '*Bowstead and Reynolds on Agency*', 19th edition, at paragraph 9-016 state:

> "*It is therefore submitted that the courts should be willing to adopt a rule of at least prima facie liability together with the unidentified principal unless it is absolutely clear that the person concerned acted as agent only.*"

7. The learned authors concede that the common law does not yet clearly recognise a *prima facie* rule to the said effect. On the other hand, there are cases where the courts have applied the more generous undisclosed principal rules to facts which are more properly characterised as unidentified principal cases. Mr. Harshaw relied on paragraph 8-075 in *Bowstead and Reynolds on Agency* in this regard: "*In all these cases the first requisite would of course be that the agent was liable as a contracting party: otherwise the situation would lack certainty.*" It appears that there is no invariable rule that a person contracting with the agent of an unidentified principal has a duty to make enquiries with a view to ascertaining on whose behalf the agent is acting.

8. The present case appears strongly to be one where the Defendant concluded a contract on behalf of an unidentified principal in circumstances where, if he could not be sued, the transaction would lack certainty. Legal policy would potentially be more likely to dictate that the Plaintiff is entitled to sue the Defendant with whom the oral agreement was actually consummated than to conclude that either: (a) the Plaintiff must be deemed to have contracted with a legal person unknown to the Plaintiff until after judgment; or (b) the Plaintiff should have no contractual right of action at all because it failed to ascertain the identity of the Company at the relevant time.

9. Accordingly, I find that the Defendant has, at best, only marginally good prospects of establishing that he was not liable to be sued at all on the relevant contract.

Exercise of discretion

10. The Plaintiff will clearly be prejudiced if the judgment is set aside over a year after it was obtained in circumstances where the Defendant (a) deliberately elected not to apply to set it aside and (b) negotiated with the Plaintiff to pay off the judgment debt on a monthly basis. Setting aside the judgment will interfere with its accrued post-judgment interest and priority rights and postpone its ability to obtain a judgment for an undisputed debt for several months.

11. Having regard to the fact that in purely factual terms there is no dispute as to the Plaintiff's entitlement to the outstanding portions of the judgment debt in respect of invoices which have never been challenged, the potential complexity of the agency law issues which the Defendant's defence would require to be tried and the marginally good strength of the defence, the costs of any such trial (as between the Plaintiff and the Defendant) would likely be disproportionate to the importance of the case and wasteful in expense terms.

12. It is difficult to see how justice will be served by requiring the Plaintiff to suffer the commercial prejudice of a risk assumed by the Defendant, a businessman who had access to legal advice. If the Default Judgment remains in place, it will be for the Defendant to pursue the Company in Third Party proceedings. If it is set aside, the Plaintiff will have to incur the costs of pursuing in contested proceedings both the Defendant and (possibly) the Company for what is in substance an undisputed debt.

13. The Default Judgment is a simple money judgment entered against a businessman which he was happy to leave in place as long as it was paid for by the Company. It would encourage misuse of the Court's machinery to permit litigants to freely elect not to challenge a default judgment for several months and then to change course at their own whim. Moreover, the Defendant's prospects of success are only marginally good.

14. In the exercise of my discretion, I decline to set aside the Judgment in Default. Unless either party applies by letter to the Registrar to be heard as to costs, the costs of the present application are awarded to the Plaintiff to be taxed if not agreed.

Dated this 25th day of January, 2012 _____
KAWALEY ACJ