[2013] SC (Bda) 48 Civ (27 May 2013)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 329

BETWEEN:

BERMUDA INVESTMENT ADVISORY SERVICES LIMITED

Plaintiff

-v-

AURELIA RESEARCH (BERMUDA) LIMITED

Defendant

EX TEMPORE COSTS RULING

(in Chambers)

Date of trial: May 27, 2013

Mr. Timothy Marshall, Marshall Diel & Myers Limited, for the Appellant
The Defendant failed to appear

Background

1. In this matter the action was commenced by Specially Indorsed Writ on October 1, 2010. The Plaintiff claimed rent due under a lease in the amount of $77, 235.15.

2. Unbeknownst to the Plaintiff, some two weeks after the present proceedings were commenced, the Defendant changed its name to "Lydertyl (Bermuda) Limited" and a relevant entry was made on the file in the Registrar of Companies Office and, possibly, advertised. The Plaintiff cannot be criticised for not noticing or investigating this matter because on November 15, 2010, one month after the change of name was effected, the attorneys of record, Conyers Dill & Pearman Limited, filed a Defence and Counterclaim under the original name of the Company.

3. The matter did not rest there; because on December 13, 2010 the Plaintiff filed a Reply and Defence and Counterclaim and on December 29, 2010, the Defendant's attorneys filed another pleading, a very short Reply to Defence and Counterclaim. Again, this document was filed under the former name of the company and one would reasonably have expected the change of name to be brought to the attention of the Court by way of amendment to the proceedings by the attorneys for the Defendant. That did not happen.

4. Thereafter, Mr. Marshall for the Plaintiff informs the Court discovery took place in the course of which no disclosure was made of the Defendant's change of name. The Plaintiff issued a Summons for Directions on January 31, 2011 seeking to move the matter on to trial[1].

5. Again unbeknownst to the Plaintiff, and again this is a matter one would have reasonably expected the attorneys for the Defendant to bring to the attention of the Court, another surprising event took place. After the Summons for Directions was issued, late in the following year, the Company convened a Final General Meeting of Members on December 21, 2012 having commenced a voluntary liquidation on a date uncertain before then. The Final General Meeting took place on January 25, 2013, according the Registrar of Companies' records, and the Company was dissolved on that date.

6. On February 15, 2013, the Plaintiff issued a further Summons for Directions. Further directions were sought and ordered on February 28, 2013 just over a month after the Company had been dissolved. Mr. De Silva appeared and indicated that he had no instructions. That signified to the Court that, perhaps, he was having difficulty in getting instructions from a company which still existed. In fact the true position

[1] Contrary to the usual practice, this Summons was disposed of through a Consent Order dated February 18, 2011.

was, it now appears based on all the material before the Court, that the Defendant had not only changed its name shortly after the commencement of the proceedings but had entered voluntary liquidation on the premise that it owed no debts and was solvent and had in fact (now) been dissolved.

7. It is difficult to comprehend how counsel could properly form the view that it was not necessary to advise the Court or the Plaintiff's attorneys of the true position. It is entirely possible that there was some breakdown in communication[2]. But from a legal standpoint, when a company enters voluntary liquidation with a liquidator being appointed from within the same 'firm' of attorneys who are the attorneys of record in the litigation, the Court is bound to impute the knowledge of those handling the liquidation to those handling the litigation.

8. And so, quite unreasonably, the Plaintiff was led to believe that the Company still existed; that it made sense to prepare the present matter to trial. And the Plaintiff did in fact prepare for trial. Witness Statements were taken and filed. The matter was listed for hearing this week. Today, on the original trial date, the Plaintiff has appeared through counsel and the Defendant has not appeared in circumstances where the attorneys of record have remained on the record rather than, as one might have expected, applying to come off the record on the basis that they had no instructions. And that is something that one would have expected to have happened long before the directions were ordered by this Court on February 28, 2013.

The Plaintiff's application for costs

9. In these circumstances Mr. Marshall, quite understandably, seeks costs against the attorneys of record or Mr. De Silva personally. He relies on the provisions of Order 62 rule 11 of the Rules of this Court which provide in material part as follows:

> "*11 (1) Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may —*
>
> *(a) order —*
>
> *(i) the attorney whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or*

[2] I.e. an internal breakdown of communication within the substantial firm.

(ii) *the attorney personally to indemnify such other parties against costs payable by them; and (iii) the costs as between the attorney and his client to be disallowed…*" [emphasis added]

10. Order 62 rules 4 and 5 go on to say:

> "*(4) Subject to paragraph (5), before an order may be made under paragraph (1)(a) of this rule the Court shall give the attorney a reasonable opportunity to appear and show cause why an order should not be made.*
>
> *(5) Without prejudice to Order 32, rule 5 (3), the Court shall not be obliged to give the attorney a reasonable opportunity to appear and show cause where proceedings fail, cannot conveniently proceed or are adjourned without useful progress being made because the attorney —*
>
> *(a) fails to attend in person or by a proper representative;*
>
> *(b) fails to deliver any document for the use of the Court, which ought to have been delivered or to be prepared with any proper evidence or account, or*
>
> *(c) otherwise fails to proceed.*"

11. It seems to me that this is a classic case where the individual attorney and the attorneys of record have been given notice of today's hearing and have simply failed to attend. And so the scope for them to complain about an Order being made in their absence has got to be very limited indeed although as a matter of law it cannot be excluded altogether.

12. The only question which troubled me with Mr. Marshall's application was the question whether or not it was proper to make an order against Mr. De Silva personally as the attorney who had the conduct of the matter as opposed to against the firm which was on the record as attorneys of record.

Disposition

13. The language of Order 62 does give rise to some ambiguity but I accept that the clearest and simplest reading is that the attorney individually is responsible, And that view is supported by a decision of Bell J (sitting as a single judge of the Court of Appeal) in *WM Hollis et al -v-Scrymgeour* [2008] Bda LR 31, where he awarded costs against a member of a firm personally as opposed to against the attorneys of

record. However, it seems to me reading the Rules purposively that they are open to a reasonable interpretation that where a firm of attorneys is on the record, as opposed to a sole practitioner, that firm must be answerable to an order for costs[3]. Otherwise, it seems to me, there would be room for the rule to become commercially meaningless in circumstances where a significant award of costs was made and the individual attorney was a man of straw.

14. In all the circumstances the Order which I propose to make is in terms of paragraph 2 of the Summons issued returnable for today, namely that counsel for the Defendant Mr. Ray De Silva and/or Conyers Dill & Pearman Limited shall pay all of the costs thrown away from February 28, 2013 to date, including the costs of today's hearing, on an indemnity basis.

15. I also order that the trial listed for today should be adjourned *sine die* and that all other costs in the action shall be reserved.

Dated this 27th day of May, 2013 _____
IAN.R.C. KAWALEY C.J.

[3] See especially the language of Order 62 rule 11(1)(a)(i).