In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 449

BETWEEN:

ADAM JOHN GIBBONS

RYAN HEYRANA

Plaintiffs

-and-

SEAN DESILVA

Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Benjamin McCosker, Walkers (Bermuda) Limited, for the Plaintiffs**

Mr. Richard Horseman, Wakefield Quin Limited, for the Defendant

Dates of Hearing: **21 August 2020**

Date of Judgment: **6 October 2020**

JUDGMENT

Application to set aside a regularly obtained judgment in default of pleading; relevant test to be applied; relevance of the reason leading to the default judgment

HARGUN CJ

Introduction

1. This is an application by Sean DeSilva, the Defendant, to set aside a default judgment dated 18 February 2020. The default judgment was obtained by Adam Gibbons and Ryan Heyrana, the Plaintiffs, on the ground that the Defendant had failed to file and serve the Defence in this action as required by the Rules of the Supreme Court. By that Judgment, the Court ordered that the Defendant pay to the Plaintiffs $39, 590 and pre-judgment interest pursuant to the Interest and Credit Charges (Regulation) Act of 1975 in the sum of $364.44 together with costs of the proceedings.

Procedural Background

2. The Plaintiffs commenced these proceedings by Specially Endorsed Writ of Summons filed on 7 November 2019. In the Statement of Claim, the Plaintiffs relied upon a binding agreement between the Plaintiffs and the Defendant, in September 2018, whereby the Defendant agreed to purchase in Florida a 20 ft. Aqua Sport Centre Console built in 1979 (the "**Vessel**"), import it to Bermuda and thereafter to refurbish it so that it could be used for recreational purposes in Bermuda's harbours and littoral waters. The Statement of Claim alleges that the Defendant agreed that he would sell the refurbished Vessel to the Plaintiffs for an "*all inclusive*" price of $15,000.

3. In the Statement of Claim, the Plaintiffs assert that it was an implied term of the agreement that the Vessel would be structurally and mechanically sound; and that it would be delivered in a safe and seaworthy condition, suitable for recreational use in Bermuda's harbours and littoral waters. The implied term is said to be necessary in order to give "business efficacy" in accordance with the principle in the *The Moorcock* (1889) 14 PD 64 and section 14 of the Sale of Goods Act of 1978.

4. The Plaintiffs further allege in the Statement of a Claim that in about May 2019, the Defendant announced that the refurbishment and remedial work on the Vessel was complete and it was ready for sea trials. The Plaintiffs arranged for the Vessel to be inspected by a qualified marine surveyor, Mr. Tyrone Sampson, to confirm the seaworthiness and insurability. The seaworthiness inspection was carried out by Mr.

Sampson on 9 May 2019. Mr. Sampson's report identified, inter alia, the following issues with the Vessel which, the Plaintiff alleged, compromised its seaworthiness:

a. The core of the cockpit sole had delaminated, comprising the cockpit sole and making it impossible to permanently secure the centre console of the Vessel;

b. The engine bilge was not watertight;

c. The fuel tank filler hose had deteriorated and needed to be replaced with an approved type; and

d. The low-lying water line and soft cockpit sole required an additional bilge pump together with a redundant electrical supply.

5. In his report, Mr. Sampson concluded that the Vessel had been cosmetically overhauled but that the sole was compromised to the point where the Vessel was a poor marine risk:

> *"The above vessel at this inspection had the transom replaced and deck, hulls, bottom and sides nicely painted. The bottom appeared structurally sound and in good condition. However, it is not a good marine risk in its present condition."*

6. Following the seaworthiness inspection and the delivery of Mr. Sampson's report, the Plaintiffs allege that they asked the Defendant to undertake further remedial work to ensure that the Vessel could be delivered in accordance with the terms of the agreement. The Plaintiffs further allege that the Defendant stated that he would not undertake the further remedial work required to ensure the seaworthiness of the Vessel unless the Plaintiffs pay a further sum of US$10,000.

7. As at the date of the Statement of Claim, the Defendant remains in possession of the Vessel and the US$39,500 which has been paid to the Defendant by the Plaintiffs.

8. In accordance with RSC Order 18, rule 2, the Defendant was required to serve his Defence within 14 days after latter of the time limited for appearing or after the Statement of a Claim had been served upon him. In either case the Defendant's Defence was therefore due to be served by no later than Monday 9 December 2019. On 4 December 2019, Mr. Charles Richardson of Compass Law Chambers filed a Memorandum of Appearance on behalf of the Defendant but failed to file the Defence by the required date of 9 December 2019.

9. Counsel for the Plaintiffs sent an email to Mr. Richardson on the 20 January 2020 putting him on notice that the Plaintiffs intended to enter a default judgment against the Defendant on Friday, 24 January 2020, on the ground that he had failed to serve the required Defence.

10. The Defendant failed to file the required Defence by 24 January 2020 and as a result Judgment in default of Defence was signed by the Registrar of the Supreme Court on 18 February 2020 in the amount of $39, 590 together with pre-judgment interest in the sum of $364.44. The Plaintiffs were also awarded costs of these proceedings.

11. By Summons dated 6 March 2020, Compass Law Chambers, on behalf of the Defendant, sought to set aside the default judgment dated the 20 February 2020. The Summons is supported by the affidavit of Mr. Charles Richardson dated 25 February 2020. In his affidavit Mr. Richardson explains that shortly after being provided with the Writ of Summons, he prepared the Memorandum of Appearance and the Statement of Defence. However, whilst the Memorandum of Appearance was filed with the Supreme Court Registry, the Statement of Claim was never filed or served upon the Plaintiffs' attorneys. Mr. Richardson explains:

> *"Most regrettably, in preparation for the complex murder trial which I am currently involved in, I inadvertently and mistakenly did not file the [Statement of Defence] and did not properly prioritize the requisite documents for this matter; however, it must be stressed in the strongest possible terms that this was an unintentional oversight on my part and not the fault of my client, [Mr. DeSilva].*

> *Accordingly, I have been instructed to apply to the Court to set aside the default judgment."*

12. In his affidavit Mr. Richardson states that upon hearing an application to set aside a default judgment, the Court will consider, inter alia, whether there is a genuine defence that is reasonably arguable. In relation to that issue Mr. Richardson contends that a reasonably arguable defence indeed exists:

> *"13. Plainly stated, the salient issue in this matter appears to be whether the boat was structurally sound and fit for recreational use in Bermuda's Harbour and littoral waters; respectfully, the facts of this matter demonstrated that the boat was clearly fit and sound for these purposes.*
>
> *14. Further to this point, the question as to whether the boat would satisfy the stringent and discretionary requirements for insuring a boat which had aged as much as the one in this matter (i.e. would it be from an insurer's perspective, a good marine risk?) is separate and distinct from the question as to whether the boat was structurally sound and fit for recreational use in Bermuda's harbour and littoral waters.*
>
> *15. Simply put, whether or not the boat was, from an insurer's perspective, "a good insurable risk" was neither an express nor implied term of the contract between the parties.*
>
> *16. In sum, I am resolute in the assertion that my client has a genuine and arguable defence to the present claim."*

13. In the Defence, settled by Mr. Richardson, the Defendant asserts that the all-inclusive quote of US$15,000 was always subject to the condition that all prices and estimates quoted may be subject to change.

14. In that draft Defence, the Defendant admits the implied term that the boat would be in a safe and seaworthy condition for the purposes of being used recreationally in Bermuda's harbours and littoral waters. However, the draft Defence asserts that "*there was never any agreement that the boat would be "insurable" for the price of $15,000."*

15. The Defence settled by Mr. Richardson also admits the issues identified by Mr. Sampson and as set out at paragraph 4 above. However, the draft Defence states that these issues "*did not and would not affect the seaworthiness or safety of the boat for the purposes for which it was stated to be required for. Those matters might have an effect on the assessment of an insurer looking to extend coverage, but they are not relevant to seaworthiness as properly defined by reference to the purpose for which the boat was to be used."*

16. The Court was also provided with a draft Defence drafted by the Defendant's new attorneys, Wakefield Quin. In this draft Defence, the Defendant denies that the works outlined in Mr. Sampson's report, as set out at paragraph 4 above, were necessary in order to render the boat seaworthy. It is positively asserted that the boat was and is seaworthy. The Defence settled by Wakefield Quin does not seek to make any distinction between seaworthiness for the purposes of navigating Bermuda harbours and littoral waters on the one hand and whether the Vessel was a *"good risk*" for the purposes of insurability on the other hand.

Relevant test for setting aside a default judgment

17. In the Supreme Court Practice,1999, the editors state the relevant principles at 13/9/18 in the following terms:

> *"The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the Court should pay heed, 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 because,*

if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in <u>*Alpine*</u> <u>*Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle*</u> *[1986] 2 Lloyd,s Rep. 221 at 223,CA, where the earlier cases are summarised. From that case the following propositions may be derived:*

(a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under O. 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.

(b) If proceedings are deliberately ignored this conduct although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside"

18. The editors of the Supreme Court Practice go on to state that the preferred view is that unless potentially credible affidavit evidence demonstrates a real likelihood that a defendant will succeed on fact no *"real prospect of success"* is shown and relief should be refused.

19. In *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, Potter LJ considered the issue of burden of proof in relation to the requirement of showing "realistic prospect of success":

8. "I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the <u>*Saudi Eagle*</u> *that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under R.S.C. Order 14…*

> *9. In my view, the only significant difference between the provisions of CPR 24.2 and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under CPR 13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under CPR 24.2.*
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> *10. It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24. However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].”*

20. It follows that in order to succeed in setting aside a default judgment, the defendant has the burden of proof of establishing that he has a realistic prospect of success. A realistic prospect of success is one which carries some degree of conviction, and must be one more than merely arguable. That burden is ordinarily discharged by the defendant filing “credible affidavit evidence” demonstrating a real likelihood that he will succeed in his defence. In the circumstances where there is a dispute on the facts, the Court is not bound to accept

everything said by a party in his affidavit in support of the application to set aside a default judgment. The Court is entitled to consider whether there is real substance in the assertions being made by the defendant.

Discussion on realistic prospect of success

21. The central issue raised in the Statement of a Claim is whether the issues identified by Mr. Sampson in his report, as set out at paragraph 4 above, rendered the Vessel unseaworthy for recreational use in Bermuda's harbours and littoral waters. The existence of the implied term as to seaworthiness is admitted in the draft Defence settled by Mr. Richardson. That draft Defence also admits the existence of the issues identified by Mr. Sampson in his report (see paragraphs 15 and 16 of the draft Defence settled by Mr. Richardson).

22. Photographs of the Vessel show that it is a center console boat. The Plaintiffs contend that the most fundamental defect which rendered the Vessel unseaworthy was that the cockpit sole had delaminated, making it impossible to permanently secure the center console to the hull of the Vessel. In simple terms, the Plaintiffs contend, Mr. Sampson, the marine surveyor, found that although the hull was structurally sound, the entire structure of the Vessel which sat upon it was not properly attached. On the face of it, if the true factual position is that the center console could not be permanently secured to the hull of the Vessel, it would accord with common sense that the Vessel would not be seaworthy.

23. The only affidavit evidence filed in support of the application to set aside the default judgment is the affidavit of Mr. Richardson, the Defendant's *former attorney.* Mr. Richardson deals with this issue at paragraph 13 of his affidavit where he states: *"Plainly stated, the salient issue in this matter appears to be whether the boat was structurally sound and fit for recreational use in Bermuda's harbour and littoral waters; respectfully, the facts of this matter demonstrated that the boat was clearly fit and sound for these purposes."* Mr. Richardson does not state that he has any particular qualifications to express this opinion. Furthermore, the affidavit makes no attempt to expressly deal with

the serious allegation that the fact of the cockpit sole becoming delaminated made it impossible to permanently secure the center console to the hull of the Vessel.

24. Mr. Richardson, in his affidavit, seeks to draw a distinction between two issues: whether the Vessel was in such a condition that it was capable of being insured (he accepts that it was not); and whether the Vessel was in such a condition that it was seaworthy (he asserts that it was). It is not readily apparent why a vessel which is seaworthy should not be a "good risk" for purposes of insurance. In any event, no such distinction is asserted in the draft Defence settled by Wakefield Quin on behalf of the Defendant in August 2020.

25. In the circumstances, I am not satisfied that the Defendant has filed credible affidavit evidence demonstrating a real likelihood that the Defendant has "real prospect of success." In my judgment, the Defendant has failed to discharge the burden of proof which rests upon him to establish that he has a real prospect of success in establishing his defence.

Reason for the default

26. Mr. McCosker, who appears for the Plaintiffs, argues that the Court is entitled to look at the Defendant's conduct and statements and ascertain if, in the circumstances, it should disentitle him from proceeding. In this regard, he relies upon the recent English cases which have made it clear that an attorney's failure to properly prioritise between competing client interests will not amount to a "good reason" to set aside a default judgment. In particular he relies upon the decision of the English Court of Appeal in *Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1537 at [41] where the Court stated:

> *"If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the*

circumstances, that may constitute a good reason… ***But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines.*** *They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."*

27. It should be noted that the above passage sets out the requirements of the English CPR 3.9 which provides:

"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

28. The Bermuda Rules of the Supreme Court have not expressly incorporated the CPR 3.9 (1). However, having regard to the broad principles underlying RSC Order 1A, I consider that the general statement made by the English Court of Appeal in *Andrew Mitchell* can be

taken into account in dealing with an application to set aside a default judgment regularly obtained. Accordingly, overlooking a deadline, whether on account of overwork or otherwise on the part of an attorney, is unlikely to be a good reason. It is a factor which the court can be taken into account in the overall exercise of this discretionary jurisdiction. However, the primary consideration remains whether the defendant can persuade the court by credible affidavit evidence that he has a real prospect of success in establishing a defence.

Conclusion

29. In this case I have come to the view that the Defendant has failed to discharge the burden of proof requiring them to establish, by credible affidavit evidence, that he has a real prospect of success in establishing a defence to the claim of the Plaintiff. Accordingly, I dismiss the Defendant's application to set aside the default Judgment of the Court dated 20 February 2020.

30. In relation to the issue of costs of this application, my provisional view is that the Defendant should pay the Plaintiffs' costs of this application. However, if the Defendant wishes to argue that the Court should make some other order in relation to costs, the Defendant must make such an application within the next 21 days.

Dated this 6th day of October 2020

NARINDER K HARGUN

CHIEF JUSTICE