Neutral Citation Number: [2022] CA (Bda) 19 Civ

Case No: Civ/2022/12

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE ELKINSON
CASE NUMBER 2021: No. 001

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 17/11/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

RISA GREEN

Appellant

-v-

TIFFANY MAHRAOUI

Respondent

Eron S.L. Hill, McKenzie friend, assisting the Appellant appearing in person

Christopher Swan, Christopher E. Swan & Co, for the Respondent

Hearing date(s): 10 November 2022

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APPROVED REASONS

KAY JA:

1. These are the reasons explaining why on, 10 November 2022, we allowed this appeal.

Introduction

2. This is a Landlord and Tenant dispute relating to an apartment in Devonshire. The proceedings have a tortuous history. In setting out the chronology I refer to Ms. Risa Green as "the Tenant" and Ms. Tiffany Mahraoui as "the Landlord"

The Chronology

3. On 9 September 2019, the Landlord and the Tenant entered into a tenancy agreement. On 13 January 2020, the Landlord commenced proceedings in the Magistrates' Court claiming $9,701 in respect of rent, damage to the property and other matters. The particulars referred to a notice to quit, *"effective 31 January 2020"*. On 31 January 2020, the return date specified in the Summons, Magistrate Chin ordered the Landlord to provide further and better particulars of the claim, which was amended to $14,713. He further ordered a defence to be filed within 14 days, and fixed a trial date for 10 March 2020.

4. On 18 February 2020, the Landlord provided further and better particulars and, on 3 March 2020, the Tenant filed her defence. On 10 March 2020 Magistrate Attridge adjourned the trial to 29 April 2020. On 1 June 2020, no trial having taken place on 29 April, Magistrate Chin, in the absence of the parties, adjourned the case, "*sine die*." On 5 October 2020, the case had (again) been listed for a trial. On this day neither the Tenant nor her attorney, Mr. Arthur Hodgson, was in attendance. The Landlord's counsel applied to the Magistrate for a judgment in default of appearance, and Magistrate Chin ordered judgment in default of appearance in the sum of $17,771.

5. Apparently, on 5 October, the Tenant, who had recently returned from the United States, was in quarantine, and Mr. Hodgson, who had been unwell, arrived at court after judgment had been entered. On 27 November 2020 the Tenant successfully applied to Magistrate Chin to set aside the default judgment. On 5 April 2021, the Landlord filed a Notice of Motion in the Supreme Court, appealing against the order setting aside the default judgement. On 25 April 2022 the Landlord's appeal to the Supreme Court came before Assistant Justice Jeffrey Elkinson. The Tenant was not present and was not represented. The Assistant Justice in an *ex tempore* ruling entered judgment for the Landlord in the summer of $17,771 plus costs, and on 18 May 2022, the Tenant filed a Notice of Appeal in this Court.

The appeal in the Court of Appeal

6. On 10 November 2022, the hearing of the appeal took place in this court when the Tenant was assisted by Mr Eron Hill, her McKenzie friend. There are anecdotal assertions about communications between the parties' legal representatives at various stages and also about contact or lack of contact between the Tenant and Mr. Hodgson.

7. In the event we did not need to investigate these matters. Our decision to allow the appeal was on a basis that called for no consideration of the merits of the underlying case or of the way in which the proceedings have been conducted in the past. It rested on a fundamental point of procedure.

8. It is first necessary to examine what took place at the hearing before Magistrate Chin on 5 October 2020. By that time, the Landlord had served the ordinary summons of 15 January 2020, claiming $9,771, and the further and better particulars dated 18 February 2020 which claimed "damages" in the sum of $14,797. The Tenant had served her defence on 3 March 2020. It amounted to a complete denial of liability. Trial dates had been adjourned on a number of occasions. On this occasion, what transpired is recorded in the following court note by Magistrate Chin:

> *"Defendant fails to appear. The court read aloud its notes dated 14 August 2020 and Jaymo Durham [attorney for the Landlord] confirms that he and his clients are prepared for trial. The court queries whether Jaymo Durham has filed and served his amended claim. Jaymo Durham provided defendant with invoices and documents in support of the amendments to $17,771.60 total inclusive of loss of rent, damages and collection fees associated with those losses. Judgment for $17,771.60 as the Defendant has failed to appear and Defendant has knowledge of an impending increase."*

9. In other words, being satisfied that the Tenant knew of the listing and the proposed increase in the quantum of the claim, and having received no explanation for the absence of the Tenant and her attorney, Magistrate Chin simply entered judgment against the Tenant for the increased amount claimed. No evidence was adduced at the hearing.

10. On 5 October 2020, the governing procedure was that contained in Order 15 of the Magistrates' Court Rules 1973 ("the Rules") which applies to *"...the hearing of a suit upon the date to which the hearing was postponed under Order 8."*

11. Order 15/4 then goes on to provide as follows:

> *"If the plaintiff appears, and the defendant does not appear, or sufficiently excuse his absence, or neglects to answer when duly called the court may, upon proof of service of the notice of trial where such notice is required by these Rules, proceed to hear the suit and give judgment* ***on the evidence adduced by the plaintiff****, or may postpone the hearing of the same and direct notice of such postponement to be given to the defendant."* [Emphasis added]

12. That provision was not followed by Magistrate Chin. He did not, *"proceed to hear the suit and give judgement on the evidence adduced by the plaintiff."* No evidence was given; that was a significant error. He should have, at least, required the Landlord's attorney to call his client in order to prove the case. A suitably sceptical judge would no doubt also have probed the issue of the spectacularly increased quantum of the claim.

13. What happened in the proceedings thereafter was all constructed on that fundamental error. Magistrate Chin later set aside the judgment in the belief that he was *"setting aside a default judgment"*, by reference to well-known authorities from England and Wales, (*Alpine Bulk*

Transport Co v Saudi Eagle Shipping Co Inc, The Saudi Eagle [1986] 2 Lloyd's Rep. 221) and Bermuda (*Gibbons and Heyrana v DeSilva* [2020] SC (Bda) Civ). However, they were concerned with setting aside judgment in default of pleadings, not fully pleaded cases in which a defendant then fails to appear at trial.

14. The problem was later compounded in the Supreme Court, when Assistant Justice Elkinson purported to quash Magistrate Chin's ruling, whereby he had set aside the so called "default judgment", and to restore that judgment in the sum of $17,771.60. When we raised this procedural history with Mr. Swan, he informed us that there is an established practice in the Magistrates' Court, pursuant to which, when a defendant does not appear at trial, the magistrate will proceed as Magistrate Chin did in this case. He said that a magistrate will sometimes follow the procedure prescribed by Order 15/4 and require the claim to be proved by evidence. But on other occasions, the requirement of proving the case in that way is dispensed with. There is no legal basis which permits the letter course. I suspect that somewhere along the line magistrates have confused the Order 15/4 procedure with the position under Order 8, which is concerned with the procedure, which applies on the return day specified in the original summons. In that situation, where a defendant is absent, and does not give written notice of a defence, admission or counterclaim (which would engage Order 6), the magistrate may proceed to give judgement for the plaintiff, *"without proof of the claim".*

15. Order 8/5 of the Rules it provides:

> *"Subject to Rule 6, if the plaintiff appears on the return day and the defendant does not, the court may, on being satisfied —*
>
> *(a) that the summons has been served in accordance with these rules, at least seven clear days prior to the return day;*
>
> *(b) that the claim is within the jurisdiction of the court and is otherwise a proper claim;*
>
> *(c) that these rules have been complied with give judgement for the plaintiff —*
>
> *(i) without proof of the claim in the case of a debt or liquidated demand; and*
> *(ii) upon proof of the claim in any other case, or otherwise make such order as the justice of the case may require"*

16. However, the present case has at no stage come within that provision. It is a demonstrably defended suit. In these circumstances, any established practice of the kind described by Mr. Swan is without authority. We were able to dispose of this appeal on this simple basis at the hearing. The Tenant with the assistance of her McKenzie Friend, Mr. Eron Hill, had intended to approach the appeal in a different way by seeking leave to amend the Notice of Appeal and placed before the court evidence or material explaining the Tenant's history of non-appearance at the listed hearings. It has not been necessary for us to consider that. It remained in a somewhat inchoate state at the date of the hearing. It would be inappropriate for us to comment on it or to avert to the merits of the underlying dispute, which has already generated costs out of all proportion to the sum claimed.

When allowing the appeal, we remitted the case to the Magistrates' Court for trial, set aside a garnishee order to which the Tenant was subjected pursuant to the enforcement of the judgment, and made an order in favour of the Tenant in respect of the costs of the appeal to this court.

CLARKE P:

17. I agree.

BELL JA:

18. I agree.