In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 50

CURTIS P RICHARDSON

Appellant

-v-

SUGARCANE COMPANY LIMITED

Respondent

JUDGMENT

(in Court)[1]

Appeal against refusal of Magistrates' Court to set aside a default judgment

Date of hearing: October 24, 2016
Date of Judgment: November 15, 2016

The Appellant appeared in person
Mr Dante Williams, Marshall Diel & Myers Limited, for the Respondent

Introductory

1. By an Ordinary Summons dated August 27, 2014, the Respondent (under the name of Sugar Cane Condominium Association)[2] sued the Appellant for $5887.50 in respect of condominium maintenance fees for September 2013 until July 2014.

[1] The present judgment was circulated to the parties without a formal hearing in order to save costs.

2. On or about October 31, 2014, the Respondent obtained judgment in default when the Appellant failed to appear. By an undated letter he applied to set aside judgment on the following grounds:

> *"I did not hear the date given and I again apologize for that…*
>
> *Up until receiving the judgment Summons just this week I had no idea that the matter was still being pursued…*"

3. The Respondent meanwhile had failed to appear on January 28, 2015 (when counsel was in another court when the case was called) and wrote the Court to restore the Summons on January 28, 2015. The Appellant reiterated his application by letter dated March 13, 2015 stating that he was ready to pursue his Counterclaim which he filed on or about the same date. The Default Judgment was set aside.

4. The matter was then set down for trial on February 2, 2016. The Appellant again failed to appear and Judgment in Default was entered in favour of the Respondent a second time, this time in the amount of $15,768.75. He again applied to set aside the Default Judgment (this time by email dated February 4, 2016 before a Judgment Summons had been taken out). He explained his failure to appear as, yet again, mishearing the date. This application to set aside prompted two further hearings.

5. The first hearing was on March 2, 2016 (Wor. Nicole Stoneham, as she was then). Mr Williams opposed the application on the grounds that the Appellant was engaging in stalling tactics. The Learned Magistrate refused the application as regards $5209.14 (for reasons which are unclear on the written record) but adjourned the application for the remaining $10,559.61 for hearing on May 30, 2016.

6. The second hearing took place on May 30, 2016 (Wor. Tyrone Chin). The Respondent placed documentary evidence before the Court primarily in the form of emails to substantiate its submission that the Defence had no "*merits to which the Court should pay heed*": *Ball-v-Lambert* [2001] Bda LR 81 at page 3 (Meerabux J). Mr Williams explained that applications to set aside are typically dealt with informally in the Magistrates' Court without evidence being filed on the merits.

The Decision of the Magistrates' Court

7. The Learned Magistrate's Ruling dated June 22, 2016 refers to *Ball-v-Lambert* and summarised the parties' respective cases. His crucial finding on the merits of the Appellant's Defence was as follows:

---

[2] Although the style of the action in various documents suggests otherwise, it seems clear from the Record that the corporation was generally regarded as the true Plaintiff in the Magistrates' Court.

"*In reply, Mr Richardson said there is no signed maintenance contract. It is only oral…his emails are not binding…Mr Richardson wants to see where his money is being spent when he's not paying his maintenance. The Court is of the opinion that Mr Richardson's query may not be genuine as it may well be associated to the fact that he has admittedly stated that he is an unemployed architect…*

Mr Williams made mention that Mr. Richardson had previously missed another date when judgment was entered against him and that Mr. Richardson had provided a similar excuse.

The Court has taken into account the letters submitted by Mr Richardson, the bundle of e-mails from Mr Williams and the oral submissions made by both sides. The Court does not support Mr Richardson's application to set aside judgment… "

Merits of appeal

8. This Ruling was difficult to fault in terms of resolving the application to set aside the Default Judgment. The Court clearly decided on the basis of the correct legal test, central to which is the requirement that the applicant not merely disclose an arguable defence but a "*defence which has reasonable prospects of success*"; it "*must carry some degree of conviction*": *Ball-v-Lambert* [2001] Bda LR 81, citing Sir Roger Ormrod in *Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc.* [1986] 2 Lloyd's 221 at 223. Mr Williams also aptly relied upon more recent decisions of this Court applying the same principles: *Wakefield and Accardo-v- Marshall* [2010] Bda L.R. 53 (Wade-Miller J); *M & M Construction Ltd.-v- Claudio Vigilante* [2013] Bda L.R. 6 (Kawaley J).

9. Was the informal procedure adopted by the Magistrates' Court unfair to the Appellant? In this Court directions would have been given for the filing of Affidavit evidence in support of and in opposition to an application to set aside. On balance, I find that proceeding informally when a litigant in person is involved (as is often the case in the Magistrates Court) will in most cases enhance the fairness of the hearing rather than impairing it. The Appellant's case here was that no (or no sufficient) documentary evidence of the contract sued upon existed, so he can hardly complain of injustice flowing from being denied an opportunity to place documentary evidence before the Court.

10. The email correspondence relied upon by the Respondent clearly demonstrated that the Appellant admitted a general obligation to pay maintenance fees and admissions that he was in arrears. There was no formal Defence, but the Appellant filed a document headed "*Sugarcane Owners Association Matters of Contention*". This document appears to rely upon an agreement evidenced by the Respondent's emails

for the Appellant to do work in lieu of paying maintenance fees, an agreement which was clearly spent, with a credit being given to the Appellant, before the fees subsequently sued for fell due. The Appellant was unable to demonstrate before the Magistrates' Court or before me an arguable defence "*with real prospects of success*".

11. It follows that the appeal must be dismissed.

The Appellant/Defendant's Counterclaim

12. The only issue which I found difficult to resolve at the end of the hearing was, assuming that the appeal was dismissed, what Order the Court should make in relation to the Counterclaim. This issue arose not because the arguments that the Respondent had been guilty of mismanagement of the monies they were collecting from owners appeared credible. The difficulty was that it was unclear from either the Ruling on February 2, 2016 or June 22, 2016 that the Appellant's Counterclaim had ever been dealt with in any way.

13. Mr Williams conceded that the Record was entirely unclear in this regard. In the ordinary course of civil litigation where a default judgment is entered after a counterclaim has been filed, any defence would be extinguished by operation of law leaving intact a counterclaim which asserts claims independent of the claimant's cause of action. I find no proper basis for displacing the presumption that, absent a positive ruling striking-out the Appellant's Counterclaim, it has survived the entry of a Default Judgment on the Respondent's claim.

14. In these circumstances it would be wrong for this Court to make any Order as to the Appellant's Counterclaim and so I leave him free to pursue it, assuming it has not been struck out, before the Magistrates' Court.

Conclusion

15. The Appeal against the refusal of the Magistrates' Court in Rulings dated March 2, 2016 and June 22, 2016 to set aside the Default Judgment entered against the Appellant in the Magistrates' Court on February 2, 2016 is accordingly dismissed.

16. Unless either party applies by letter to the Registrar to be heard as to costs, the Appellant shall pay the Respondent's costs of the appeal, to be taxed if not agreed.

Dated this 15th day of November, 2016 _____

IAN R.C. KAWALEY CJ