Neutral Citation Number: [2021] CA (Bda) 2 Civ

Case No: Civ/2020/12

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2019: No. 449

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 19 March 2021

Before:

THE PRESIDENT, SIR CHRISTOPER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

SEAN DESILVA

Applicant

- v -

ADAM J GIBBONS

1st Respondent

- and -

RYAN HEYRANA

2nd Respondent

Mr. Richard Horseman of Wakefield Quin Ltd. for the Applicant

Mr. Benjamin McCosker of Walkers (Bermuda) Ltd. for the Respondents

Hearing date : 2 March 2021

- -

APPROVED JUDGMENT

Default judgment - application for leave to appeal out of time - appropriate test

BELL JA:

Introduction

1. The application before the court in this appeal is for leave to appeal the refusal by the Chief Justice to set aside a default judgment dated 18 February 2020, and his refusal of an extension of time within which to make that application. The Chief Justice refused to set aside the default judgment in a judgment dated 6 October 2020, and refused leave to appeal that decision and an extension of time within which to do so on 17 December 2020. The applications were then renewed to this court. I will refer to the parties as the Appellant and the Respondents, even though leave to appeal has not yet been granted.

2. The default judgment was for the relatively small amount of $39,590, together with costs. The proceedings leading to the judgment had been commenced by a Specially Indorsed Writ of Summons dated 7 November 2019, with the claim said to have arisen from a contract for the purchase of a 20 foot Aquasport motor vessel. It was pleaded that the Respondents had approached the Appellant in relation to the purchase, importation and refurbishment to a seaworthy condition of the vessel in question for an "all inclusive" price of US$15,000. The contract itself was said (paragraph 6) to have been evidenced by a series of email and WhatsApp exchanges between 27 August 2018 and "around" 30 September 2019, pursuant to which the parties agreed the basis on which the Appellant would import and refurbish the vessel, and the price which the Respondents would pay.

3. Paragraph 7 of the Statement of Claim then sets out the obligations of the Appellant in terms of an inspection of the vessel in Florida, its importation into Bermuda and the undertaking of certain specified remedial work, making reference to the need for the vessel to be in a safe and seaworthy condition at the time of handover to the Respondents.

4. Paragraph 8 of the Statement of Claim sets out the implied terms of the contract, namely that the vessel would be structurally and mechanically sound, delivered in a safe and seaworthy condition suitable for use in Bermuda's inshore waters, and pleading that the Appellant would adhere to reasonable commercial standards of fair dealing and would act in good faith in performing his obligations under the contract.

5. Paragraph 9 pleads that in consideration for the Appellant's services, the Respondents were to pay him the sum of US$15,000, which sum it is said was repeatedly confirmed to be expressed on an "all inclusive" basis, making reference to three emails dated 27 August, 29 August and 31 August 2018. These emails were not included in the material later exhibited to the Appellant's affidavit sworn on 10 December 2020, in support of his application for leave to appeal the Chief Justice's judgment refusing to set aside the default judgment.

6. Paragraph 12 pleads that the purchase price of US$15,000 was paid by the Respondents to the Appellant on or about 4 September 2018 (the documentation subsequently exhibited casts doubt on the accuracy of this date, and does not identify when the various further amounts bringing the total to the sum of $39,590 claimed were paid by the Respondents to the Appellant), and that the vessel was landed in Bermuda on or about 26 September 2018.

7. However, paragraph 13 then pleads that there were significant cost overruns such that in the period between September 2018 and January 2019 the Respondents paid to the Appellant an amount in excess of US$39,000, said to be on account of the purchase of the vessel and the remedial work. Given that the remedial work was stated to be part of the contract for which $15,000 was to be paid, it is not clear why the Respondents paid the sums they did, and when and in what amounts they made such payments.

8. I pause at this point to note that in the material exhibited to the Appellant's affidavit there are two documents described as purchase invoices, both dated 5 September 2019, one covering the sale of the vessel for $15,000, stating that a deposit of $5,000 had been paid, and the other referring to the rebuilding of the transom for $7,000 and spray painting for $2,000, towards which total of $9,000 a deposit of $6,000 was paid.

9. The Statement of Claim continues in paragraph15 by pleading that the Appellant had in about May of 2019 announced that the remedial work was complete and that the vessel was ready for sea trials. It was at this time that the Respondents arranged for a survey to be undertaken by a marine surveyor, Tyrone Sampson, who produced a report dated 9 May 2019 ("the Report"), which detailed a number of deficiencies with regard to the vessel's condition. These were set out in paragraph 16 of the Statement of Claim as being "serious issues" which it was said compromised the vessel's seaworthiness. It was pleaded that these issues on the part of the Appellant were a breach of the parties' agreement, insofar as the Appellant had failed to procure a proper inspection in Florida, had failed to deliver the vessel in a safe and seaworthy condition, and had failed to adhere to reasonable commercial standards or act in good faith in connection with the vessel and the remedial work.

10. Finally, in terms of the Statement of Claim, the Respondents pleaded in paragraph 19 that, following delivery to them of the Report, they had asked the Appellant to undertake further remedial work to ensure that the vessel could be delivered to them in accordance with the contract, ie in a seaworthy condition. In paragraph 20 the Respondents pleaded that the Appellant had told them that he would not undertake the further remedial work required to ensure the vessel's seaworthiness unless they paid a further $10,000 to the Appellant. It was this refusal to undertake the further work (which the Appellant did in fact subsequently undertake) that led to the Respondents' refusal to accept delivery of the vessel and the institution of proceedings.

The Course of the Proceedings

11. Appearance was entered on behalf of the Appellant, but apparently this was not served on the Respondents' attorneys, and in any event no defence was filed within the prescribed timeframe, which led to the Respondents obtaining a default judgment on 18 February 2020. Charles Richardson, who was acting for the Appellant at that time, then made an application by summons dated 6 March 2020 to set this judgment aside. The summons was supported by an affidavit sworn by Mr Richardson on 25 February 2020, in which he maintained that the Appellant had a good arguable case. Mr Richardson explained that because of his involvement in a complex murder trial, he had failed to file the defence which had by then been drafted. Although the affidavit does not appear to have exhibited the draft defence, as is the usual practice, the document was before the Chief Justice, because it is referred to in his judgment of 6 October 2020 refusing to set aside the default judgment.

12. In terms of the merits of the Appellant's defence, Mr Richardson averred that the salient issue was whether the boat was structurally sound and fit for recreational use in Bermuda's inshore waters,

and averred that the facts demonstrated that the boat was clearly fit and sound for these purposes. He drew a distinction between that requirement, and the boat's being insurable, no doubt because the Report had concluded that the vessel was not a good marine risk in its present condition, owing to the fact that the cockpit sole was compromised, the core having delaminated, which had made the sole very soft, such that the Tee top and centre console could not be permanently secured.

The Chief Justice's Judgment

13. The matter was argued before the Chief Justice on 21 August 2020, and his judgment delivered on 6 October 2020. The Chief Justice had before him not only the defence which Mr Richardson had drafted, but that drafted by Richard Horseman, whom the Appellant had instructed very shortly before the hearing. He also had before him the Report, which counsel advised us had been handed to the Chief Justice during the course of the hearing. The Chief Justice set out the procedural background, referring to the Report, and Mr Sampson's findings in relation to the delamination of the core of the cockpit sole, which made it impossible to permanently secure the centre console of the vessel, noting Mr Sampson's conclusion that the sole was compromised to the point where the vessel was a poor marine risk. The Chief Justice noted the failure to file a defence within the prescribed period, the consequent default judgment and the subsequent application to set that judgment aside. He referred in detail to Mr Richardson's affidavit and the contention made in that affidavit that a reasonably arguable defence existed.

14. The Chief Justice then turned to the relevant test for setting aside a default judgment, referring to authority, and concluding that it was necessary for the Appellant to show that his defence had a real prospect of success, which burden, he pointed out, was normally discharged by a defendant filing credible affidavit evidence demonstrating a real likelihood that he will succeed in his defence.

15. The Chief Justice then addressed the central issue raised on the pleadings, namely the seaworthiness of the vessel. He referred to Mr Sampson's findings contained in the Report and the critical finding that the centre console could not be permanently secured to the hull of the vessel, saying (paragraph 22 of the judgment) that if that were the true factual position, it would accord with common sense that the vessel would not be seaworthy.

16. He next turned to Mr Richardson's affidavit, and the assertion therein that the boat was clearly fit and sound for the purposes for which it had been sold. He noted that Mr Richardson did not claim to have any particular qualification to express the opinion which he did, and commented that the affidavit had made no attempt to deal expressly with the central issue raised in the Respondents' pleading, namely the delamination of the cockpit sole found by Mr Sampson, and its consequence, as expressed above. He concluded that in the circumstances he was not satisfied that the Appellant had filed credible evidence demonstrating that the Appellant had a real prospect of success.

17. Next, the Chief Justice addressed the reason for the default. He referred to the case of *Andrew Mitchell MP v News Group Newspapers Limited* [2013] EWCA Civ 1537 at [41], where the English court addressed the failure to meet a deadline by reason of overwork or otherwise on the part of the lawyer acting. The case turned on the provisions of the English CPR 3.9, but the Chief Justice considered that the broad principles underlying RSC Order 1A in Bermuda meant that the general statements made in the English case could be taken into account when considering the reasons for overlooking a deadline. All of this led him to the conclusion that the Appellant had failed to discharge the burden of proof requiring him to establish that he had a real prospect of success in establishing a defence to the Respondents' claim. Rule 3.9 of the CPR replaced an

earlier provision which dealt in greater detail with the principles to be applied in relation to an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order. The new CPR rule is much broader, requiring the court to consider all the circumstances of the case, including the need for litigation to be conducted efficiently and at proportionate cost. The judgment moved on to emphasise the need to have regard to the overriding objective.

The Subsequent Appellate Process

18. Since it was an interlocutory judgment, leave to appeal was necessary, and the time within which application for leave had to be made was fourteen days from the date of the Chief Justice's judgment, that is to say on or before 20 October 2020. In the event, no application was made within the prescribed time, and an application for leave to appeal and for an extension of time was then filed in the Registry on 17 November 2020, issued on 7 December and argued before the Chief Justice on 17 December 2020. By that time the Appellant had filed an affidavit, sworn on 10 December 2020, explaining Mr Richardson's omission which had led to the default judgment, his instructions to Mr Horseman, and, for the first time, his case against the claims made by the Respondents being explained. He denied that the centre console could not be permanently secured as indicated by Mr Sampson in the Report, and said that as a result of the Report he had reinforced the sole by installing a new fiberglass floor at a cost of under $4,000. He described the vessel as being a "fixer upper", and said that he was selling the Respondents a boat, and that the Respondents were going to pay separately to make whatever changes they wanted. He acknowledged that as part of the price of $15,000, he had agreed to clean up the boat, paint the bottom and install a motor. He said that the Respondents had embarked on fixing up the boat, making many changes and improvements which were not part of the original purchase price. In regard to the motor, he said that the Respondents had wanted to have an engine which they owned installed, which necessitated a new transom, for which the Respondents had agreed to pay $7,000, and spray painting the entire boat, for which they had agreed to pay $2,000. There were other items which the Respondents wished to have added, and the Appellant exhibited certain emails which do not make the true contractual position much clearer.

19. In addition, the Appellant made reference to the delay in filing the application for leave to appeal. He explained that Mr Richardson had advised him shortly before the hearing date before the Chief Justice that he did not have a case, because the boat had by that time been sold elsewhere. Mr Richardson had put this advice in writing on 17 August, to the effect that in his view a court would find resoundingly against the Appellant if he resisted the Respondents' claim, and saying in the clearest of terms that the Appellant's best course was to settle on the terms which the Respondents had by then offered, seeking no more than the return of the moneys they had paid, and foregoing any claim for legal fees. The Appellant exhibited this letter.

20. The Appellant thought this advice "ridiculous", because he was of the view that by that stage there was an agreement with the Respondents that he should sell the boat (and, by implication, that they should keep the net proceeds of sale). His case at paragraph 16 of the defence drafted by Mr Horseman was that by this time the Respondents had told him that the boat was his to do with as he pleased, since they were refusing to accept delivery on the grounds of the unseaworthiness identified in the Report. It was for this reason that he had instructed Mr Horseman to argue the set aside application before the Chief Justice. The Appellant did not fully explain the delay of almost a month between the Chief Justice's judgment and his application for leave to appeal, save to say that he had tried unsuccessfully to settle with Mr Richardson, whose failure to file the defence in time had led to the Respondents obtaining the default judgment. However, there was an additional

matter to which the Appellant did not make reference in his affidavit. It transpired from the Respondents' skeleton argument on the application to the Chief Justice for leave to appeal the 6 October ruling, that Mr Horseman had advised the Respondents' attorneys on 12 November 2020 that although an application for leave to appeal had by then been drafted (and a copy had been provided to the Respondents' attorneys), it had not been filed because the cost of further proceedings made little sense in the context of the amount in dispute, and Mr Horseman was at that point trying to persuade his client to accept that reality. However, on 17 November, Mr Horseman filed the application and sent a further email to the Respondents' attorneys, explaining that the Appellant wished to appeal, and that he had been obliged to file. The timing is not completely clear, but it would seem that some further part of the delay was occasioned by the advice the Appellant was receiving regarding the cost benefit of pursuing the appeal, when he was in fact already out of time.

21. In any event, the Chief Justice refused both an extension of time and leave to appeal. There was then a period of 7 days within which the applications for leave to appeal and an extension could be renewed to this court, and this deadline was met, supported by an affidavit of 24 December, which was in almost identical terms to that of 10 December 2020.

The Grounds of Appeal

22. The grounds of appeal pleaded first that the Chief Justice had erred in law when he found that the Appellant had not asserted a credible defence on the merits. It was suggested in the application for leave to appeal that Mr Richardson's assertion that "the boat was clearly fit and sound" for recreational use in Bermuda's inshore waters was effectively Mr Richardson giving evidence on behalf of his client in accordance with his instructions. Next it was pleaded that in circumstances where the Appellant's former counsel had failed to file a proper defence and appropriate affidavit evidence, and new counsel had had to pick up matters at short notice, the court had adopted too rigid an approach when considering whether the Appellant had asserted a viable defence. Finally it was suggested that instead of refusing to set aside the judgment, the court should have considered requiring the Appellant to provide security for the due prosecution of the case.

The Appellant's Evidence

23. As indicated above, the Appellant had sworn two affidavits, in almost identical form, the first dated 10 December 2020 in support of his application for leave to appeal the Chief Justice's refusal to set aside the default judgment, and the second dated 24 December 2020 in support of the application to this court. At first glance the two are identical after the opening paragraph, but on close examination there are two minor changes. First, in paragraph 9 of the first affidavit, the Appellant had said, following his denial that the centre console could not be permanently secured as indicated by Mr Sampson, that as a result of the Report he had reinforced the sole by installing a new fiberglass floor at a cost of $3,845. In the second affidavit, before referring to the reinforcement, the Appellant said that the centre console was in fact already secured appropriately. In a similar vein, at paragraph 21 of the first affidavit, the Appellant swore that the vessel was fine now, because he had gone ahead and had done the reinforcement work. In the second affidavit he stated that the vessel was fine before he had undertaken the work in question.

24. What the Appellant did not refer to in either affidavit was the admission that he had made in the second draft defence regarding this work. As mentioned in paragraph 10 above, the Respondents had pleaded in paragraph 20 of the Statement of Claim that the Appellant had told them that he would not undertake the further remedial work required to ensure the seaworthiness of the vessel

unless the Respondents paid him a further sum of $10,000. This was admitted in paragraph 15 of the draft defence prepared by Mr Horseman which was before the Chief Justice. So the Appellant had accepted that he had asked the Respondents for a further $10,000 before he would undertake the remedial work, something which was highly relevant to the course of the dispute between the parties, but to which he made no reference in his affidavit.

This Appeal

25. Mr Horseman contended that the length of the Appellant's delay in making application for leave to appeal was not inordinate, being only 27 days. But he did accept that the delay was attributable to two causes; first was the unspecified period during which the Appellant was seeking to settle a claim against Mr Richardson, and secondly, there was the period in November 2020, when Mr Horseman had drafted, but had not filed, an application for leave to appeal. Instead, he had discussed with his client the obvious problem of the cost of proceeding making little sense in the context of the amount in dispute. It was no doubt for these reasons that the Respondents' attorneys characterised the delay as deliberate and not inadvertent, something which Mr Horseman accepted, as he was bound to do.

26. In terms of the merits of the Appellant's case, Mr Horseman accepted that the court did need to look at the prospects of success. But he also accepted that the Chief Justice had before him only Mr Richardson's affidavit and the two draft defences. And he was bound to accept, as he did, that there was no evidence before the Chief Justice that the problem of the laminated cockpit sole either had been or could be fixed.

27. Mr McCosker emphasised that the Chief Justice had had before him the evidence of Mr Sampson in terms of the Report, on the one hand, when compared with the affidavit of Mr Richardson, which made a bald assertion (my words) regarding the seaworthiness of the vessel, as to which Mr Richardson was not qualified to speak, and which did not, in any event, provide any detail in response to Mr Sampson's specified complaints. He submitted that the Appellant had not demonstrated a defence which had a good prospect of success, nor given good reasons for the default.

Conclusion

28. The one thing which is clear beyond any doubt is that the Respondents paid the Appellant a sum which they claim to have been in excess of $39,000 towards the purchase of an Aquasport vessel, which vessel was not delivered to them, but instead sold elsewhere, although it is now the Appellant's case that such sale was pursuant to an agreement with the Respondents that he would sell the boat. The implication from the Appellant's affidavit is that the Appellant would then account to the Respondents for the sale proceeds, but in the event, he has not done so, because, he says, of their proceedings against him. The Appellant denied that there were cost overruns but does not say what amount was paid to him by the Respondents, while accepting that there were costs agreed and paid for by the Respondents.

29. But the issues before the Chief Justice were whether the Appellant had a good prospect of success in defending the Respondents' claims, and whether he gave a good reason for the failure to file the defence in time, which led to the default judgment. I would reject the contention that Mr Richardson's affidavit represented credible evidence as to the boat's seaworthiness. Neither do I accept Mr Horseman's submission (paragraph 17 of his submissions) that expert evidence would be a matter for the trial. It was something that was required at the time of the set aside application,

to meet the Respondents' case, based as it was on the Report and the condition of the vessel when Mr Sampson inspected it. In the event, the Chief Justice was in my view correct to conclude that the Appellant had failed to discharge the burden of proof resting upon him to establish that he had a real prospect of success in establishing his defence. And in my view the Chief Justice was entitled to look cynically at the Appellant's delay in proceeding with his application for leave to appeal, as I do, as soon as he realised that he was in breach of the time limit prescribed by the rules.

30. I would also note at this point the matter referred to at paragraph 24 above. The Appellant was asking the court to exercise its discretion in relation to setting aside the default judgment. In such circumstances, it was incumbent on the Appellant to be full and frank in his evidence. That duty is not discharged by swearing in an affidavit, first that the boat was sold in "fair condition" (paragraph 1), but also that the alleged defect could be cured (and was) for less than $4,000 (paragraph 2), when in fact the Appellant had refused to undertake any further remedial work without a payment of $10,000.

31. As to the relevance of the *Mitchell* case in relation to delay, I agree with the Chief Justice that having regard to the broad principles underlying the provisions of RSC Order 1A (regarding the need for litigation to be conducted efficiently and at proportionate cost) the general statements made by the court in *Mitchell* can be brought into consideration when the Bermuda court is considering the overall exercise of its discretion in the context of setting aside a default judgment. That is the whole purpose of the overriding objective. And looking at the facts in this case, I would accept Mr McCosker's characterisation of the delay in making application for leave to appeal, at a time when the Applicant knew he was out of time, as being deliberate and not inadvertent. In such circumstances a litigant cannot expect the courts to come to his aid.

32. In the circumstances I would dismiss the applications for leave to appeal, and for an extension of time. In the absence of any application in relation to costs, to be made within 21 days, I would order that the Respondents should have their costs of this appeal.

SMELLIE JA:

33. I agree.

CLARKE P:

34. I also agree. The applications for leave to appeal and extension of time are dismissed.

Geoffrey R. Bell

BELL JA

SMELLIE JA

C.B.S. Clarke.

CLARKE P