In The Supreme Court of Bermuda

CIVIL JURISDICTION

2004: No. 383

BETWEEN:

EUGENE BLAKENEY (Trading as BLAKES HOLDINGS)

Plaintiff

-v-

DENNIS LISTER

Defendant

EX TEMPORE RULING

(in Chambers)

Date of hearing: February 10, 2014

Mr. Ben Adamson, Conyers Dill & Pearman Ltd., for the Plaintiff
Ms. Lovette Tannock, Christopher E. Swan & Co., for the Defendant

Background

1. The present action was commenced by Specially Endorsed Writ filed on November 18, 2004. The claim was for $57,010.65 which was said to be owed under a construction contract by the Defendant who contracted the Plaintiff as a builder.

2. A Defence and Counterclaim was filed on or about December 21, 2004 and the Defendant raised a substantial counterclaim which was alleged to be supported by a technical report and which claimed $495,000. Thereafter a Reply and Defence to Counterclaim was filed.

3. The matter came before me on February 10, 2005, nine years ago today, and directions were given, *inter alia*, for inspection within 14 days and for Scott schedules to be produced 28 days thereafter. The Plaintiff issued a Summons on May 19, 2005 seeking an unless order complaining that the Defendant had not filed his List of Documents or Scott Schedule and the matter came before me again on June 9, 2005 when I made an Order ("the Unless Order") in the following terms:

> "*1. Unless the Defendant do file and serve his list of documents pursuant to the Order of Mr. Justice Kawaley dated 10 February 2005 within 21 days of this Order that judgment be entered for the Plaintiffs and that the Defendant's counterclaim be struck out.*
>
> *2. Unless the Defendant do file and serve his Scott schedule pursuant to the Order of Mr. Justice Kawaley dated 10 February 2005 within 21 days of this Order that judgment be entered for the Plaintiffs and that the Defendant's counterclaim be struck out.*"

4. Costs were also awarded to the Plaintiffs in any event. Thereafter, the next significant event occurred at 4.12 pm on June 30, 2005 when the Defendant filed his List of Documents and Scott Schedule in compliance with the Order. I say "compliance with the Order", but I note at this juncture that the Plaintiff contends that there was non-compliance because, on a strict reading of the words of the Unless Order, there was a requirement to both "file and serve" the relevant documents. And it is complained in the present application, and indeed it was complained shortly after the time for service expired, that service on the Plaintiff's attorneys had not taken place.

5. The next development in the litigation was that on July 1, 2005, the Plaintiff's attorneys sent a letter to the Registrar which simply read as follows:

> "*We enclose for filing a Judgment.*
>
> *Thank you for your assistance and we look forward to receiving the filed copies in due course…*"

6. The letter enclosed a judgment which was drawn up for the Registrar to sign and which she did sign on July 4, 2005. There was nothing in the covering letter to indicate the basis that judgment was being sought[1] but the recitals to the Judgment read as follows:

> "*UPON THE ORDER of the Acting Chief Justice Kawaley dated 10 June 2005 directing the Defendant to deliver his list of documents and Scott Schedule within 21 days of the date of the said order failing which the Plaintiff would be at liberty to enter judgment against the Defendant.*"

7. As already noted, the Judgment was sought without apprising the Registrar of the fact that the relevant obligation had been not just to serve the documents but also to file them. Had that been drawn to the learned Registrar's attention she might well have seen fit to inspect the file and see whether the Order had been partially (and very arguably substantially) complied with by filing the relevant documents.

The present application

8. Thereafter, the matter from the Court perspective went to sleep and the next event on the Court file was the filing of a Notice of Change of Attorneys on September 5, 2013 at 3.02 pm by the Defendant's present attorneys, Christopher Swan & Co. There followed on September 2, 2013 a Summons which was issued by the Defendant which sought to have the Judgment of July 4, 2005 set aside and the Defendant's Counterclaim restored. That Summons was supported by the Affidavit of the Defendant's counsel, Ms. Tannock, which basically set out the history of the matter. The application was then properly fortified by an Affidavit from the Defendant himself, who on February 3, 2014 swore that he had previously instructed Myron Simmons of Lightbourne & Simmons in this matter and that he never received actual notice from that firm of the fact that a Default Judgment had been entered. The state of the litigation, as he understood it to be, was that incomplete attempts to negotiate a settlement had been pursued and, in effect, he assumed as he stated in paragraph 15 of his Affidavit:

> "*That I thought that the matter had just died away, which I felt was in the Plaintiff's best interest considering the amount of my counterclaim.*"

[1] It seems obvious that the failure to refer to that part of the Unless Order which required filing of the same documents in Court was accidental as discovery orders often only require documents to be served on the opposing party without mandating filing in Court. It is also true that the Unless Order could fairly be read as entitling the Plaintiff to enter judgment without more if a default occurred and accepted that the practice in relation to enforcing 'unless orders' in 2005 was probably far from clear, a position that arguably still exists today.

9. He then goes on to say that it was not until 2013 in the course of another business matter that it was drawn to his attention that a judgment had been entered against him. He then instructed his present attorneys to apply to set it aside.

10. The Plaintiff responded to the application with an Affidavit of January 3, 2014 in which he explained why he allowed the action to go to sleep; which was, to use his words in paragraph 8 of his Affidavit:

> "*Mr. Lister is and was a powerful figure in the previous administration. I did not want to send the bailiffs to him while he was in a position of power.*"

11. The other matter of significance which is set out in the Affidavit of the Plaintiff is the complaint that due to the lapse of time it would be impossible for him to have a fair trial. Not only have workers who used to work for him left his employ, which I infer creates a doubt about the extent to which they would be willing to assist him as witnesses in the same way as they would and could have done in the past. But also, having regard to the counterclaim which the Defendant raises, he avers in paragraph 6 of his Affidavit:

> "*I also believe, speaking from experience, that nearly nine years after the construction, it would be impossible to show which defects (if there really were any) were due to my work, to the previous contractor's work or to the subsequent work of the contractor who took over from me, or even to subsequent wear and tear.*"

Determination

12. The present application arises in very unusual circumstances and the first issue which troubled the Court to decide was the question of whether the Judgment was a regular one or not. This question is clouded by the fact that the practice of making unless orders has developed in recent years in the Bermudian courts without the guidance of specific rules. The practice which is normal, in my experience, is as follows. When a party is the beneficiary of an unless order which provides that the innocent party is entitled to enter judgment in the event of non-compliance with the terms of the unless order, the matter of whether or not the aggrieved party is entitled to enter judgment is invariably in my experience put before the trial judge for adjudication.

13. In most cases, if not in all, an application is made by Summons to the Court for a formal order that the innocent party be entitled to enter judgment or indeed be entitled to an order striking out a defence or counterclaim, even if the unless order was drafted in terms which implied that breach of the order would automatically give rise to the

relevant right[2]. I am comforted that such an approach is only consistent with the elementary rules of natural justice by the fact that the English Civil Procedure Rules actually confer an express right for a party who has failed to comply with an unless order or similar order to seek relief from its provisions[3]. And under that regime it appears to be the case that where a party apparently in breach of an 'unless order' fails to apply for such relief, the innocent party may well be able to simply proceed to obtain the order that they hoped to obtain.

14. But, looking at what happened in the present case, I am bound to find that the Judgment which was entered was not a regular judgment[4] because the procedure which was adopted was something akin to the procedure which might have been adopted in relation to a judgment in default of appearance or, perhaps, even a judgment in default of pleadings where the Registrar is asked to sign a judgment administratively. Even in the case of a judgment in default of appearance, the practice is that the applicant for judgment in default does not simply request the Registrar to sign an order but is required to actually adduce proof that the default complained of has occurred. In the case of a default of appearance, a failure to file an appearance is normally elicited by means of a *praecipe*. There is an additional requirement to prove when service occurred so the Registrar can ascertain whether or not to sign a judgment in default based on a clear evidential basis.

15. In this case the Registrar was not made aware of the basis on which the Plaintiff sought to enter judgment. There was a somewhat incomplete reference in the recitals to the Judgment to one part of the Unless Order but the learned Registrar's attention was not drawn to the fact that the Order included a filing requirement which had been complied with. It is quite obvious to me that had an application been made to enter judgment against the Defendant on the grounds that, despite the fact that the relevant document had been prepared and filed within the time limit but had simply been served late, this Court would never have entered judgment in favour of the Plaintiff.

16. The problem that the Defendant still has to face is the question of delay and the position that Ms. Tannock took was, in effect, to invoke the Court's broad equitable jurisdiction to do justice. Mr. Adamson pointed out that, apart from the serious prejudice which his client would face if the Judgment was set aside and the Counterclaim restored because a fair trial is no longer possible, the delay in seeking

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[2] This at least reflects a best recollection of my own experience; the experience other judges may well be different.

[3] Rule 3.9 of the CPR deals with '*Relief from sanctions*' and provides in salient part as follows: "*(1) 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…*"

[4] Under paragraph 13.2 of the CPR, the Court has a positive duty to set aside an irregular judgment, as Mr. Adamson pointed out, conceding that under Bermuda law there was a positive right to have an irregular judgment set aside. No equivalent rule exists under Bermuda law but I took the view that the Defendant ought to be regarded as having a positive right to have the irregular Judgment set aside- subject to meeting the requirements of Order 2 rule 2 of our own Rules.

this relief is inordinate. And, as technical as it may seem to a lay person, the strict legal position is that service took place of the Judgment by service on the Defendant's former attorneys. This fact was deposed to by Mr. Hill in his Affidavit of December 3, 2013 and the evidence that is contained in paragraph 13 of his Affidavit where he says "*I served the Default Judgment on the Defendants on 5 July 2005*" was not contradicted.

17. I was sufficiently concerned about the sufficiency of this evidence to probe Ms. Tannock as to whether or not the position of service on the attorneys had been properly investigated and she very properly disclosed to the Court that she was not in a position to challenge the assertion that the attorneys had been properly served.

18. And so the question which is pivotal, in my judgment, is the question of whether or not the Plaintiff should be allowed to benefit from an irregular judgment when the Defendant (on his own un-contradicted evidence) had no knowledge of the Judgment until approximately a year ago. The relevant rule which I consider is engaged (although the Defendant felt that he could rely on the more stringent test of showing an arguable defence if the Judgment was regarded as a regular one) is in Order 2 rule 2 of the Rules:

> "*(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity*."

19. Clearly, the second limb of the "unless" element in that rule is satisfied because the Defendant has not taken any fresh step in the action, other than applying to set the Judgment aside. The dilemma is the question of whether the application has been made within a reasonable time. Applying a technical and perhaps traditional approach, as I have already indicated, it is obvious that the Defendant has not sought relief within a reasonable time because service of the Default Judgment on his attorney started time running against the Defendant in terms of his wishing to challenge the irregularity. The only question which arises is whether the Defendant should be left, assuming his evidence is correct, of suing his former attorneys for failing to notify him of the Default Judgment.

20. On balance it seems to me that there are two sides to the injustice story. The first side has already been discussed; that is the injustice to the Plaintiff of having to defend a counterclaim which is now, in terms of the events which give rise to it, some 10 years old. The other injustice which the Court cannot ignore is the fact that the Plaintiff, having obtained an irregular judgment, has in fact done nothing to enforce that Judgment for a period of over 8 ½ years. That is an extraordinary period of time for a judgment obtained in highly unusual circumstances to be outstanding and it fortifies, to some extent, the Defendant's complaint that he knew nothing of this Judgment.

21. In a typical case where a late application to set aside is made, the plaintiff has been taking steps to enforce the judgment, it is obvious to the defendant that the judgment exists and the defendant has simply failed to challenge enforcement until the full weight of enforcement bites-typically, when a writ of execution is issued. In this case it seems to me that the true position is that both parties had decided to 'let sleeping dogs lie'. The Plaintiff had decided not to enforce his Judgment and the Defendant had decided not to pursue his counterclaim. Neither party can effectively pursue a trial today and, on balance, it seems to me that the unusual combination of circumstances that have coalesced in this case make it unjust that the Defendant should be exposed, having in a sense brought the action back to life to protect his position, to the risk of the Plaintiff now deciding to enforce a judgment which he has allowed to lie on the Court file for 8 ½ years[5].

22. The original Unless Order which was made in this matter was effectively a case management order made under Order 1A (the "Overriding Objective") and the overriding objective is something that the parties are obliged to help the Court to further under Order 1A/3. The Court is also required to seek to give effect to the overriding objective when it exercises any power given to it by these Rules or interprets any rule and the Court is required, amongst other things, to ensure that cases are dealt with expeditiously and fairly. In summary, the unusual Order that I make in this case is to set aside the Judgment which was signed by the Registrar on July 4, 2005 and to stay the action generally, both as to the Plaintiff's claim and the Defendant's counterclaim on the grounds that neither case can now be fairly tried due to the passage of time.

Alternative finding

23. I should deal with the position, in case I am wrong in reaching this finding, as to how I would I have dealt with the matter had I felt bound to refuse the application to set aside the Judgment.

24. In those circumstances if I was required to refuse to set aside the Default Judgment, I would, in any event, of the Court's own motion have stayed any enforcement of the Judgment on the grounds that the Plaintiff had been guilty of inordinate delay in enforcing his enforcement rights.

Costs

25. I should hear counsel as to costs but I should indicate my provisional that each party should bear its own costs because, in essence, this matter does stem from an error on

[5] It was also, obviously, equally unjust that the Defendant should have such an irregular judgment recorded against him as unsatisfied.

the part of the Court in signing the Judgment when in fact if perhaps the matter had been looked at more carefully, it would have been referred to the trial judge to enable the trial judge to consider whether or not it was appropriate to enter judgment.

[After hearing counsel the Court made no order as to costs as regards the application and the action generally]

Dated this 10th day of February, 2014 _____

IAN R.C. KAWALEY CJ