In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: Nos 81 and 82

BETWEEN:-

(1) FLORINDO CANALE
(2) JUDY CANALE

Plaintiffs

-and-

(1) STEPHEN HOLLOWAY
(2) LESLIE HOLLOWAY

Defendants

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: 6th June 2014

Mr Richard Horseman, Wakefield Quin, for the Plaintiffs
Mr Paul Harshaw, Canterbury Law Limited, for the Defendants

Introduction

1. On 15th March 2011, the Plaintiffs filed writs and judgments by consent in two related actions: Civ 2011 No 82 and Civ 2011 No 81. All these documents were dated 25th January 2011. They were never served on the Defendants.

2. Civ 2011 No 82 was a claim for $344,698.87, comprising $311,393.87 principal and $33,305.00 interest as at 20th November 2009, together with costs and interest as from 21st November 2009.

3. Civ 2011 No 81 was a claim for $35,060.70, comprising $31,673.18 principal and $3,387.52 interest as at 20th November 2009, together with costs and interest as from 21st November 2009.

4. The judgment by consent in each case provided that judgment was entered against the Defendants in the principal sum claimed in the writ, together with costs and interest.

5. Both judgments by consent were signed by both Defendants and by counsel for the Plaintiffs, Christopher Swan ("Mr Swan"). As noted above, they were dated 25th January 2011, which is prior to the date when the writs were issued in March 2011.

6. The Defendants now apply to have the judgments by consent set aside.

Background

7. The Plaintiffs sold their company, Cycles International Limited ("the Company"), to the Defendants. The Second Plaintiff has exhibited copy share transfer forms dated 23rd July 2004 whereby the Plaintiffs transferred the shares in the company to the Defendants.

8. The Plaintiffs claim that they lent $450,000.00 to the Defendants towards the $1.2 million purchase price of the Company. They claim that as security they procured a charge over its shares and stock.

9. The Second Plaintiff has exhibited copies of: (i) a certificate of registration dated 8th June 2005 of a mortgage charge dated 21st July 2004; (ii) particulars dated 6th June 2005 of a mortgage or charge dated 22nd July 2004; (iii) a memorandum of an equitable charge, which was ostensibly signed, sealed and delivered by all the parties on 22nd July 2004; and (iv) a promissory note whereby the Defendants promise to pay the Plaintiffs $450,000.00, which was also ostensibly signed, sealed and delivered by all the parties on 22nd July 2004. The authenticity of these documents has not been challenged.

10. Items (ii) to (iv) were drawn up by Mr Swan in his capacity as attorney for the Company, and he witnessed the parties' signatures to items (iii) and (iv).

11. The Plaintiffs further claim that they lent an additional $50,000.00 to the Defendants for the purchase of stock by the Company. This claim has not been challenged.

12. The Second Plaintiff has exhibited a copy of a loan agreement between the parties whereby the Plaintiffs lent the Defendants $50,000.00 at an interest rate of 8% compounding daily for one year. The document was ostensibly signed by all the parties and witnessed by an unrelated third party. Its authenticity has not been challenged.

13. The sums claimed in the writs were the monies said to be outstanding in respect of both loans. The Second Plaintiff has exhibited spreadsheet records of payments allegedly made by the Defendants showing how the sums claimed in the writs were calculated. These payments have not been challenged.

Litigation history

14. On 4th April 2011 the Plaintiffs issued judgment summonses with respect to both actions returnable on 27th April 2011. They recorded the fact that by orders dated 25th January 2011 the Court had ordered the Defendants to pay the sums claimed in the writs. The summonses were served on the Defendants on 18th April 2011. The Defendants would therefore have been aware from the summonses that judgment had been entered against them.

15. The matter came on for hearing on 27th April 2011 before the Assistant Registrar. The Plaintiffs were represented by their then attorney Michael Smith and the Defendants appeared in person. The Assistant Registrar's notes record the First Defendant as acknowledging that the Defendants had both signed the judgments by consent but that they were not in a position to pay the monies due under them. The Court examined the Defendants as to their means and made orders for them to produce certain documents.

16. There was no suggestion at the hearing by the Defendants that the judgments had been improperly obtained or that the judgment debts were not due and owing.

17. Nothing further appears to have happened in the actions until 25th February 2013, when the Plaintiffs' new attorneys, Wakefield Quin, wrote to the Defendants seeking their proposals for payment of the outstanding debts.

18. In response, the First Defendant prepared a spreadsheet showing the Defendants' average monthly income and outgoings. He mailed this to Wakefield Quin on 27th February 2013 as an attachment to an email. The email stated:

> Hope this helps in understanding my situation, I am happy to talk to you if and when you have any questions.

19. There was no suggestion in the email that the judgments had been improperly obtained or that the judgment debts were not due and owing.

20. On 12th November 2013 the Plaintiffs issued further judgment summonses. The Defendants instructed attorneys, Canterbury Law Limited, who came on the record on 21st November 2013. They applied promptly to set aside the judgments by consent. The applications were supported by an affidavit of the First Defendant. In summary, he:

(1) Accepted that in 2004 the Defendants had purchased shares in the Company from the Plaintiffs.

(2) Complained that he had never been served with any documents in these proceedings other than the two sets of judgment summonses and supporting affidavits. He stated that he knew what court documents looked like as he used to serve court documents in England.

(3) Described the circumstances in which he signed the judgments by consent as follows:

> 7. In or about early 2009 I saw Mr Christopher Swan on the street in Hamilton. I explained to him that my wife and I were going to have to shut down the Company. Mr Christopher Swan told me to come in to see him. I told Mr Christopher Swan that we did not have a lot of money to pay him and he said it was all right and we should come in to see him about shutting the Company down anyway.
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> 8. Later in or about 2009 my wife and I went to Mr Christopher Swan to discuss shutting the Company down, as the Company was not making money and we had no more money to put into it. At that meeting Mr Christopher Swan handed my wife and I a document to sign, explaining that it was a document which required us to pay money to the Plaintiffs for loans in respect of the Company if we came into some money, but not otherwise. As best I can recall the words of Mr Christopher Swan at that time were "*most of this is legal mumbo jumbo, all you need to know is it says that if you come into money you have to pay the Canales*" or words to that effect. … I had no idea then that Mr Christopher Swan was preferring their interests over the interests of my wife and I.

> 9. I trusted Mr Christopher Swan at that time because he was our lawyer. He was our lawyer and he sent us a bill for some $2,000 after that consultation.

(4) Asserted: (i) that the Defendants had already paid more than $1 million towards the purchase of the Company; and (ii) that on the basis of the Second Plaintiff's figures they were making loan repayments and had paid more than $200,000.00.

(5) Sought copies of the documents sued on so that the Defendants could raise a defence to the Plaintiffs' substantive claim.

(6) Complained:

> 15 My wife and I now appear to have judgments against us:
>
> 15.1 arranged by a lawyer we thought was our lawyer but who turned out to be acting for the other side;
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> 15.2 who misinterpreted to us what the meaning of the document we signed really meant;
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> 15.3 which document was "signed" more than a year before the Writ was issued;
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> 15.4 without ever having been served with a Writ of Summons;
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> 15.5 without ever having an opportunity to seek true independent legal advice;
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> 15.6 in respect of "loans" which should have been paid off by the payments of some 1 million dollars previously paid to the Plaintiffs.
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> 16 I do not understand how it can be said that the rule of law has operated in this case or how it can be said that my wife and I have been afforded access to the courts and a fair trial of the matters in issue.

21. On 8th January 2014 the Court ordered by consent that enforcement of the judgments by consent be stayed pending the determination of the applications to set them aside.

22. Meanwhile, the Defendants have attempted to obtain the Company's file from Mr Swan's law firm, Christopher Swan & Co. On 24th April 2014 they secured an order for delivery up by Mr Swan of any Company documents which were in his possession, custody or power which were the property of the Company. Copies of the relevant documents have now been produced.

23. The Second Defendant has sworn an affidavit dated 21st May 2014 in which she states that she never knowingly signed the judgments by consent and that they were obtained by what her attorney Paul Harshaw ("Mr Harshaw") has characterised as "*misrepresentation*":

> 20 I never consented to judgment being entered against me or my husband and I never knowingly signed the document which purports to be a judgment by consent in this matter. I do recall signing one document that I could not read at the offices of Christopher Swan. The front page was folded over and I simply signed where Christopher Swan told me to. I asked what the paper was and Christopher Swan told me to sign it and the Canales will go away or words to that effect. Present at the time were myself, my husband, Christopher Swan and Mrs Brown who works for Christopher Swan. I would never consent to judgment being entered against us. It would affect my mother's house, which is collateral for our loan at Capital G Bank, and Christopher Swan knew that. That must be why he tricked me into signing the document he did and acted for the Canales against my husband and I without telling us.

Defendants' case

24. Mr Harshaw puts the Defendants' case on two grounds. The grounds are independent of each other. Each ground, he submits, is in itself sufficient to have the judgments by consent set aside.

First ground: the writs were not served

25. The first ground is that the writs were not served. Order 10, rule1(1) of the Rules of the Supreme Court 1985 ("RSC") provides that subject to the provisions of any enactment and the RSC, a writ must be served personally on each defendant by the plaintiff or his agent. Mr Harshaw submits that personal service of the writ on each defendant is therefore a precondition of obtaining judgment. Failure to serve a writ, he submits, is more than a mere irregularity: it will entitle the defendant to have the proceedings set aside as of right.

26. Mr Harshaw referred me to the judgment of the Privy Council, given by Lord Millett, in Strachan v The Gleaner Co Ltd [2005] 1 WLR 3204 at paras 25 and 28:

> 25 The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae*. The leading example is Craig v Kanssen [1943] KB 256 , where the proceedings were not served on the defendant at all.
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> . . . . .
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> 28 An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

27. In my judgment the instant case does not involve a fundamental error of procedure so as to entitle the Defendants to have the judgments by consent set aside *ex debito justitiae*.

28. In Craig v Kanssen the defendant had no notice of the order until after it had been made. In the instant case, both Defendants signed the orders, to which in the face of it they consented, before they were made.

29. Where a claim is not contested, I see no real objection to the procedure adopted here: namely, filing a judgment by consent together with the writ. Once issued, however, both documents should have been served. To that extent there was a procedural shortcoming, but it was a mere irregularity, and falls therefore within the ambit of RSC Order 2, rule 1:

> **2/1 Non-compliance with rules**
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> 1 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
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> (2) … the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein … and to make such order (if any) dealing with the proceedings generally as it thinks fit.

30. The irregularity did not nullify the judgments by consent and I am not minded to exercise my discretion so as to set them aside on account of it.

31. When considering the exercise of that discretion I bear in mind, and this is a matter to which I attach great importance, that the Defendants have not made any real attempt to raise a defence to either claim. Eg they have not challenged the existence of the loan agreements. Neither have they adduced evidence of any payments in addition to those recorded by the Second Plaintiff, or explanatory evidence as to why they have been unable to do so.

32. I note the assertions made by the First Defendant in his affidavit as to the amount of payments allegedly made by the Defendants, but it is not clear to me whether he is claiming that they have made payments over and above those recorded by the Second Plaintiff, and, if so, what those payments might be. If the Defendants were serious about defending this claim I should have expected fully documented particulars of the payments or evidence as to why they have not been provided.

33. It is helpful to consider, by way of analogy, the test in setting aside a default judgment – namely, whether the defence has merits to which the court should pay heed, *per* Lord Wright in Evans v Bartlam [1937] AC 473 at 489. That is a test which the Defendants have failed to meet. Had they satisfied that test, then I should have been more sympathetic to their applications to set aside.

34. In this regard, I am mindful of the decision of the Court of Appeal in England and Wales in Faircharm Investments Ltd v Citibank International plc [1998] Lloyd's Rep Bank 127, to which Mr Harshaw very properly drew my attention, even though the case was against him. Sir Christopher Staughton, giving the judgment of the Court, stated:

> It is now accepted that the judgment is irregular. Furthermore, it is submitted on behalf of Citibank that the error involved, in entering judgment in default of defence before the time for service of defence had even begun, was so fundamental that no exercise of the court's discretion could uphold the judgment. In support of that we were referred to an unreported decision of Russell LJ and Hollis J in this court in Charlesworth v Focusmulti Ltd , (17th February 1993). That decision has been criticised; it is said that it was based on the old law to be found in Anlaby v Pretorius (1888) 20 QB 764 and In re Pritchard (1963) Ch 502, and not on the revised Ord.2, r.6 and Harkness v Bell's Asbestos and Engineering Ltd (1967) 2 QB 792 .
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> However that may be, I am impressed by what both the deputy master and the judge said, that if Citibank are bound to lose on a subsequent application for summary judgment, it would be pointless to set aside the

> existing judgment. *Lex non cogit ad inutilia* [The law does not compel one to useless things]. I would not go so far as to say that no irregularity could be so fundamental that the judgment in such a case would have to be set aside, whatever the other circumstances. But if indeed Citibank would be bound to lose I do not, in the circumstances of this case, consider that there is such a degree of fundamental error to require that the judgment be set aside. After all the tortured misunderstanding on both sides in this case and the regrettable imprecision in the pleading and court documents, it is time that justice is done once and for all in relation to this sum of £7,788.99. As was said over 100 years ago, "*We are not here to punish people for their mistakes in procedure but to do justice.*"

I respectfully concur.

35. While dealing with the formalities by which the judgments by consent were obtained, I should address two further points.

36. First, Richard Horseman, who appears for the Plaintiffs, relies on RSC Order 2, rule 2(1):

> **2/2 Application to set aside for irregularity**
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> 2 (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.

37. I am doubtful whether appearing in answer to a judgment summons amounts to taking a step in the action, and the Defendants' attorneys acted promptly, once they were instructed, to make the application to set aside. More fundamentally, RSC Order 2 rule 2(1), which concerns applications to set aside for mere irregularity, cannot be used to defeat an application to set aside a judgment obtained as of right.

38. Second, Mr Harshaw submits that it is a pre-condition to obtaining judgment that an affidavit of service is filed proving due service of the writ on the defendant. However he relies on RSC Order 13, rule 7, which deals with

judgment in default of appearance to a writ. That was not the basis on which judgment was obtained in this case, although I suppose it might be argued that the rule applies by analogy. More fundamentally, failure to file an affidavit of service is a mere irregularity and therefore covered by RSC Order 2, rule 1(1). This irregularity is not sufficient to persuade me in the exercise of my discretion to have the judgments by consent set aside.

Second ground: the consent was only apparent

39. The second ground is that the Defendants' consent to the judgments was only apparent and not real. Mr Harshaw refers me to para 1143 of Halsbury's Laws of England, Fifth Edition, which states:

> A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was … obtained by … misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose.

40. On the Defendants' case, the consent order was obtained by misrepresentation and/or concealment of relevant facts which Mr Swan, should have disclosed. Specifically, it is alleged that Mr Swan: (i) misrepresented to the Defendants that the judgments by consent would only be enforced if and when they were in a position to pay; (ii) misrepresented to the Defendants the nature of the documents which he asked them to sign and concealed the fact, which he should have disclosed, that they were in fact judgments by consent; and (iii) impliedly misrepresented to the Defendants that in procuring their signatures he was acting in his capacity as their attorney or attorney for their Company and concealed the fact, which he should have disclosed, that he was in fact acting in his capacity as attorney for the Plaintiffs.

41. I am not in a position to determine the merits of these allegations without hearing live evidence, although I cannot but observe that they have been

raised rather late in the day. But I do not have to determine their merits as they do not go to the underlying merits of the Plaintiffs' claims. On this ground, too, the absence of any real defence on the merits is fatal to the Defendants' application. It would be pointless for me to set aside the judgments by consent when, on the material before me, the Plaintiffs would be bound to succeed were the matter to be litigated further. *Lex non cogit ad inutilia.* In this regard I note that the evidence, summarised above, which has been filed by the Plaintiffs in support of their claim, is cogent and unchallenged.

42. The applications to set aside the judgments by consent are therefore dismissed. It is open to the Defendants to make fresh applications if they are able to demonstrate that the amounts of the judgment debts were in excess of the monies owed when the judgments were entered. If they are able to demonstrate any further payments since the judgments were entered they are of course at liberty to do so when proceedings are brought to have the judgments enforced.

43. I am grateful to both counsel for their assistance, and should like in particular to commend Mr Harshaw, who fought a difficult case with skill and perseverance.

44. I shall hear the parties as to costs.

DATED this 6th day of June, 2014

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Hellman J