# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2013: No. 403**

**BETWEEN:**

**LANIECE WOODS**

**Plaintiff**

**-v-**

**CHRISTOPHER SWAN**
**(in his capacity as Executor of the estate of JOHN EUSTACE, deceased)**

**Defendant**

## RULING ON APPLICATION TO SET ASIDE POSSESSION ORDER

(in Chambers)

Date of hearing: August 12, 2014
Date of Ruling: August 20, 2014

Mr. Kai Musson and Mr. Samuel Riihiluoma , Cox Hallett Wilkinson Limited, for the Plaintiff
Mr. Christopher Swan, Christopher E. Swan & Co., for the Defendant

**Background**

1. By a Generally Endorsed Writ of Summons issued on October 30, 2013, the Plaintiff sought, *inter alia*, specific performance of a lease of 'Evans View Cottage', in Southampton Parish ("the Property"). In anticipation of this Writ being filed, on

October 29, 2013 Hellman J granted an Ex Parte Order requiring the Defendant to permit the Plaintiff to remain in possession of the Property until further Order.

2. The Plaintiff's pleaded case was that she paid a deposit for a lease of the Property, signed a lease document dated November 1, 2013 ("the Lease"), was given keys and moved into the property. The Defendant then refused to sign the Lease. The Lease was attached to the October 29, 2013 Ex Parte Order, and provided for:

    (a) a term of two years from November 1, 2013 until October 31, 2015;

    (b) either party could terminate on three months' notice "*at anytime*".

3. The Defendant disputed, *inter alia*, agreeing to the Plaintiff moving in before the Lease commenced according to its terms, and denied that the Lease took effect without it being fully executed.

4. By Summons dated February 27, 2014 supported by the First Swan Affidavit, the Defendant applied for an order terminating the tenancy and for possession. Reliance was placed on a Notice to Quit by January 31, 2014 issued on October 31, 2013 as a valid termination notice within section 11(b) of the Landlord and Tenant Act. It was also deposed that the deposit and November rent had already been repaid to the Plaintiff.

5. On March 20, 2014, Hellman J gave directions for an expedited trial of the Plaintiff's action and the Defendant's application. Documents were filed indicating the Plaintiff had health problems. On March 27, 2014, the Plaintiff filed her List of Documents and on March 31, 2014, the Defendant filed his List.

6. On May 16, 2014, a Notice of Hearing for a trial in open Court on June 15, 2014 was issued, but this hearing was subsequently delisted. No doubt this was because the Plaintiffs' initial attorneys, Wakefield Quin ("WQ") applied for leave to come off the record by Summons dated June 4, 2014. That Summons was served on the Plaintiff by email because she was believed to be abroad receiving medical treatment and unavailable for personal service. I granted leave on June 12, 2014, directing that until she notified otherwise, her address for service was at the Property. The engrossed Order was filed the same day at 3.55pm.

7. However, another internal Registry stamp on the back of the original engrossed Order on the Court file is dated June 17, 2014 and bears the initials of the Clerk in the Registry who circulates final orders for signature. It is unlikely, in the ordinary course of business, that the signed engrossed service copies of the June 12, 2014 Order would have been available for WQ to collect before June 18, 2014 at the earliest. Speculation in the course of the hearing that WQ were guilty of delay in serving this Order appears from the record to be wholly unfounded.

8. The following day, June 13, 2014, the Defendant issued a fresh Summons seeking to terminate the tenancy and obtain possession supported by the Second Swan Affidavit. This Affidavit sought possession on the grounds of delay in circumstances where the Plaintiff was remaining in the Property without paying rent. The Summons was issued returnable for July 3, 2014. It was served by delivery to the offices of WQ on June 18, 2014.

9. It is unclear when and how the Defendant became aware of the fact that the Plaintiff had instructed fresh attorneys ("CHW"), because her present attorneys only formally came on the record by Notice dated August 7, 2014, filed on August 8, 2014. It is common ground, however, that WQ served the Defendant with the June 12, 2014 Order on June 19, 2014, one week after obtaining the Order but the day following service on them of notice of the July 3, 2014 possession hearing. Prior to this service on the Defendant, WQ remained for service purposes and otherwise, attorneys of record[1]. According to the Plaintiff's Second affidavit dated August 6, 2014, she received no notice of the July 3, 2014 hearing from WQ of the Defendant.

10. On July 3, 2014, I granted the Order sought by the Defendant in the absence of the Plaintiff (the "Possession Order"). By Summons dated August 8, 2014, the Plaintiff acting by her new attorneys issued a Summons seeking to set aside the Possession Order.

**The July 3 hearing and the granting of the Possession Order**

11. At the July 3, 2014 hearing of the Defendant's Summons, Mr. Swan opened his submissions by informing the Court that the application had been served on WQ while they were still attorneys for the Plaintiff although they had since ceased to be attorneys of record. The Court implicitly accepted that the Plaintiff had been given sufficient notice of the hearing for the Court to proceed in her absence.

12. According to the electronic record, the hearing commenced at 10.38am. I declined to entertain an oral application made for rent on the grounds that it was not disclosed in the Summons served on WQ. I expressed concern about whether or not the Plaintiff might have been absent for medical reasons, based on information she had personally emailed to the Court on June 11, 2014 about her unavailability for a hearing scheduled for June 12, 2014. I resolved that concern by concluding that service on June 18, 2014 afforded an adequate opportunity for her to advise the Court of her unavailability on July 3, 2014. At 10.54 am, I gave the following *ex tempore* ruling:

[1] Order 67 rule 6 (1). The requirements of rule 6(1)(c) (filing a certificate of service of the removal from the record order with the Registry) are rarely adhered to or enforced, and usually become redundant if the action actively proceeds in the absence of the former attorney.

"*On balance I have to say the Plaintiff has been fortunate to have been assisted by the Court on an interim basis to take up occupation of premises in circumstances where the parties had not formally consummated a lease. It may well be that she had some form of expectation which equity might have acknowledged in terms of some sort of proprietary estoppel claim, to occupy the premises on terms of the Lease.*

*Assuming that to be the case in her favour, the Lease itself contemplated that either party could terminate it on three months' notice. I'm satisfied that the landlord has in fact given three months' notice. And even if reason was required to terminate the Lease (which the Lease that the Plaintiff relies on does not suggest is the case), I'm satisfied that there has been non-payment of rent. This may well be attributable, in part, to financial difficulties faced by the Plaintiff arising from the health conditions of which she has advised the Court.*

*But that cannot constitute grounds for the Court refusing the application that the Plaintiff makes on notice to the…or the Defendant makes, on notice to the Plaintiff, as evidenced by an Affidavit of Service sworn on the 18th of June by Joan Wilkinson; who deposes that on the 18th of June she served the Plaintiff with the Summons which gave notice of the hearing today.*

*The only view that I would express is that I would hope that, having been granted the Order that I grant today, that the Defendant will have regard to the need for consideration to be given to the Plaintiff in terms of being able to vacate the premises in an orderly fashion especially if she is, as appears to be the case, in some personal difficulties having regard to her health.*

*[Mr. Swan: I am sure the Defendant will take to heart those words just spoken by My Lord.]*

*And so Possession Order granted. Costs to the Defendant, to be taxed if not agreed."*

13. And so the July 3, 2014 Order was consciously made on the basis that service by the Defendant of notice of the July 3, 2014 hearing on WQ on June 18, 2014 was sufficient notice to the Plaintiff of the hearing, even though WQ had since June 18, 2014 ceased to be attorneys of record. Although the relevant rule was not explicitly alluded to, this was the correct legal position. Order 67 provides in salient respects as follows:

"***67/6 Withdrawal of attorney who has ceased to act for party***
*(1)Where an attorney who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance*

*with rule 1, or notice of intention to act in person in accordance with rule 4, the attorney may apply to the Court for an order declaring that the attorney has ceased to be the attorney acting for the party in the cause or matter, and the Court may make an order accordingly, but unless and until the attorney—*

*(a) serves on every party to the cause or matter (not being a party in default as to entry of appearance) a copy of the order, and*

*(b) procures the order to be entered in the Registry, and*

*(c) leaves at the Registry a copy of the order and a certificate signed by him that the order has been duly served as aforesaid, he shall, subject to the foregoing provisions of this Order, be considered the attorney of the party till the final conclusion of the cause or matter in the Court.*

*(2)An application for an order under this rule must be made by summons and the summons must, unless the Court otherwise directs, be served on the party for whom the attorney acted.*

*The application must be supported by an affidavit stating the grounds of the application.*

*(3)An order made under this rule shall not affect the rights of the attorney and the party for whom he acted as between themselves.*" [emphasis added]

14. The Court also expressly applied its mind to the fact that the Plaintiff might have been unable to attend due to medical difficulties, but considered that the interval between June 18, 2014 and July 3, 2014 was sufficiently ample to afford the Plaintiff a reasonable opportunity of advising the Court by email, as she had done in relation to the hearing of WQ's application for leave to come off the record on June 12, 2014, if she was for good reason unable to attend the hearing. WQ had, after all, informed the Court on the hearing of its withdrawal application that it was able to communicate with the Plaintiff by email.

**The Plaintiff's application to set aside the Possession Order**

**Factual basis of application**

15. The Plaintiff's August 8, 2014 Summons seeking to set aside the Possession Order was supported by her 2nd Affidavit sworn on August 6, 2014. That Affidavit recites the uncontroversial facts relating to the withdrawal of her previous attorneys, the Defendant's service on her previous attorneys of the application for the Possession Order, and makes the following substantive averments in support of her application to set aside the Possession Order:

> "*7. On 3rd July 2014 (which was the date when the Defendant's application seeking an Order for Possession was heard), I was completely unaware of this application as I had no notice of these proceedings from either the attorney for the Defendant or my former attorney…until sometime after the hearing I eventually received a copy of the Order dated 3rd July 2014 by hand…*
>
> *10. I am advised by my attorney that I possess a right to a fair hearing and that the fact that I was not provided with any notice of the hearing on 3rd July was in contravention of this right. Consequently, I humbly pray that the Order for Possession dated 3rd July 2014 and the Writ of Possession dated 24th July 2014 be set aside….* "

16. The Plaintiff's 2nd Affidavit is, perhaps, most significant in terms of what it does not depose to. Firstly, there is no express denial that WQ passed on the documents relating to the July 3, 2014 hearing to her. Nor is there any indication that she was not contactable by her former attorneys between the date on which they were served with the application for the Possession Order (June 18, 2014) and the date of the hearing just over two weeks later. Secondly, there is no suggestion whatsoever that the Plaintiff will suffer substantial injustice because she has been deprived of the opportunity of advancing a meritorious claim.

17. Mr. Musson did place before the Court a letter from Mount Sinai dated May 27, 2014, which confirms that she had surgery the previous day, would likely recuperate in three to six months' time, and was due to return for an assessment in 6 to 8 weeks of the letter being written. It appears from the letter that the Plaintiff would likely have been at home, or at least out of hospital, from the end of May until mid-July. So there is no basis for any finding that WQ could not have, with reasonable diligence, have given the Plaintiff effective notice of the July 3, 2014 hearing, whether by ordinary post or email, between June 18 and July 3, 2014.

18. In addition, the Plaintiff's 2nd Affidavit is silent on the issue of when (if at all) she was served with a copy of the June 12, 2014 Order. It is a matter of record that WQ on June 11, 2014 gave her notice by email that it would be seeking such an order, but there was no evidence as to whether, and if so when, the Plaintiff was given notice that the Order had actually been obtained. Since the Defendant's attorneys were not served with the Order until June 19, 2014, there is no basis for assuming that the Plaintiff was served before that date either. As I have already noted above based on my own examination of the Court file, it seems improbable that WQ received signed service copies of the June 12 Order back from the Court before June 18 at the earliest. So I am unable even to find that the Plaintiff had any reasonable basis for assuming, after the June 12, 2014 Order was in fact made, that the Defendant's attorneys would

forthwith be serving her with process directly. Because it is unclear when she first became aware of the fact that the Order was not simply sought, but actually granted.

19. However, in broad and practical terms, it is obvious that the Plaintiff relied on her former attorneys to notify the Defendant's attorneys to serve her with any new process after the former attorneys had ceased to act. She would clearly also reasonably expect that her former attorneys would pass on to her any legal process which had been served upon them before their effective withdrawal.

**Legal grounds of application**

20. The application to set aside the Possession Order was accordingly grounded in a purely abstract and technical invocation of fair hearing rights.

21. Giving the provisions of Order 67 rule 6 of the Rules a wide berth, Mr. Musson submitted firstly that service was irregular and should be set aside under Order 2. He also relied on the following sub-paragraph of Order 45 rule 3, which applies to applications for possession orders:

> "*(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.*" [emphasis added]

22. Next he relied upon the following selective extract from the broad statement of principles by the English Court of Appeal (Leggatt LJ) in *Shocked-v-Goldschmidt* [1998] 1 All ER 372 at 381f:

> "*(2) Where judgment has been given after a trial it is the explanation for the absence which is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*"

23. Finally, Mr. Musson referred the Court to the following more elevated pronouncements about the importance of access to the Court. Lord Diplock in *Bremer Vulkan-v-South India Shipping* [1981] 1 All ER 289 made the following observations in the not entirely inapposite context of considering the jurisdiction to strike-out an action for want of prosecution:

> "*Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided*

*are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by another citizen, the defendant.*"

24. The constitutional right of access to the Court, counsel pointed out, was protected under Bermudian law by section 6 of the Bermuda Constitution.

**The Defendant's opposition**

25. Mr. Swan submitted firstly that the Possession Order had been properly and validly obtained and that setting it aside required regard to be had for both (a) the reason for the Plaintiff's absence, and (b) the merits of her claim. Having regard to the merits, he referred to the history of the matter, the absence of any merits and the futility of ordering a rehearing.

26. Having regard to the Plaintiff's health challenges, he indicated that arrears of rent might not be pursued. He forcefully contended it was impossible to conceive of how the Defendant could not be entitled to an order in the same terms as the impugned Possession Order.

**Findings: exercise of Court's discretion**

27. Despite being initially swayed by the heady high-level notions of justice upon which Mr. Musson relied, I am bound to accept Mr. Swan's more prosaic and practical analysis of what substantial justice requires in the unique circumstances of this case. While the judicial inclination to set aside orders made in the absence of a party may well generally be a healthy one, the exercise of the discretion to do so must always be exercised on objectively justifiable grounds.

28. The Possession Order was made in circumstances where the Court considered that it had, in effect, bent over backwards to assist the Plaintiff despite the thin merits of her claim. By the time the Order was made, it was impossible to identify any plausible grounds upon which the Court could properly find that she was entitled to remain in occupation of the Property. The Lease that she contended for was determinable on three months' notice which she had clearly been given.

29. The Plaintiff was validly served in care of her former attorneys with notice of the July 3 hearing before their withdrawal took effect pursuant to Order 67 rule 6. The bare assertion that she was unaware of the hearing sheds no light on whether the lack of awareness of the hearing is attributable to accident, oversight, negligence or wilful blindness.

30. I find that the crucial considerations, shaped by the particular circumstances of the present case, are set out in the following fuller extracts from the judgment of Leggatt LJ in *Shocked-v-Goldschmidt* [1998] 1 All ER 372 at 381e-g:

> "*(1)Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision . (2) Where judgment has been given after a trial it is the explanation for the absence which is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing. (3) Where the setting aside of judgment would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are very strong reasons for doing so. (4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.* "

31. The right to a fair hearing is not a one-dimensional right operating solely for the benefit of whoever happens to be the claimant in an action[2] . As Lord Bingham observed in *Attorney-General's Reference (No. 2 of 2001)*[2004] 2 AC 72 at 84-85:

> "*[b]ut the Convention cannot, in the civil field, be so interpreted and applied as to protect the Convention right of one party while violating the Convention right of another*".

32. The holistic nature of fair trial rights are reflected in Order 1A of this Court's Rules. The overriding objective of the Court in handling civil cases is to adjudicate them justly, and the parties are each required to assist the Court to achieve this goal. Managing cases justly includes, *inter alia,* "*saving expense*" while active case management entails, *inter alia*, "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*". The right to pursue proceedings or applications to a full hearing or trial is not an absolute right triggered by the mere filing of an application. It is a right to a fair hearing of a meritorious claim, a right which may be lost by a litigant who fails to prosecute her claim it in an efficient manner, or who files a claim which is so unmeritorious that its very pursuit would constitute an abuse of the process of the Court.

33. In the present case, the only relevant factor established by the Plaintiff for setting aside the Possession Order is that she did not have actual notice of the hearing. Why she did not have notice was not satisfactorily explained-in the ordinary course of events, one would have expected her former attorneys to have passed on the application papers they were duly served with to the Plaintiff, in sufficient time for her to appear at the hearing or request an adjournment, whether they sent the

[2] As regards the Possession Order, the Defendant is in the position of plaintiff in any event.

documents by ordinary post or email. Her health challenges, which were evidenced by a letter belatedly placed before the Court, do not appear to have been so serious that she was likely to have been incapable of receiving or responding to communication in relation to the present proceedings.

34. Factors which operate in favour of upholding the Order cumulatively carry far greater weight, even if the Plaintiff has some more convincing excuse for not attending which she has simply not articulated to date:

    (1) the Plaintiff's attorney of record was duly served with notice of the hearing;

    (2) the application for the Possession Order was fully argued, albeit in a short hearing. A contested hearing would require more Court time and private costs;

    (3) the Plaintiff's case not merely lacks any real prospects of success. It was marginally arguable when she commenced her action. Her case for remaining in occupation of the Property is now liable be struck out on the grounds that, on the merits, it is plain and obvious that it is bound to fail; and

    (4) it is doubtful that the Plaintiff is or will be in a position to fully compensate the Defendant for her continued use of the Property, long after any lease which was entered into had been terminated. It would cause the Defendant substantial prejudice for his properly obtained judgment to be set aside.

**Conclusion**

35. For the above reasons, the Plaintiff's application to set aside the Possession Order is dismissed.

36. Unless either party applies to be heard as to costs by letter to the Registrar within 21 days, the costs of the present application shall be awarded to the Defendant to be taxed if not agreed.

Dated this 20th day of August, 2014 _____

IAN R.C. KAWALEY CJ