In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No. 260

BETWEEN:

JUDITH ETHEL ANN SIMMONS

(as Executor of THE ESTATE OF GLADSTONE W.C. TROTT)

Plaintiff

-v-

(1) DAVID GARTH MCCANN

(2) CARLOS BOSCH

Defendants

RULING

(in Chambers)

Date of trial: October 10, 2014

Date of Judgment: October 22, 2014

Ms. Stephanie Hanson, Conyers Dill and Pearman Limited, for the Plaintiff

Mr. Paul Harshaw, Canterbury Law Limited, for the 2nd Defendant

Introductory

1. The 2nd Defendant applies by Summons dated May 13, 2014 to set aside a Judgment in Default of Defence entered in favour of the Plaintiff on January 8, 2014. The Plaintiff's Specially Indorsed Writ was issued on July 25, 2012 and the 2nd Defendant entered an unconditional appearance on August 27, 2012.

2. The action was originally commenced in the name of the now deceased Gladstone Trott. His executor was named Plaintiff in place of the deceased by consent on October 10, 2013. Until this juncture, the 1st and 2nd Defendant were jointly represented by Wakefield Quin Limited. The 2nd Defendant's present attorneys filed a Notice of Change of Attorneys on his behalf on April 10, 2014, in response to the Plaintiff's attempt to execute the Default Judgment.

3. On May 8, 2014, Hellman J ordered as follows:

> "*1. execution of the judgment herein against the second-named Defendant, Carlos Bosch, be stayed until the first instance determination of his application to set aside the judgment or further order of the Court; and*
>
> *2. the costs of and occasioned by this order are reserved to the determination of the second-named Defendant's application to set aside Judgment.*"

4. It was common ground that the primary consideration in determining whether or not to set aside the Judgment was whether the 2nd Defendant was able to "*show that he has a defence which has a real prospect of success*": *Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's Rep 221 at 223 (Sir Roger Ormrod). This approach has been approved in a variety of local cases to which the Plaintiff's counsel referred: *Dobie-v-Interinvest (Bermuda) Ltd and Black* [2009] Bda LR 31; *Wakefield and Accardo-v-Marshall et al* [2010] Bda LR 53; *M& M Construction Ltd-v-Vigilante* [2012] Bda LR 6 (also cited by Mr. Harshaw). The 2nd Defendant's counsel additionally referred to *Ball-v-Lambert* [2001] Bda LR 81.

5. Ms. Hanson invited the Court to have regard to the manner in which the 2nd Defendant has defended the present claim and to refuse the application to set aside judgment in any event following the approach adopted in *Wakefield and Accardo-v-Marshall et al* [2010] Bda LR 53, where Wade-Miller J held:

> "*Additionally, in arriving at a decision the court is entitled to look at the First Defendant's conduct and statements and ascertain if in the circumstances it should disentitle him from proceeding. Delay in itself is not a bar to proceedings but the nature of the delay and any disadvantage to the other side caused by the delay can be taken into account.*"

6. It was also common ground that the Default Judgment should be varied as the 2nd Defendant's liability rested upon, if anything, one promissory note which he signed jointly with the 1st Defendant. Under the first note dated 19th November 2006, the Defendants promised to pay $500,000 together with interest at the rate of 10% ("the Note"). The Plaintiff also sought to vary the quantum of the Judgment under the Note as against both Defendants, even though no challenge was made by the 1st Defendant to the Judgment at all. This was in part because, as a result of queries on quantum raised by the 2nd Defendant, the original Plaintiff's executor had reviewed the deceased records, compiled while the original Plaintiff ("Mr. Trott") was of a very advanced age, and ascertained that credit should be given for extra payments totalling $ 24,139.19.

7. The 1st Defendant was also liable under a second promissory note.

8. Subsidiary issues were (a) whether the 2nd Defendant had been properly served with the Writ, and (b) whether, if all other issues were resolved against the 2nd Defendant, he should be given leave to defend with respect to the amount of approximately $37,371.22 which he contended might be revealed, through discovery of corporate records under the control of the 1st Defendant, had also been repaid.

Findings: has the 2nd Defendant shown a case with real prospects of success for denying liability on the Note altogether?

Factual findings

9. I approach the present application by assuming in the 2nd Defendant's favour that:

   (a) at all material times only the 1st Defendant was both a director of and shareholder of the Company;

   (b) the $500,000 advanced by Mr. Trott in return for the Note was remitted to the Company, as Mr. Trott knew or ought to have known, for its benefit and use;

   (c) the 2nd Defendant received no direct benefit from the borrowing, as Mr. Trott knew or ought to have known; and

   (d) the 1st Defendant in or about 2007 became the 100% beneficial shareholder of the Company.

10. However, the 2nd Defendant admits that when he executed the Note he was both a director and shareholder of the Company which he formed jointly with the 1st Defendant in 2003. He was advised to dispose of his shares due to Immigration law

changes which were introduced in 2007, and he did so by assigning his shares to the 1st Defendant. He also resigned as a director.

11. The 2nd Defendant in paragraph 6 of his First Affidavit avers that the money referred to in the Note was provided to the Company without suggesting that this was inconsistent with the basis on which he signed the Note. On the contrary, his positive case is that he understood the transaction to have been for the benefit of the Company.

12. The Note headed "PROMISSORY NOTE" was issued on terms that 10 % interest would be payable when the Note was called on six months' notice. The body of the Note described the parties and the core obligations as follows:

> "*We, DAVID GARTH MCCANN of 29 Middle Road in Southampton in the Islands of Bermuda and CARLOS BOSCH of Queens Cove in Pembroke Parish in the said Islands (hereinafter together called 'the Obligors') are HEREBY JOINTLY AND SEVERALLY OBLIGED INDEBTED and firmly bound unto GLADSTONE W.C. TROTT of Trott Manor. St Georges Parish in the said Islands (hereinafter called 'the Obligee' shall where the context so admits include his heirs and assigns) IN THE SUM OF Five hundred thousand dollars ($500,000.00)…*"

Liability of 2nd Defendant on the Note as principal

13. In the draft Defence, it is averred that the 2nd Defendant "*agreed as an agent of the Company, to a loan from the Plaintiff….the Note was prepared by…a lawyer…and the second-named Defendant did not question the 2006 Note at that time. He simply signed the document in the belief that he was agreeing to the loan for the benefit of the Company as an agent of the Company. It now appears that the words 'for and on behalf of the Company' or similar words were inadvertently omitted from the 2006 Note.*"

14. Mr. Harshaw advanced this beguiling argument with more conviction than this limb of the Defence actually possesses. The submission implies that the only question raised in construing the instrument is whether the director/shareholders when signing their names did so as principals or "for and on behalf of the company". It ignores the fact that the obligors are expressly defined in the body of the Note as well. It is an argument which might have been tenable if the obligors were simply described in the body of the Note as "we, the undersigned".

15. If the drafter of the Note had intended to make the Company the borrower, the Company could easily have been named as such. There would be no need to mention the agents (with their names in capital letters described as "jointly and severally obliged") at all. That language, as Ms. Hanson, pointed out, was wholly inconsistent with the notion of a single corporate obligor.

16. Ms. Hanson advanced more fundamental legal policy grounds for firmly rejecting the construction of the Note the 2nd Defendant contended for. I accept her submissions in this regard. The following provision of the Bills of Exchange Act 1934 (applied to promissory notes by section 81 of the Act) are pivotal:

> "**Person signing as agent or in a representative capacity**
> *25 (1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.*
>
> *(2)In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.*"

17. Section 25 creates a presumption that a person who signs a promissory note without specifying their agency capacity expressly is contracting as principal. The construction in favour of validity is important because third party assignees of the original holder of a note ought to be able to rely on the express terms of promissory notes. Section 80 of the Act provides:

> "***Liability of maker of promissory note***
> *80 The maker of a promissory note by making it—*
>
> *(a) engages that he will pay it accordingly to its tenor;*
>
> *(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.*"

18. '*Bowstead and Reynolds on Agency*', 19th edition, explains these statutory rules contained in section 25 of the 1934 Act at paragraph 9-051 as follows:

> "*These rules are to be justified on the ground that negotiable instruments are likely to come into the hands of persons who have no knowledge of the circumstances in which they were issued; such persons must be able to rely on what appears on the fact* [face] *of the instrument.*"

19. Accordingly, I find that the argument that the 2nd Defendant only signed the Note as an agent has no realistic prospect of success. As a matter of construction of the Note, that argument is hopeless. The same conclusion applies to the argument, which was only implicitly advanced, that the 2nd Defendant in signing the Note did not realise that he was assuming personal liability. In a February 15, 2012 email, Joe Wakefield, the draftsman of the Note (at that time seeking to facilitate a mediated solution in relation to the indebtedness), stated "*the notes are personal*". Although this was not an admission binding on the 2nd Defendant, it provides further general support for the construction contended for by the Plaintiff.

Invalidity of Note for lack of sufficient consideration

20. I deal with the failure of consideration defence on the assumption that the loan proceeds were all received by the Company and that the Obligors received no direct benefit under the Note.

21. The 2nd Defendant appears to have a valid complaint as against the Company that after he relinquished his shareholding the year following his execution of the Note, he derived no continuing indirect benefit from continuing to be bound by the obligations thereunder. It may well be that, as a former director, he has the right to be indemnified for his liabilities under the Note. These matters have no bearing on the issue of the adequacy of consideration as between the parties to the Note.

22. Paragraph 8 of the draft Defence provides as follows:

> "*To the extent the 2006 Note purports to be an agreement for a loan between the Plaintiff and the second-named Defendant, the 2006 Note fails for failure of consideration in that no loan was ever made to the second-named Defendant by the Plaintiff or anyone on his behalf.*"

23. There is no suggestion in this pleading, in the 2nd Defendant's evidence, or in the oral argument that the 2nd Defendant signed the Note expecting to receive monies which he did not receive. His case is that he believed he was executing the Note on behalf of the Company, which implies that the 2nd Defendant knew and consented to the monies being advanced for the benefit of the Company. The bare legal argument was that merely because the monies were paid to the Company and not the Defendants, there was a failure of consideration.

24. Mr. Harshaw cited no authority which undermined the argument of Ms. Hanson that the law did not require the 2nd Defendant to have received the loan proceeds for the necessary requirements of consideration to be met. The Plaintiff's counsel referred the Court to the following passage in '*Chitty on Contracts*', Thirtieth edition, Volume I at paragraphs 3-037 and 3-039 which I adopt as reflecting the governing legal principle:

> "*The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him: e.g. where he parts with money…in exchange for the promise…While consideration must move from the promisee, it need not move to the promisor. It follows that the requirement of consideration may be satisfied where the promisee suffers some detriment at the promisor's request, but confers no corresponding benefit on the promisor….It also follows that the promisee may provide consideration by conferring benefit on a third party at the promisor's request*…"

25. The defence that the Note fails for lack of consideration has no realistic prospects of success.

Findings: was the Default Judgment irregular because of ineffective service of the Writ?

26. The submission that the Default Judgment was a nullity because of defective service demonstrated Mr. Harshaw's commitment to pursue every avenue to set the judgment aside. Ms. Hanson simply relied upon the following provisions of Order 10 rule 1:

> "(3) *Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.*"

27. An unconditional appearance was entered for both Defendants in this action, so it is no longer possible for the 2nd Defendant to complain that he was not validly served.

Findings: discretionary reasons for declining to set aside the Default Judgment altogether

28. Although I place primary reliance on my findings on the lack of merit to the 2nd Defendant's proposed Defence, there are further discretionary grounds for declining to grant the relief sought. Firstly, in the months leading up to the commencement of the present proceedings, the 2nd Defendant was privy to emails in which Joe Wakefield was seeking to mediate a solution to the Plaintiff's claim. No point was taken on the enforceability of either Note. Secondly, as the 1st Defendant is liable for nearly 50% more money under 2007 Note, his own meek acceptance of liability provides further encouragement for viewing the 2nd Defendant's proposed Defence with a sceptical eye.

29. Moreover, in an open letter dated November 18, 2013, more than a year after the Defendants were required to file a Defence, Wakefield Quin proposed a payment schedule on behalf of both Defendants including a payment of $200,000 on or before November 30, 2013. The loan secured by the Note was obtained when the original Plaintiff was 91 years old, admittedly in optimistic financial times. The Defendants defaulted on interest payments in 2009 which payments his executor niece deposed he was dependent upon for living expenses. He commenced the present proceedings as a last resort in 2012 after his health had seriously declined. The original Plaintiff died on March 29, 2013 and is now unavailable to give evidence at any trial concerning the circumstances in which and terms upon which the Note was executed.

30. Against this background there is no reasonable or proper basis for this Court to exercise any residual discretion it may possess to set aside the Default Judgment despite the 2nd Defendant's failure to demonstrate the existence of a complete defence which has a realistic prospect of success.

Findings: were payments received wrongly applied to interest before principal?

31. For the avoidance of doubt, in case this point was seriously pursued and not (as it appeared to me) abandoned, I reject the unsubstantiated complaint that the Plaintiff was wrong to attribute payments made by or on behalf of the Defendants to interest ahead of principal.

Findings: amendment of the default judgment as regards quantum and leave to defend

32. The scope of this Court's jurisdiction to amend final orders under the slip rule is rarely considered. The Plaintiff's counsel submitted without dissent that the Court has the jurisdiction to correct errors in a default judgment, even if the error was made by a plaintiff and not in any real sense by the Court: *George Moundreas & Company SA-v-Navimpex Centrala Navala*, The Times 21 March 1983 (Court of Appeal).

33. It was agreed that an amendment should be made to give credit to the 2nd Defendant for the entire sum claimed in respect of the 2007 Note, and to apportion the single payments received on a pro rata basis to each Note. It was also agreed that both Defendants should receive credit for the amount of $24,139.19 which the Plaintiff accepted (after further investigations) had in fact been repaid. These calculations were supported by a Krys Global Report exhibited to the Second Judith Simmons Affidavit, which supported judgment against both Defendants for the amount of $665,528.48 and $306, 867.32 against the 1st Defendant alone reference the 2007 Note.

34. What was in controversy was whether the Defendant ought to be given unconditional leave to defend in respect of the further sum of $37,371.22 which Mr. Harshaw sought an opportunity to demonstrate had been repaid.

35. I am reluctant to conclude that this limb of the 2nd Defendant's case has no realistic prospects of success, because the Plaintiff herself had identified errors in the Defendants' favour in circumstances where the 1st Defendant, who apparently has access to the Company's records, raised no challenge to the quantum of the judgment debt. The 2nd Defendant should in the interests of fairness be afforded an opportunity to verify the total amount repaid. It is credible that he has not, as a former director, been given free access to the Company's records.

36. In these circumstances, I reject Ms. Hanson's submission that leave to defend should be granted on the condition that the 2nd Defendant pays the disputed amount into Court. Rather, I would grant leave to defend on the condition that the 2nd Defendant within 28 days either:

    (1) furnishes the Plaintiff with copies of the documents upon which it relies in support of its claim that the judgment debt should be reduced by a further amount; or

    (2) applies to this Court for appropriate relief against the 1st Defendant and/or the Company designed to obtain access to the Company's records of repayments made in respect of the Note.

37. Those conditions are designed to save costs by dispensing with the need for a formal Defence to be filed, and facilitating a prompt resolution of any meritorious quantum disputes as well as, if needed, access for the 2nd Defendant to Company records which appear likely to be under the control of the 1st Defendant.

Summary

38. The 2nd Defendant's application to set aside the Default Judgment is refused, save as regards (a) the sum of $37,371.22 (subject to the conditions specified in paragraph 36 above), and (b) the agreed amendments to the Default Judgment referred to in paragraph 33 above. The Plaintiff is accordingly entitled to enter judgment against both Defendants in respect of the Note for $665, 528.48-$37,371.22=$ 628,157.26, and against the 1st Defendant alone in the amount of $306, 867.32 in respect of the 2007 Note.

39. I will hear counsel if necessary on the terms of the final Order to be drawn up to give effect to the present Ruling. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Plaintiff is awarded her costs of the present application.

Dated this 22nd day of October, 2014 _____
IAN RC KAWALEY CJ