In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No. 261

BETWEEN:

DEBORAH LYNN SMITH

Plaintiff

-v-

(1) ARNOLD BROWN

(trading as "CKS Design")

First Defendant

(2) CORI BROWN

(trading as "CKS Design")

Second Defendant

EX TEMPORE RULING

(in Chambers)

Date of hearing: November 20, 2014

Mr. Richard Horseman, Wakefield Quin Limited, for the Plaintiff

Ms. Lauren Sadler-Best, Trott & Duncan Limited, for the Defendants

Introductory

1. In this matter, on March 24, 2014 the Registrar signed a Judgment in Default for failure to comply with the Unless Order made by me on February 20, 2014. And judgment was entered against the Defendants in favour of the Plaintiff in the amount

of $151, 031.30. The application before the Court today is an application by Summons dated June 5, 2014 seeking "*an Order granting relief from the sanction imposed by this Court pursuant to* [the] *Order dated 20th February 2014.*"

2. That Summons, remarkably, is not supported by any evidence explaining the reasons why relief should be granted. Nor indeed have the Defendants, even now, complied with the February 20, 2014 Order. Because the relief they seek today is not simply to be relieved by the sanction imposed by this Court on February 20, 2014, but further time (14 days) to supply the relevant documents.

3. So the Court today is not in a position to find, having regard to evidence filed after the Sanction Order was made that the Defendants appear in light of all the evidence, and the evidence recently disclosed, that they have so strong a case that the Court should look to other forms of penalty instead of allowing judgment to be granted against them by default.

Background to application

4. The background to this matter was reviewed by Mr. Horseman. And the starting point was a letter which Ms. Sadler-Best rightly points out was before the action when it might be said there were strictly no discovery obligations. But nevertheless on April 12, 2012, Wakefield Quin wrote the Defendants former attorneys and asked for "*a breakdown of the amount spent on the project and in particular, please have your client provide us with the invoices for the kitchen cabinets, vanities, tile and countertops to be produced by Upland's Group Limited and Marble Trend.*"

5. There was further correspondence on May 21, 2013 after the present proceedings had been commenced again repeating a request for the same documentation. And, eventually, on November 21, 2013, Hellman J made an Order for specific discovery in relation to documents evidencing furnishing purchased from Uplands Group Limited for the Defendants' home and specified the documentation in question. The draft Order contemplated that the Defendants would have 14 days but in manuscript the Judge extended that time to 21 days. Paragraph 3 provided as follows:

> "*The Defendants shall verify on oath by way of affidavit that they have complied with this Order of specific discovery to the best of their ability within 28 days of the date of this Order.*"

6. That Order was not complied with and on February 20, 2014 I made the following Order:

> "*(i) Unless the Defendants comply with the Order of the Supreme Court dated the 21st November 2013 within 14 days from the date of this Order, the Plaintiff is awarded judgment in the amount of $151,031.50;*

(ii) The defendants are ordered to pay the costs of this application to be taxed or agreed."

7. The basis on which that Order was made was clearly not by reference to the merits of any defence which the Defendants might have. It was made to enforce respect for the orders of this Court. So having been made subject to such an Order, if the Defendants had any genuine difficulties with complying it as opposed to being motivated to wilfully flout the Order of the Court, one would have expected that they would have instructed their attorneys before the expiration of the 14 days to either:

    (a) seek some indulgence from the Plaintiff's attorneys; and

    (b) in the absence of receiving a consensual extension of time for complying with the Order, to apply to Court for an extension of time.

8. It appears based upon all the material before the Court that they took neither step. And so the Plaintiff's attorneys then proceeded to enforce the sanction for non-compliance with that Order. On March 24, 2014 by letter to the Registrar (which on its face is copied to the Defendants' attorneys) they submitted to the Registrar a form of Judgment in Default of Compliance with Unless Order which the Registrar duly signed as of that date, March 24, 2014. Ms. Sadler-Best has doubted whether she was served with either a copy of that letter or the Judgment. But I do not believe that any evidence has been filed positively disputing service or receipt of either the letter to the Registrar or the Judgment in question.

9. But be that as it may, a Bill of Costs was filed and a taxation hearing was fixed for May 29, 2014. It appears from the Court file that the parties appeared before the Registrar and representations were made about the fact that a possible challenge was going to made to the Default Judgment. Nevertheless, the Registrar taxed the costs and seemingly an undertaking was given by the Plaintiff not to enforce the Judgment for 60 days.

Merits of application and governing principles

10. That was on May 29, 2014 and a week or so later the present Summons was filed. As I indicated earlier, the filing of this Summons was an opportunity for the defendants to file an Affidavit complying with the verification aspects of the November 21, 2013 Order and supplying the documents; and, indeed, deposing as to the merits of their defence with a view to persuading the Court that their failure to comply with the Order was not wilful or deliberate and therefore they should be given relief[1]. Instead,

[1] The Affidavit filed without leave more than two months after the time fixed for filing evidence in support of the Defendant's Summons, and sworn by counsel who appeared in support of the application for relief from

Ms. Sadler-Best has been forced to rely on abstract arguments which were largely based on the analogy, which I find is not apposite in the present case, of an ordinary application to set aside a judgment in default.

11. Mr. Horseman referred the Court to a highly persuasive authority, the English Court of decision of *Tarn Insurance Services Ltd. (in administration)-v-Kirby* [2009] EWCA Civ 19 , the judgment of the Court being delivered by Sir John Chadwick. He referred the Court to the following portions of the judgment at paragraphs 78, 79 and 82:

> "*[78]… It follows that the judge was not entitled to take the view, on 2 July 2008, that Mr Kirby should be relieved from the sanction imposed by that order solely on the ground that, as it appeared to him, there was a real prospect of a successful defence. He was required to assume that the possibility that the sanction imposed by the unless order would deprive Mr Kirby of the opportunity to advance a defence with a real prospect of success had already been taken into account by Mr Justice Evans-Lombe when making the order of 16 April 2008.*
>
> *[79] The true test, on the application for relief from the sanction imposed by the order of 16 April 2008, was whether – notwithstanding that the order was a proper order to make for the purposes of furthering the overriding objective in the circumstances known at that time – it remained appropriate, in the circumstances known at the time of the application for relief, to allow the sanction to take effect. It can be seen that each of the specific matters listed under CPR 3.9(1) is directed to that test. The fact that (as the judge thought) Mr Kirby had established in July 2008 what must be taken to be an implicit assumption underlying the order made by Mr Justice Evans-Lombe on 16 April 2008 – that Mr Kirby had a real prospect of successfully defending the claim against him if he were permitted to do so – cannot be a decisive factor…*
>
> *[82] I would not rule out the possibility that there will be cases in which – between the date that the unless order is made and the date that the court has to consider relief from sanction – it has become clear that the prospects of a successful defence to the claim were very much stronger than had been thought: but this is not such a case. And there will be cases where there is good reason to excuse non-compliance; or where there is good reason to think that a short extension of time will lead to compliance. But there was nothing in the*

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sanction, was not expressly relied upon at the hearing. The Plaintiff's counsel in argument dismissed it as amounting to no more than argument, filed late and accordingly yet a further example of non-compliance with this Court's Orders.

> *present case to suggest that Mr Kirby had made any serious effort to comply with the orders of 8 April and 16 April 2008 in the weeks since 16 April 2008; or that he would be likely to do so. On a proper appreciation of the evidence, his persistent non-compliance was deliberate. In a case of deliberate and persistent non-compliance with orders to provide information and deliver documents made in order to safeguard proprietary claims, a proper administration of justice requires that, save in very exceptional circumstances, sanctions imposed should take effect. There were no exceptional circumstances in the present case.*" [emphasis added]

12. Those observations I find instructive in the present case notwithstanding the fact that our Rules do not explicitly contain the CPR rule giving the Court jurisdiction to grant relief from a sanction such as that imposed in the present case. Clearly the Defendants have invoked a similar jurisdiction and Ms. Sadler-Best accepts that the Court should have regard to the CPR principles generally because we are guided by Order 1A which imports into our Rules the Overriding Objective.

Disposition

13. In the present case the relevant provision of the Overriding Objective which it seems to me to be appropriate to have regard to is the general obligation to ensure under Order 1A rule 1(2)(d) that cases are "*dealt with expeditiously and fairly*". And in all the circumstances of the present case I am bound to conclude that no material has been put before the Court which justifies the Court setting aside the Default Judgment which was entered in this case on March 24, 2014 for failure to comply with a February 20 Order which in turn required the Defendants to comply with a November 21, 2013 Order.

14. Today is November 20, 2014; almost a year after Hellman J's Order was made. That speaks volumes, and justifies the Court refusing the present application. It seems to me that costs should be on an indemnity basis. Costs to the Plaintiff to be taxed if not agreed on an indemnity basis.

Dated this 20th day of November, 2014 _____

IAN RC KAWALEY CJ