In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2014: CIVIL APPEAL NO: 20

KYLE BRIDGEWATER

Appellant

-v-

BERMUDA ACCOUNTING & MANAGEMENT SERVICES

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: June 18, 2014
Date of Judgment: January 13, 2015

Mr. Kamal Worrell, Lions Chambers, for the Appellant
Mr. Kevin Bean, Phoenix Law Chambers, for the Respondent

Background

1. By a Summons dated February 21, 2011[2], the Respondent sued the Appellant for $8506.46 plus costs. The claim was initially based on an alleged compromise of an original bill for accounting services in an amount of $50,000, which was negotiated down to $14,400 to be paid in six instalments three of which were outstanding. The Appellant's case was that no further sums were due because he had since discovered further errors which had caused him substantial loss.

2. Judgment was first obtained by the Respondent on or about November 26, 2010 by default. By letter dated December 10, 2010, the Appellant applied to set aside the default judgment on the grounds that he had no notice of the hearing. This judgment was set aside in November 2011. On February 22, 2013, judgment in default was entered a second time. The Appellant applied to set this judgment aside before the Worshipful Maxanne Anderson (Acting) on May 3, 2013 and prayed in aid a diary

[1] The Judgment was circulated without a formal hearing for handing down.
[2] The first Summons was apparently issued on September 13, 2010, but reissued on various subsequent dates.

error. The Learned Magistrate refused what she regarded as the second application to set aside a default judgment in the same case. The Appellant appealed against that refusal.

3. At the hearing of the appeal, I expressed the provisional view that the appeal should be dismissed on terms that that the Appellant should be at liberty to pursue any counterclaim in the same action in the Magistrates' Court. This was because in the absence of expert evidence it was difficult to assess the merits of any such counterclaim and to justify depriving the Respondent of a judgment when the Appellant had not pursued his alleged counterclaim with any diligence in the Court below. Almost four years after the Respondent had sued for the balance of an agreed sum, the Appellant had still not formulated a coherent basis for denying that any further sums were properly due. On the other hand, his counsel vigorously contended that the Appellant wished a further opportunity to pursue his complaints.

4. However, with a view to affording the parties an opportunity to resolve all issues between them, I reserved judgment on terms that:

   (a) the parties would pursue a settlement for one calendar month;

   (b) thereafter, either party could request the Court to deliver a judgment if a final compromise was not reached.

5. In the absence of any request for judgment to be delivered pursuant to the directions given at the time of reserving judgment following the June 18, 2014 hearing, the Court was entitled to assume that the parties had either resolved or were in the process of resolving their underlying differences.

6. By letter dated June 20, 2014 addressed to the Registrar but filed in the Registry on October 2, 2014 the Respondent's attorneys, rather than simply requesting that judgment be delivered as directed at the conclusion of the appeal hearing, requested a further hearing before the Court. This prompted the Registrar to request clarification from the Appellant's counsel by letter dated October 24, 2014 whether the record was complete and to seek agreed hearing dates. No response was forthcoming from the Appellant's counsel. The file was then brought to my attention in early January, 2015 for consideration as to the further conduct of the matter.

7. In light of the history summarised above, I now give judgment on the appeal which has been fully argued and treat the Respondent's request for a further hearing as a request for judgment to be delivered.

Decision

8. The Learned Acting Magistrate exercised her discretion by refusing to set aside the second default judgment she was aware was obtained by the Respondent against the

Appellant since the proceedings were begun. The principles applied in this Court to determining whether to set aside a regular default judgment have been described as follows:

> "*14. Although rigid rules ought not to be laid down as to how the discretion to set aside ought to be exercised, "a defendant who is asking the Court to exercise its discretion in his favour should 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 LR 221 at 223. This is the primary consideration, with the reasons for the failure to enter an appearance representing only a subsidiary factor to be taken into account…*"[3]

9. This Court also has regard to what might be described as the general surrounding circumstances in assessing whether it is just to deny a defendant the opportunity of being heard on such merits as may exist. In *Wakefield and Accardo-v-Marshall et al* [2010] Bda LR 53, 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.*"

10. Mr. Worrell invoked the general merits test in seeking to set aside the default judgment before the Learned Magistrate, while the Respondent countered that the Appellant had been guilty of a "*blatant and repeated disregard of Court time*", pointing out that the original claim had been substantially reduced through negotiations between the parties. The excuse for missing the relevant hearing was a diary error. The Learned Magistrate ruled as follows:

> "*After hearing submissions from both parties; and after reviewing the file, the Court notes that the defendant has been successful to set aside judgment on 7 November 2011. In this instance the Court is not satisfied that it should allow the Defendant a 2nd chance to set aside judgment therefore judgment stands.*"

11. No explicit mention is made of the prospects for success but the Learned Magistrate implicitly rejected the submission that the Appellant's defence had realistic prospects of success. She was entitled to take into account the history of the matter in support of her conclusion both that the Appellant's defence likely lacked merit and that justice in broader terms did not mitigate in favour of protracting the proceedings any further. It

[3] *Dobie-v-Interinvest (Bermuda) Ltd and Black* [2009] Bda LR 31.

is impossible for this Court to fairly conclude that the Magistrates' Court erred by failing to take into consideration any relevant matters or taking into account irrelevant matters.

12. It is admittedly somewhat unclear on the face of the record whether the default judgment was entered after hearing evidence as required by Order 15 rule 4 of the Magistrates Court Rules, or indeed on precisely what basis the judgment was entered. In my judgment, however, the same result would be justified irrespective of whether the default judgment was regarded as a regular or irregular one.

13. The Appellant's case could not be improved on appeal. The critique of the services rendered by the Respondent was vague, not particularised and unsupported by any expert evidence, despite the passage of just over a year after the application to set aside the second default judgment entered against the Appellant was refused. In addition, this Court afforded the Appellant what amounts to a third bite of the cherry by reserving judgment on June 18, 2014 and inviting the parties to pursue settlement discussions and notify the Court after the expiration of one month if a settlement was not reached so that the appeal could be disposed of.

14. It is clear from the Respondent's correspondence with the Court and the Appellant's non-communication with the Court, that the Appellant's strategic interests are aligned with delay and non-prosecution of his appeal, mirroring the approach adopted in relation to the conduct of his defence in the Court below, as found by the Learned Acting Magistrate. In these circumstances, any reasonable tribunal properly directing itself may only dispose of the present appeal in one way, namely by dismissing the appeal on abuse of process and/or merits grounds.

Conclusion

15. The appeal is dismissed and costs are awarded to the Respondent to be taxed if not agreed on an indemnity basis.

Dated this 13th day of January 2015 _____

IAN R.C. KAWALEY CJ