In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 442

BETWEEN:

SEAN SMITH

Plaintiff

-v-

NICOLE STONEHAM

1st Defendant

-and-

CAROL STONEHAM

2nd Defendant

EX TEMPORE RULING

(in Chambers)

Date of Hearing: June 29, 2015

Mr. Jaymo Durham, Amicus Law Chambers Ltd., for the Plaintiff

Mrs. Shade Subair-Williams and Mr. Javone Rogers, Mussenden Subair Limited, for the Defendant

Introductory

1. Before the Court today is a composite Summons issued by the Plaintiff seeking to set aside judgment on the Counterclaim and to strike-out the Defence.

2. This action was commenced by way of a Specially Indorsed Writ of Summons which was issued on December 23, 2014 and claims money due under a construction contract which, according to the Statement of Claim, was oral even if it was partly evidenced by writing.

3. The Defendants responded by filing an undated Defence and Counterclaim on January 29, 2015. And the Counterclaim essentially alleged that the Plaintiff failed to complete the works to a satisfactory standard and alleged negligent breach of contract.

4. The response to that was not lightning-fast. Because the Defence to Counterclaim fell due on February 12, 2015 and, in fact, a Default Judgment was obtained on March 24, 2015 and a Defence to Counterclaim was only filed after that. That pleading was clearly late, filed on or about March 25, 2015; and, in effect, it was filed in support of the Plaintiff's application to set aside the Default Judgment.

5. Directions were ordered in relation to the Plaintiff's Summons on April 30, 2015. Those directions gave the Plaintiff leave to file further evidence within 14 days, because he had already filed an Affidavit dated March 18, 2015 in support of his Summons. The Defendants were given leave to file Affidavit evidence 14 days thereafter and then standard setting down directions were ordered.

6. What happened in fact was that the Defendants through the 1st Defendant filed a Reply Affidavit sworn on May 29, 2015, the Plaintiff having not availed himself of the opportunity to file further evidence. And then, without leave of the Court, the Plaintiff filed his reply evidence on June 22, 2015. As a practical matter it must be noted that the Directions Order was deficient in not providing for an opportunity for the Plaintiff to reply to the evidence filed, really, in answer to his own applications. And so, although objection was made at the beginning of the hearing to the technical breach of the Directions Order which the filing of the Reply Affidavit of the Plaintiff entailed, I exercised my discretion by permitting the Affidavit to be treated as regularly filed, because justice clearly required that the Plaintiff should have an opportunity to respond.

Application to set aside Default Judgment-governing principles

7. The Plaintiff's primary application was obviously to set aside the Default Judgment on the Counterclaim. And his counsel relied on the well-known case of *Alpine Bulk Transport Inc.-v-Saudi Eagle Shipping Co. Inc ('The Saudi Eagle')*

[1986] 2 Lloyd's LR 221, which the Defendant's counsel agreed represented the applicable law.

8. The relevant principles are set out at in the judgment of Sir Roger Ormrod at page 223 where he says this:

> "*The following 'general indications to help the Court in exercising the discretion" (per Lord Wright at page 488) can be extracted from the speeches in Evans v Bartlam (1937) A.C. 473 , bearing in mind that "in matters of discretion no one case can be authority for another' (ibid, page 488):*
>
> > *(i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;*
> >
> > *(ii) the Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the court should not "lay down rigid rules which deprive it of jurisdiction" (per Lord Atkin at page 486);*
> >
> > *(iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;*
> >
> > *(iv) the primary consideration is whether the defendant "has merits to which the Court should pay heed" (per Lord Wright at page 489), not as a rule of law hut as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown "merits" the "Court will not, prima facie, desire to let a judgment pass on which there has "been no proper adjudication" (ibid. page 489 and per Lord Russell of Killowen at page 482).*
> >
> > *(v) Again as a matter of common sense, though not making it a condition precedent, the court will take into account the explanation as to how it came about that the defendant "found himself hound by a judgment regularly obtained to which he could have set up some serious defence" (per Lord Russell of Killowen at page 482).*
>
> *In applying these 'general indications' it is important in our judgment to be clear what the 'primary consideration' really means. In. the course of his argument Mr Clarke Q.C. used the phrase 'an arguable case' and it, or an equivalent, occurs in some of the reported cases (e.g. Burns v Kendel (1977) 1 Ll.L.R. 554 and Vann v Awford). This phrase is commonly used in relation to Order 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it is used in the same sense in relation to setting aside a default judgment, it does not accord, in our judgment, with the standard indicated by each of their lordships in Evans v Bartlam. All of them clearly contemplated that 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. (In Evans v Bartlam there was an obvious defence under*

the Gaming Act and in Vann v Awford a reasonable prospect of reducing the quantum of the claim). Indeed it would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The 'arguable' defence must carry some degree of conviction."

Merits of application to set aside Default Judgment

9. Mrs. Subair-Williams invited the Court, in light of that test, to scrutinise the defence very critically and to remember that the burden is on the Plaintiff, the Defendant to the Counterclaim, to establish more than a triable issue. How that test is applied in practice is, in my judgment, a somewhat fluid matter which depends on the nature of the claims.

10. The present claim is a fairly classic construction dispute where a contractor, the Plaintiff, has started a project, fallen out with his customers and has sued for the balance of monies he contends are due. Meanwhile, his customers have asserted that he carried out the work in an imperfect manner which has caused them loss because remedial steps will have to be taken. These matters, particularly in the context of an oral contract, are so difficult to assess in merits terms merely be looking at pleadings and affidavits that it would take unusual circumstances for the Court to be able to properly conclude that the Defendant to the Counterclaim is unable to make out a defence which "*carries some degree of conviction*" to it.

11. In this case the substance of the proposed Defence to the Counterclaim is not based on expert evidence, at this stage, suggesting that the work was perfectly done. Rather it is contended either that costs-saving methods were deployed by the Plaintiff with the Defendants' consent, which diminished the quality of the work done. Or, on the other hand, the repudiation of the contract by the Defendants prevented him from completing work. Those arguments at this stage, without making more than a superficial attempt to assess their merits, appear to me to carry sufficient conviction to justify the Court in setting aside the Default Judgment.

12. In my experience the Court adopts a somewhat more liberal view towards setting aside a regularly obtained Default Judgment where the primary claim, which is distilled in the Default Judgment, is not a claim where the merits of the claim can be very easily ascertained by looking at a single document such as a promissory note. In this case the merits on either side depend very much on an assessment of

evidence which is not presently before the Court and which would, in the absence of agreement, have to be tested by oral evidence and cross-examination.

13. It has to be said that the Defendants acted with due decorum in the way they went about seeking the Default Judgment. Because the history of the matter, which their counsel took me through, is that after the Defence to Counterclaim fell due on February 12, 2015, they corresponded with the Plaintiff's attorneys on March 11 and March 20, 2015, before finally obtaining Default Judgment on March 24, 2015. Although there was some response from the Plaintiff's attorneys suggesting that they might be contemplating applying to strike-out the Defence and Counterclaim, no such application came. And so the Defendants were quite justified in proceeding by default as they did.

Application to strike-out Defence

14. The second application was an application to strike-out and in this regard, again, the principles were largely common ground. The Defendants' attorneys in this case relied in response to the application on essentially the same principles as the Plaintiff relied on in moving the strike-out.

15. The strike-out application was a somewhat unusual one in that the grounds were not set out in the Summons and the Defence and Counterclaim clearly disclosed an arguable defence. The only shadow of a criticism which Mr. Durham was able to advance was that it was implausible that there was no liability on the part of the Defendants to pay the Plaintiff anything. That is a somewhat artificial analysis of the Defence and Counterclaim because it is clear, as Mr. Durham himself accepts for other purposes, that this is really a dispute about quantum. How much is due under the Plaintiff's claim, and how much is due under the Defendants' Counterclaim, in either case, if anything at all?

16. But the test for striking-out a pleading is helpfully set out in the case of *Wenlock-v- Moloney* [1965] 1 W.L.R. 1238 where Sellers LJ (at 1242F-1243C) says this:

> "*On the face of it the writ and the Statement of Claim did disclose a cause of action, and both defendants pleaded to the Statement of Claim, as I have said, by their Defence. In the judgment no reference is made I think to sub paragraph 2, that no evidence should be admissible on an application under paragraph (1) (a).*
>
> *It is said before this court (and no doubt was said before the Master) that the affidavits were put in not under (a) but under (b) and (d) of that rule. If, as here, the only ground on which the action can be said to disclose no reasonable cause of action is that it is not one which is likely to succeed, then I doubt whether affidavit evidence was admissible. There have been cases where affidavits have been used to show that an action was vexatious or an*

abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try the issues in this way is to usurp the function of the trial judge…."

17. And Dankwerts LJ (at page 1243G-1244A) said this:

"*The position is very clearly expressed by Lord Herschell in Lawrence v. Lord Norreys (1890) Law Reports 15 Appeal Cases, 210, at page 219. He said 'It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved'. In that case the application succeeded in the Court of Appeal and the House of Lords because those Courts concluded that the story told in the proceedings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case.*" [emphasis added]

18. The present Defence and Counterclaim is very far removed from that. And so it follows that the application to strike-out the Defence is refused.

Costs

19. The parties addressed me as to costs and Mr. Durham sensibly conceded that it was inevitable that costs should follow the event as far as the strike-out application is concerned.

20. The position of the application to set aside the Default Judgment is a little bit more complicated because the Plaintiff has had some measure of success today; although the application to set aside has been necessitated by the fact that the Plaintiff has been in default in circumstances where there really is, before the Court, no or no satisfactory explanation whatsoever for the default. So the position really is that not only were the Defendants entitled to proceed by way of default, but they did so in an entirely proper manner giving the Plaintiff every opportunity to take steps to make the entry of a default judgment unnecessary. But before the filing of the Affidavit of the Plaintiff, late and without any formal leave of the Court on June 22, 2015, there was no reason for the Defendants' attorneys to think that the application to set aside the Default Judgment might succeed.

21. Mrs. Subair-Williams went further to say that in fact, having regard to the absence of any expectation, the Defendants were justified in thinking that they might still succeed. That may be overstating the position somewhat. I accept entirely that the

Court will usually visit costs consequences on a party who has succeeded but who has conducted proceedings, or a particular part of proceedings, in an unreasonable manner[1].

22. In this case it seems to me that the Defendants should be awarded their costs in relation to the response to the application to set aside the Default Judgment up to and including a review of the Affidavit of June 22, 2015. But thereafter, each side should bear their own costs. The Plaintiff has succeeded today and would ordinarily expect to be rewarded in costs. But bearing in mind the way in which the present application has become necessary, the appropriate Order in my judgment is to deprive him of the costs to which he would otherwise be entitled and to make no Order as to the costs after June 22, 2015.

Dated this 29th day of June, 2015 _____
IAN R.C. KAWALEY

[1] Order 62 rule 10 of the Rules of the Supreme Court provides: "*(1)Where it appears to the Court in any proceedings that any thing has been done, or that any omission has been made, unreasonably or improperly by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"