In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No: 84

BETWEEN:

HEART & SOUL CONSTRUCTION LIMITED

Plaintiff

And

VELEKA EVE

Defendant

CHAMBERS RULING

Application to set aside Judgment made as a sanction for non-compliance with an Unless Order

Date of Hearings:	Friday 1 December 2017 and Friday 8 December 2017
Date of Ruling:	Thursday 21 December 2017
Plaintiff	Mr. Chris Swan (Christopher E. Swan & Co.)
Defendant	Mr. Kamal Worrell (Mastermind Bermuda Law)

RULING of Registrar Shade Subair Williams

Introductory

1. The Parties in this matter appear before the Court on the Defendant's summons, dated 25 August 2017, for an order to set aside judgment made by the learned Justice Charles-Etta Simmons on 20 September 2013. In this case, judgment was made on the papers as a sanction for non-compliance with an Unless Order made by the same learned judge on 15 August 2013 at a hearing where only the Plaintiff was present.

Background

2. The Plaintiff filed a Specially Indorsed Writ on 16 March 2011 for unpaid contractual works to the Defendant's property in the sum of $188,790.00.

3. On 10 May 2011 the Defendant filed a Memorandum of Appearance through her then attorney, Kevin Taylor of Marshall Diel & Meyers and on 3 June 2011 a Defence was filed on basis that the contractual works were carried out poorly.

4. On 16 March 2012 the Plaintiff filed a summons for pre-trial directions which was heard before the learned Hon. Chief Justice, Ian Kawaley, on 19 April 2012 when pre-trial directions were issued.

5. In part, Kawaley CJ, ordered for the parties to exchange their list of documents within 14 days of his 19 April 2012 directions. Neither party complied with this time-frame. Over two months later, the Plaintiff filed its list of documents on 6 July 2012 which was served on the Defendant's attorney on 12 July 2012. To date, the Defendant has not filed a list of documents.

6. The Chief Justice's directions also provided for the exchange of witness statements on or prior to 30 September 2012. To date, neither party has complied with this direction. In fact, nearly a year lapsed after the first missed deadline (Thursday 3 May 2012) before the Plaintiff took any Court action at all.

7. By letter dated 1 April 2013 and filed on 2 April 2013, the Plaintiff requested a case management hearing before a Judge in Chambers. A Notice of Hearing, dated 4 April 2013, was issued listing this matter for Thursday 25 April 2013. The Defendant filed a Notice of Intention to Act in Person on 9 April 2013.

8. On 25 April 2013, when this matter was listed at the request of the Plaintiff, Mr. Swan, by letter of same date, requested for the hearing to be relisted to 9 May 2013 to accommodate a priority matter before an Acting Magistrate in the Court below. Mr. Swan's delist letter was not copied to the Defendant. Nonetheless, a Court Administrator acting on behalf of the former Registrar, confirmed a relisting for 16 May 2013.

9. On 16 May 2013 the Defendant, Veleka Eve, appeared before the learned Justice Carlisle Greaves as a litigant in person. Counsel for the Plaintiff also appeared. It seems from the learned judge's handwritten note of the hearing that Ms. Eve informed the Court that she had or would retain Mr. Worrell to represent her. Indeed, four days later on 20 May 2013, Mr. Worrell filed a Notice of Appointment of Attorney confirming his representation of the Defendant.

10. At the 16 May 2013 hearing, Greaves J ordered for the Defendant to comply with the 19 April 2012 directions within a 14 day period and for the parties to '*follow the Order per time periods stated therein.*' The pre-trial directions, as can be implicitly understood from the 16 May 2013 Order, required the Defence to file its List of Documents within 14 days of the Order. The said Order by Greaves J also specified for the parties to exchange witness statements within a 28day period and

leave was granted for the filing of expert evidence from the Defendant with a provision for reply expert evidence from the Plaintiff. From 16 May 2013 the matter was adjourned to 11 July 2013.

11. On 11 July 2013 Mr. Worrell made his first Court appearance in this matter before Greaves J. It appears from the Court record that Mr. Swan, on behalf of the Plaintiff, failed to appear on this occasion. Unsurprisingly, the Court acceded to Mr. Worrell's request for an adjournment and the matter was adjourned for one month. Mr. Worrell, a known offender for failing to file perfected Orders with the Court, did not draw up an Order arising out of the 11 July 2013 hearing. However, by reference to the learned judge's handwritten note, it is clear enough that the Court ordered for the Registrar to list the matter again in one month. A return date was not specified.

12. A month of Thursdays thereafter on 15 August 2013, Mr. Swan appeared before the learned Justice Charles-Etta Simmons. On this occasion, Mr. Worrell was not present. There are no documents on the Court file which would suggest that the Registrar (my learned predecessor, Charlene Scott) issued a Notice of Hearing to either party to appear on 15 August 2013. Mr. Swan initially suggested that a Notice of Hearing must have been issued on the basis that he could not otherwise explain how he knew to appear before Simmons J on15 August 2013. However, Mr. Swan also accepted that he regularly appears in the Thursday Civil Court Chambers session on various matters and that it is equally plausible that he noticed this matter on the cause list while attending on other unrelated matter(s).

13. Notwithstanding, at the 15 August 2013 hearing Simmons J noted on the record that the matter was set for mention from 11 July 2013. Seemingly, the learned judge proceeded on the basis that both parties had sufficient notice to appear. The Court made an order in the following terms:

    "*Unless the Defendant complies with the order of 16th July 2013 within 14 days of the date hereof, the Defence shall be struck out and Judgment to the Plaintiff shall be ordered*."

14. It is clear, as was accepted by both parties, that the above reference in the Order to 16 July 2013 was an error and that it was intended for the Order to instead refer to the previous order of 16 May 2013.

15. It is an agreed fact between the parties that the Mr. Swan caused a copy of the 15 August 2013 Unless Order to be sent to the Defendant's home address by registered mail. However, Mr. Swan accepted that he never served the Defendant's Counsel, Mr. Worrell, with a copy of the Order.

16. All the same, on 20 September 2013, Simmons J made the following Order on the papers (ie. without a hearing): "*Pursuant to the non-compliance of the Defendant with the order of July 16th 2013 and the failure to comply with the order of August 15th 2013 the Defendant's Defence is struck out and Judgment to the Plaintiff is ordered*."

17. There is no evidence or suggestion that a copy of this Order was served on Mr. Worrell. In fact, what followed was the filing of a Writ of Execution by the Plaintiff on 15 October 2014. Notably, the Plaintiff never filed a Judgment Summons.

18. A Court Administrator, by letter dated 22 October 2014, advised Mr. Swan on his omission to file a Praecipe which he later filed more than two years later on 6 May 2016. Mr. Swan also refiled his writ of execution on 6 May 2016. This prompted the Registry to direct Mr. Swan to file a Notice of Intention to Proceed pursuant to the Order 3(6) of the Rules of the Supreme Court 1985.

19. Over a month later, a Notice of Intention to Proceed was filed by the Plaintiff on 10 June 2016. Some four months later, Mr. Swan wrote to the Court to inquire as to the status of the Writ of Execution without receipt of a reply.

20. On 7 December 2016 Mr. Worrell filed a Search Praecipe to search the Court file having obviously received a copy of the writ of execution. Some three weeks thereafter on 29 December 2016, Mr. Worrell filed a Summons application to stay the Writ of Execution. This application was supported by affidavit evidence from the Defendant, Veleka Eve. In her affidavit sworn on 23 December 2016, Ms. Eve expressed surprise as to how the proceedings had reached this point. Ms. Eve also stated that the Orders of 15 August 2013 and 16 July 2013 were never served on her or otherwise communicated to her. In the same affidavit, she said that she was assured by her Counsel that even he was unaware of the said Court fixtures. (It is clear that there are no Orders of 16 July 2013 in these proceedings. The reference to a 16 July 2013 Order was erroneously stated in the Unless Order made by Simmons J on 15 August 2013).

21. On Thursday 12 January 2017 and on 9 March 2017 the Defendant's summons to stay the writ of execution was adjourned by the learned Justice Stephen Hellman for lack of service on the Plaintiff. I was told by Counsel that the learned judge also advised Mr. Worrell that he would have to file a summons to set aside judgment if he intended to challenge the judgment.

22. On 23 March 2017 the matter came before me and was further adjourned at the parties' request to 6 April 2017 for Counsel to consider a procedural point. The matter was relisted by agreement from 6 April 2017 to 20 April 2017 to oblige Mr. Swan. However, on 20 April 2017 Mr. Worrell did not appear. Accordingly, I adjourned this matter from 20 April 2017 to 27 April 2017.

23. On 27 April 2017 Mr. Swan appeared but Mr. Worrell was absent once again. Mr. Swan advised the Court that he personally informed Mr. Worrell about the 27 April 2017 hearing and assured the Court that Mr. Worrell's absence was not for a lack of knowledge on his part. Consequently, I made an Unless Order that the Defendant's summons would be struck out in the event of another non-appearance on the return date fixed for 4 May 2017. On 4 May 2017 both parties appeared before me. and I made another Unless Order that the application to stay the writ of execution would be struck out if by 11 May 2017 a proper application to set aside judgment was not filed by the return date on 11 May 2017.

24. On 11 May 2017 both parties again appeared before me and Mr. Worrell confirmed that he had in fact filed a summons to set aside judgment.

Governing Principles of Law

25. The Rules of the Supreme Court 1985 provide for judgment to be made summarily but with regard to the merits of the case under Order 14. Judgment may otherwise be made administratively in default of an appearance or pleadings by a Defendant in accordance with Order 13. In this case, however, judgment was made by way of sanction for non-compliance with an Unless Order which required action by the Defendant in furtherance of pre-trial directions previously issued by the Court.

26. Our Rules of the Supreme Court do not contain specific provisions for Unless Orders and sanctions for non-compliance with directions made by the Court. All the same, the Court's jurisdiction to grant judgment as a sanction and without regard to the merits of the Plaintiff's case is unchallenged. Indeed, the Court's powers to do so were in exercise of its inherent jurisdiction which has been long recognized.

27. Mr. Swan referred to the judgment of the learned Hon. Chief Justice, Ian Kawaley, in *Smith v Brown et al [2014] SC (Bda) 92 Civ (20 November 2014)*. In *Smith v Brown*, the Registrar signed a Judgment in Default for failure to comply with an Unless Order made by the learned Chief Justice approximately one month prior. At paragraph 7 of the Judgment, it reads;

> "*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 (with) 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*."

28. In *Smith v Brown* the application seeking relief from the default judgment was not supported by evidence explaining why such relief should be granted. More so, at the time of the application the Defendants still had not filed the documents required under the Unless Order. At paragraph 10, the learned Chief Justice stated;

> "*…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 willful or deliberate and therefore they should be given relief…*"

29. The learned Chief Justice cited with clear approval the following portions of *Tarn Insurance Services Ltd. (in administration) v Kirby [2009] EWCA Civ 19*:

> "[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 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 008 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 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*."

30. Mr. Worrell referred me to an extract from Blackstone's Civil Practice 2010 which looks at Part 23 of the CPR and the principles governing applications for relief:

"*…On an application for relief, r.39(1) provides that the court will consider all the circumstances, and then sets out nine factors which will be considered:*

(a) the interests of the administration of justice;
(b) whether the application for relief has been made promptly;
(c) whether the failure to comply was intentional;
(d) whether there is a good explanation for the failure;
(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
(f) whether the failure to comply was caused by the party or his legal representative;
(g) whether the trial date or the likely trial date can still be met if relief is granted;
(h) the effect which any failure to comply had on each party; and
(i) *the effect which the granting of relief would have on each party*."

31. Mr. Worrell underlined the reference to *Woodhouse v Consignia plc [2002] EWCA Civ 275* where it was held that a refusal of relief deprives the defaulting party of access to the court, which has particular importance under Article 6(1) of the European Convention on Human Rights. (Also see *Blerim Ethemi v Robert Shiels [2008] EWHC 291 (QB)* where the Court on appeal against a sanction for failure to comply with an Unless Order for disclosure refused to interfere with the sanction despite having recognized that it was harshly imposed.)

32. Applying the CPR principles, it is relevant to distinguish deliberate breaches of an Unless Order from non-intentional failures and omissions to comply. (See *CIBC Mellon Trust Co. v Stolzenberg [2004] EWCA Civ 827* and *Bournemouth and Bascombe Athletic Football Club Ltd v Lloyds TSB Bank plc [2003] EWHC 834 (Ch)*.) Previous defaults will also be a relevant consideration (see *RC Residuals Ltd v Linton Fuel Oils Ltd [2002] 1 WLR 2782*.) Additionally, the Court will assess the extent of prejudice caused to the other side as a result of the non-compliance and whether the non-compliance is more the fault of the attorney than the litigant party.

33. An explanation for the non-compliant delay is another factor. (See *Finnegan v Parkside Health Authority [1998] 1 WLR 411* where the Court of Appeal held that the absence of a good reason for delay was only one factor to be weighed against the numerous other factors for consideration.)

34. This approach differs from the standard approach to setting aside judgement as outlined by the ex tempore ruling of Kawaley CJ in *Sean Smith v Nicole Stoneham and Carol Stoneham [2015] Bda LR* and in my previous ruling in *Michael Paulo v Damon Simmons Civ 109 of 2016* where I also cited *Burgess v Burgess-Salina and Williams [2016] Bda LR 8* and *Alpine*

Bulk Transport Inc v Saudi Eagle Shipping Co. Inc ('The Saudi Eagle') 1986 2 Lloyd's LR 221 and *Evans v Bartlam [1937] AC 473.*

Analysis

35. Judgment in this case arises from non-compliance with Unless Order made by Simmons J on 15 August 2013. However, there is nothing before me to suggest that the learned judge satisfied herself that the Defendant had been properly made aware of the date and time of the 15 August 2013 hearing. Greaves J did not adjourn the 11 July 2013 hearing to a specified date and time. Instead, he directed the Registrar to list the matter in a month. Accordingly, a Notice of Hearing should have been issued as he directed. However, this does not appear to have occurred. For that reason, I accept that Mr. Worrell did not have notice of the 15 August 2013 hearing.

36. It follows that the making of an Unless Order at the 15 August 2013 hearing was unjust in the circumstances. This is worsened by the agreed fact that Mr. Worrell was never served with a copy of the Unless Order made by Simmons J. The Defendant cannot be reasonably expected to comply with an Order which was not served on her attorney. Mr. Worrell was clearly Counsel of Record and ought to have been served with any order obtained by the Court.

37. In any event, even if the Unless Order had been served, I think it excessively harsh that the terms of the Unless Order did not provide the Defendant with any opportunity to reappear before the Court to explain its position before Judgment was granted as a sanction for non-compliance.

38. I have also had regard to the Plaintiff's conduct which followed. In my assessment of this matter, it was not reasonable for the Plaintiff to pursue judgment by way of writ of execution without having first issued a Judgment Summons. There was a delay period in excess of one year between 20 September 2013 when Judgment was granted and 15 October 2014 when Mr. Swan first attempted to proceed by way of writ of execution. This was overly aggressive on the Plaintiff's part, particularly in the circumstances of how judgment came to be granted in this case.

39. Another two years of inaction lapsed before Mr. Swan filed a Praecipe and refiled his writ of execution on 6 May 2016. Again, I find that a Judgment Summons ought to have been the first step of enforcement. This would have given the Defendant a fair opportunity to state its position before the Court.

40. I am also mindful that the May 2016 writ of execution was filed by the Plaintiff prior to having first filed a Notice of Intention to Proceed. The Defendant, at paragraph 9 in her first affidavit, contends that she was never served with a copy of the Notice of Intention to Proceed which was filed in June 2016. Notably, Mr. Swan was silent on this point in his reply affidavit evidence before the Court, which I have fully considered. This is a materially important factor for consideration.

41. In assessing the timeframe which passed before the Defendant took action before the Court to challenge the Judgment, I have looked to the 29 December 2016 date on which Mr. Worrell filed the summons application to stay the Writ of Execution. This followed the Deputy Provost Marshall's 25 November 2016 letter to Ms. Eve confirming that she had been personally served with the writ of execution on 18 November 2016. I find that the Defendant acted within a reasonable enough timeframe in challenging the writ once she was made aware of it.

42. The fact that Mr. Worrell did not explicitly seek relief by praying for an Order to set aside judgment in his summons for a stay of the writ of execution is a mere technical error on the part of the Defendant's Counsel. It is clear and obvious from the Defendant's supporting affidavit evidence that her intention was to have the judgment set aside. Accordingly, I find that her application for relief was not made with any excessive delay.

43. I have approached my assessment of this application having had regard to the interest of the administration of justice and all of the factors listed in the Rule 39(1) of Part 23 of the UK CPR regime which I found to be of useful guidance in circumstances where Judgement has been imposed by way of sanction.

44. I have also had regard to the approach of the learned Chief Justice in *Smith v Brown et al [2014] SC (Bda) 92 Civ (20 November 2014)*. However, *Smith v Brown* is to be distinguished from this case as no real complaint was made in former case on the correctness or fairness of the Unless Order itself. In this case, I have found that the 15 August 2013 Unless Order ought not to have been made in the first instance.

45. For the sake of completion, I have also had regard to the merits of the Defence on its face. While, I need not hold the Defence to the highest standard of having to prove a real prospect of success in circumstances where Judgment was made without regard to the merits of the Plaintiff's case and by way of sanction, I have nevertheless found that the Defence is clear and detailed enough to pass any such preliminary evidential threshold.

46. For all of these reasons, I have found that it is just and fit to set aside the judgment entered on 20 September 2013.

Conclusion

47. The Summons application to set aside the Judgment made on 20 September 2013 is granted.

48. Necessarily, I strike out the Plaintiff's writ of execution.

49. A new summons for pre-trial directions shall be filed as a next step in advancing this matter if the parties are unable to resolve this dispute privately.

50. I will hear Counsel, if necessary, on the terms of the Order to be drawn up to give effect to this Ruling.

51. Unless either party applies[1] within 21 days to be heard as to costs, costs shall follow the event in favour of the Defendant only to the extent that the Defendant may recover 50% of its costs on a standard basis, to be taxed if not agreed.

52. The partial award of costs is attributable to the non-appearances and the inordinate delay caused by the Defendant between 20 April 2017 and 1 December 2017.

Dated this 21st day of December 2017

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SHADE SUBAIR WILLIAMS
REGISTRAR OF THE SUPREME COURT

[1] See Court Circular 31 of 2017 issued on even date setting out new filing forms for all civil and commercial hearings requested.