In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2015: CIVIL APPEAL NO: 28

PAUL HARSHAW

Appellant

-v-

KEETHA LOWE

Respondent

JUDGMENT
(In Court) [1]

Date of Hearing: January 20 2016
Date of Judgment: January 29, 2016

The Appellant appeared in person
Mr. Javone Rogers, Mussenden Subair Limited, for the Respondent

Introductory

1. The Appellant appeals against the decision of the Magistrates' Court (Wor. Tyrone Chin) dated July 21, 2015 setting aside the default judgment obtained by the Appellant against the Respondent on May 31, 2013 in the amount of $13,095. The underlying claim was in respect of legal fees.

2. He complains that the Learned Magistrate erred in law by applying the wrong test in deciding to set aside judgment and in doing so in the absence of any evidence filed in support of the application to set aside supporting the merits of the proposed defence.

[1] The Judgment was circulated without a formal hearing for handing down.

The proceedings in the Magistrates' Court

3. The Appellant issued an Ordinary Summons in the Magistrates' Court for $12,090 together with standard filing charges of $175 against the Respondent in Case No. 13CV00808. The Summons was issued returnable for May 31, 2013. According the Service Endorsement on the back of the Summons, the Respondent was personally served on April 12, 2013. She failed to appear on May 31, 2013 and judgment was entered in favour of the Appellant in default.

4. The Appellant thereafter issued two Judgment Summonses. The first was returnable on October 30, 2013 and the second was returnable on December 10, 2014. The Respondent failed to appear in either case, although personal service was never carried out on the second occasion. In between these two Summonses being issued, the Respondent's initial application to set aside the Default Judgment was apparently dismissed on or about September 12, 2014 when she failed to appear. The Respondent appeared before the Senior Magistrate on February 23, 2015 and stated that she was making a complaint to the Bermuda Bar Council against the Appellant and, apparently, that she wished to apply to set aside the Default Judgment. The Court directed her to file and serve a Defence within 14 days and adjourned the matter until May 13, 2015 to, *inter alia*, fix a date for the application to set aside.

5. On May 13, 2015, the Appellant and the Respondent (now represented by counsel) appeared before the Wor Nicole Stoneham. Mr Harshaw understandably initially believed, based on the contents of the Notice of Hearing issued by the Court on or about February 24, 2015, that the May 13, 2015 hearing only concerned the status of a 'Complaint to Bar Council'. The Respondent's counsel however stated that a Defence had already been filed and requested a hearing date for the application to set aside the Default Judgment. The Appeal Record confirms that the Respondent's Defence and Counterclaim was filed in the Magistrates' Court on May 12, 2015. The matter was further adjourned until June 17, 2015 when the parties appeared before Wor Tyrone Chin, with the Appellant being represented by Ms Alsha Wilson. The Appellant was ordered to produce copies of the bills which supported his claim within seven days. The matter was set down for hearing on July 21, 2015.

The Supreme Court Bankruptcy Proceedings

6. The Appellant apparently responded to receipt of the February 24, 2015 Notice of Hearing issued by the Magistrates' Court "*Mention Re: Complaint to Bar Council*" by issuing a Bankruptcy Notice in this Court on or about March 6, 2015. The Respondent made abortive attempts to retain counsel to deal with the Bankruptcy Notice but ended up filing an Affidavit in support of a stay of the Bankruptcy Proceedings herself on May 6, 2015. In this Affidavit, she explained that she appeared before the Senior Magistrate in February 2015 on her own initiative and explained that her failure to appear had been due to the illness of two family members (her daughter-in-law and mother), both of whom had since died. She sought a stay of the Bankruptcy Proceedings in order to be able to pursue her application to set aside judgment which was due to be mentioned on May 13, 2015.

7. Without formally granting a stay, I adjourned the Bankruptcy Proceedings on May 8, 2015 until June 12, 2015 and invited counsel to further adjourn the matter by consent if the application to set aside was still pending before the Magistrates' Court on June 12, 2015.

The impugned Magistrates' Court Decision of July 21, 2015

8. It was common ground before the Magistrates' Court that the same test applicable to setting aside a judgment in default in the Supreme Court applied to the equivalent application in the Magistrates' Court: *Bridgewater-v-Bermuda Accounting and Management Services* [2015] SC (Bda) 2 App (13 January 2015); [2014] Bda LR 2. Mr Rogers for the Respondent cited this authority for this proposition. Mr Harshaw further cited *Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc* [1986] 2 Lloyd's LR 221, and two Bermudian cases applying this English court of decision: *Ball-v-Lambert* [2001] Bda LR 81; *M & M Construction Ltd-v-Vigilante* [2012] Bda LR 6.

9. The primary defence was that the relevant account to which the Default Judgment related had been paid in full. The Counterclaim asserted that interest was payable in respect of the proceeds of the sale of a property which ought to have been paid into an interest-bearing account. It asserted without particularity that the Respondent had been overcharged and had overpaid and sought, in effect, an accounting from the Appellant. Mr Harshaw submitted that there was no satisfactory explanation for the default and related highly prejudicial delay, and no evidence in support of the merits of the Defence, which was now only being pursued merely to defeat the Supreme Court Bankruptcy Proceedings. The Counterclaim raised issues which were not justiciable in the Magistrates' Court.

10. The Learned Magistrate after summarising the various arguments made concluded as follows:

> "*The Court is somewhat satisfied as to the explanation for Ms. Lowe failing to appear on 31st May 2013 and on 12th September 2014. This Court is quite satisfied that its major consideration has been attained in that the Court deems that the Defendant has a Defence and a Counterclaim which both have prospects of success.*"

Findings: merits of the appeal

<u>The Legal Test for setting aside a regular default judgment</u>

11. Mr Harshaw rightly submitted that the Learned Magistrate erred in law in failing to accurately record the correct legal test for setting aside the Default Judgment. The test is higher than "*prospects for success*". In *Burgess-v-Burgess-Salina and Williams* [2016] SC (Bda) 7 Civ (25 January 2016), I recently summarised the principles which were also common ground in the present case as follows:

"*14.There was no controversy as to the governing principles applicable to an application to set aside a default judgment which has been regularly obtained. Mr Durham relied upon the leading English Court of Appeal authority of Alpine Bulk Transport Co. Inc. –v-Saudi Eagle Shipping Co. Inc [1986] 2 Lloyd's Rep 221. I most recently applied the guidance provided by that case in S Smith-v- N Stoneham et al [2015] SC (Bda) 42 Civ (29 June 2015) where I stated:*

> '*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 bound 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."* [Emphasis added]

12. The proposed defence must have "*real prospects of success*". However, this was a somewhat technical criticism of the Ruling since the applicable principles were not in dispute and the relevant authorities were placed before the Court. There is no basis for a finding, without more, that the Learned Magistrate in substance applied the wrong test because he expressed himself in an overly compressed way. The imperfection of language used does not support setting aside the decision unless this Court is satisfied that real injustice has occurred. Section 14 of the Civil Appeal Act 1971 provides:

> "*(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*"

Was the Learned Magistrate substantively wrong to find that the Defence disclosed real prospects of success?

13. Mr Harshaw complained that no evidence was filed in support of the application to set aside the Default Judgment. It is true that ordinarily evidence should be filed in support of such applications. Exceptional circumstances would be where the applicant gives oral evidence, raises an obviously meritorious defence and/or any other instances where the judgment creditor effectively waives the right to insist on evidence being filed.

14. It was not asserted that the Appellant asked the Court to direct the Respondent to file evidence in support of her Defence and Counterclaim and was wrongly refused by the Court. The Appellant appeared at mention hearings on May 13, 2015 and June 17, 2015. No application requiring the Respondent to support her own application by anything more than the pleading she had filed on May 12, 2015 was made on either date. In my judgment the Appellant acquiesced in the Court dealing with the application without evidence over and above the Affidavit filed in the Bankruptcy Proceedings explaining the delay.

15. That said, it was fairly open to the Appellant to argue, as he did before the Magistrates' Court and this Court, that in the absence of evidence it was not open to the Court to find that the Defence "*has merits to which the Court should pay heed*". Mr Rogers in argument below relied heavily on the fact that the Respondent had previously reduced her defence to writing in a letter dated May 23, 2014 in support of her initial application to set aside. This was a matter which lent greater credibility to the Defence, especially as it also explained the reasons why she had allowed the default to occur. In addition, the Learned Magistrate had before him the Affidavit sworn by the Respondent in support of her application to stay the Bankruptcy Proceedings. This Affidavit did not, as it perhaps should have done, contain any explicit averments as to the merits of her Defence. But, reading it in a common sense and generous way, the Affidavit did provide broad evidential support for the Respondent's own convictions about the Defence.

16. Mr Rogers confirmed in argument before me that the Respondent's Defence did include the concise argument that the nothing was due because the Appellant had admitted as much in an email which was not before the Court. This seemed to me to be the sort of evidence which could, if it existed, demonstrate very shortly real prospects of success. Counsel produced a copy of the email which I admitted to supplement the Record, pursuant to section 14(5) of the Civil Appeals Act 1971, which provides:

> "(5)*The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition.*"

17. While the January 14, 2014 email from the Appellant to the Respondent viewed in isolation is not crystal clear, it states: "*On July 12, 2012, your accrued fees and charges were satisfied from the costs awarded against….in relation to the Partition action…*" If the email was, as Mr Harshaw contended, only referring to the satisfaction of the Respondent's outstanding fees in relation to one unrelated matter, such a meaning cannot be extracted from the bare words of the email. This additional material strengthens rather than undermines the conclusion reached by the Learned Magistrate on the merits of the Defence.

18. The Court's discretion to set aside a default judgment is, at the end of the day, an unfettered one. It would be surprising if the Learned Magistrate was not to some extent influenced by the unattractive spectre of a lawyer aggressively pursuing a

former client, who was at all material times a litigant in person facing extreme personal challenges, through the courts. In this Court and the Magistrates' Court, the Overriding Objective requires the Court, when making any procedural decision, to have regard to the importance of "*ensuring that the parties are on an equal footing*". This is a further consideration which fortifies the substantive soundness of the impugned decision of the Magistrates' Court.

19. The reasons for the default were in my judgment satisfactorily explained, and supported by sworn evidence. This was not mere carelessness or deliberate neglect, but truly exceptional personal circumstances of a nature which are unlikely to occur in many cases. This is an important consideration because the courts should not lightly deprive judgment creditors of their vested rights and give undeserving delinquent defendants an opportunity to pursue a defence which ought to have been more diligently pursued.

20. Accordingly, I find that no substantial miscarriage of justice flowed from the legal misdirection complained of and dismiss the appeal against the setting aside of the Default Judgment.

21. Mr Harshaw fairly complained about the fact that publicity was given by the Respondent to professional conduct complaint which ought to have been confidential. No complaint had in fact been made by the Respondent when she told the Magistrates' Court that she was preparing to make a complaint. It is understandable that the Respondent, then acting in person, should have mentioned a proposed complaint to the Court. However, she should have been told that such a complaint was entirely a matter between herself and the Bar disciplinary authorities and had no bearing on her civil claim. No mention of the complaint ought to have appeared on a Notice of Hearing issued by the Magistrates' Court.

22. I do not ignore the fact that there may well be exceptional cases where disciplinary proceedings against a barrister who is simultaneously a party to court proceedings may properly be brought to the attention of the Court. However the general rule, reflected in section 25 of the Bermuda Bar Act 1974, is that disciplinary proceedings are confidential[2].

The Counterclaim and the Jurisdiction of the Magistrates' Court

23. The Learned Magistrate recorded no decision in relation to the Appellant's submission that the Counterclaim contained matters which were not justiciable before the Magistrates' Court. In a strict sense, this aspect of the argument did not really arise for consideration. Whether or not the Default Judgment was affirmed or set aside, the Respondent would have been entitled to pursue her Counterclaim, either

[2] Section 25 provides:
"*Subject to section 24B of this Act, every disciplinary proceeding under this Part of the Act shall be treated as confidential by every person having access thereto.*"

within the existing proceedings or by way of a fresh action. However, the point was argued and merited some form of decision.

24. The Learned Magistrate may well have had in mind that a logical consequence of his ruling that the application to set aside should be granted was that the Appellant would be able to raise his jurisdictional arguments by way of defence to the Counterclaim. If this was the case, it was not reflected in his ruling.

25. Mr Harshaw rightly argued that the jurisdiction of the Magistrates' Court only extends to contractual and tortious claims. Section 15 of the Magistrates' Act 1948 ("***Civil jurisdiction of court of summary jurisdiction***") provides as follows:

> "*15.The civil jurisdiction of a court of summary jurisdiction shall be limited —*
>
> *(a) to actions wherein the plaintiff seeks to recover a debt or demand in money, payable by the defendant with or without interest, upon a contract express or implied; or*
>
> *(b) to actions wherein the plaintiff seeks to recover damages alleged to have been suffered by reason of any act, default, neglect or omission on the part of the defendant:*
>
> *Provided that if the court of summary jurisdiction for any reason at any stage of the proceedings considers any cause or matter arising before it under the powers conferred by this subsection more suitable for argument in and disposal by the Supreme Court then the court of summary jurisdiction may decline the consideration or further consideration of such cause or matter.*"

26. Section 17 ("*Restriction on court of summary jurisdiction to take cognizance of certain actions*") provides as follows:

> *"17.A court of summary jurisdiction shall not take cognizance —*
>
> *(a) of any action for any libel or slander, or for seduction, or malicious prosecution or false imprisonment; or*
>
> *(b) of any action wherein the title to any corporeal or incorporeal hereditaments, or wherein the validity of any devise, bequest or limitation under any will or settlement, may be disputed.*"

27. Mr Rogers, explaining that the Defence and Counterclaim were drafted in understandable haste, conceded that the pleading did include some matters which the Magistrates' Court was not competent to try. I find that the allegations made in paragraphs 14 and 15 of the Defence and Counterclaim of failing to pay monies into a

trust account and offering investment advice (which at this point are merely bare allegations wholly unsupported by any or any direct evidence) clearly fall outside of the scope of section 15 of the Magistrates' Act. The former allegation may fall within section 17(b).

28. Paragraph 17 is not formally pleaded as a claim requiring an accounting from the Appellant. It may be possible to sustain the overpayment allegation through requiring the Appellant to provide further and better particulars of his own claim that monies are still due. This assumes that the amount sought falls within the monetary jurisdictional limit set by section 16 of the 1948 Act of $25,000. I accept the submission that requiring the Appellant to provide a full accounting as a substantive claim cannot be pursued in the Magistrates' Court.

29. On balance, I accept the submission of Mr Harshaw that the Counterclaim cannot properly be pursued in the Magistrates Court, but only to the extent that it relies upon the allegations contained in paragraphs 14-15.

Conclusion

30. For the above the reasons the appeal is dismissed. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the appeal are awarded to the Respondent to be taxed if not agreed.

Dated this 29th day of January 2016 _____

IAN RC KAWALEY CJ