SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1996

SUIT NO. 143 of 1995

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

and

1. BENETTON (St. Lucia) LTD.
2. TRACI BETTS

Defendants

Mrs. B. Fleming for Plaintiff
Mr. P. Foster for Defendants

1996: July 3;
October 2.

J U D G M E N T

MATTHEW J. (In Chambers).

On February 21, 1995 the Plaintiff filed a writ of summons indorsed with statement of claim asking for a sum of money in excess of $400,000 plus interest and costs being debts owing to the Plaintiff by the Defendants.

The writ of summons was served on the Defendants on March 7, 1996 and three days later they filed an entry of appearance. On July 4, 1995 Arthur Isidore swore to an affidavit that he had served the Defendants with the writ of summons and on July 13, 1995 the Plaintiff entered judgment in default of defence.

On August 1, 1995 the Defendants took out a summons upon an application to set the judgment aside. The summons was supported by an affidavit of Traci Betts and several exhibits were appended to the affidavit.

At paragraph 2 and 3 of the affidavit the deponent alleged that the Plaintiff had sued Benneton (St. Lucia) Limited and not Benetton (St. Lucia) Ltd, the correct name of the company, and so the judgment entered is erroneous. Quite frankly I do not take this objection seriously which seems to be catching at straws and in any case I find it was correctly answered by paragraph 2 of the affidavit of Stanley Ernest Hulse, Manager of the Plaintiff, filed on November 6, 1995.

Paragraphs 5 to 16 of Betts' affidavit refer to details of correspondence between the solicitors of the Parties. It is sufficient to state that the Plaintiff's solicitor gave a lot of accommodation to the Defendants to be permitted to file a late defence. The Defendants were requesting of the Plaintiff the documentation to be used by the latter in support of its case. By letter of June 9, 1995 the Plaintiff seems to have provided the necessary documentation and requested that the defence be filed and served not later than June 16, 1995.

The Defendants did not comply. They seem to be giving as the reason or one of the reasons the fact that about that time the Registry Office was on strike but they admitted in Betts' affidavit that the Staff of the Registry returned to work on July 3, 1995, yet by July 5, 1995 they were still asking for further accommodation to July 14, 1995 by which time they would file the defence.

Evidently the Plaintiff was not willing to give such further accommodation and on July 13, 1995 the judgment in default of defence was filed. I hold that the default judgment was regular.

But that does not mean that the Defendants could not apply to set the judgment aside and they seem to have done that by paragraph 17 of the affidavit of Traci Betts. One of the exhibits to this affidavit is a draft defence.

By paragraph 2 of that defence, the Defendants seem to be denying that the first-named Defendant owes the Plaintiff the sums claimed. In respect of the claim against the second-named Defendant it is alleged that there was no consideration for the guarantee and/or in the alternative, the Plaintiff wrongfully procured and induced the second-named Defendant to sign and execute the document by way of undue influence and they say the guarantee is null and void.

By way of reply to paragraph 17 of the affidavit on behalf of the Defendants, the Plaintiff filed two affidavits by two of their managers. John Miller seems to have been a former manager. His affidavit was filed on November 6, 1995. Paragraphs 2 to 9 of Miller's affidavit answer the particulars of the defence. There appears to be in effect a conflict between the pleadings and the affidavit evidence. Paragraph 10 of the affidavit states that in the circumstances outlined in the previous paragraphs the second-named Defendant has failed to establish a prima facie defence to the action and so the default judgment should be upheld and the application by the Defendants should be dismissed.

Stanley Ernest Hulse seems to be the succeeding manager. He also had an affidavit filed on November 6, 1995. In paragraph 6 of his affidavit he gives the reasons why the Defendants do not have a prima facie defence to the action on the merits to warrant the setting aside of the default judgment. Again this is based on his version of the facts. For example, he says there was good consideration for the guarantee. The Defendants dispute that in the particulars of their defence. In his affidavit at paragraph 6(ii) he states in part:

> ".....as the second-named Defendant was not a cohabitee who was induced to sign a guarantee to secure a loan advanced to the second-named Defendant's cohabitee".

But the contrary is stated in the said particulars of the defence.

What he said at paragraph 6(iii) is based on his view at 6(ii) and carries the matter no further; and what he says at paragraph 6(v) is equally disputed and the letter dated September 4, 1992 from Betts to the Bank does not necessarily support the fact that the debts were incurred by the second-named Defendant. Paragraphs 6(vi) to 6(x) are equally disputable.

And it is on the basis of his view of the facts that he is asking that the default judgment be upheld and the application of the Defendants be dismissed.

The Plaintiff's request is premised on the fact that everything that has been said in the affidavits made on its behalf are true. I have no doubt that the two managers are men of repute but it would be strange and perhaps dangerous if allegations in a pleading could be discarded so easily and a judgment maintained by affidavit evidence which have not been tested by cross-examination.

Learned Counsel for the Defendants was quite terse in his submissions to set aside the default judgment. He however referred to "the New Civil Court in Action" by David Barnard at pages 96-97. The passage states in part:

> ".....Where judgment is regular it is standard practice to file an affidavit stating why judgment was allowed to be entered (e.g. mistake, delay etc.) and showing that the defendant has a prima facie defence to the action or there is some triable issue (otherwise it would be a pointless exercise to set the judgment aside). In **Evans v Bartlem** (where the defendant had allowed judgment to be entered in default of acknowledgement for what was in effect a gaming debt and then applied to set the judgment aside), Lord Atkin explained the true position and at the same time formulated the classic

statement of the basic principle of procedural law, namely that a failure to follow the rules of procedure is not to debar a defendant from seeking judgment on the merits."

Counsel submitted that the Defendants ought not be penalised for a procedural flaw.

Learned Counsel for the Plaintiff made her submissions by way of her typical documented arguments which were laden with authorities in support of the proposition that the Defendants' application ought to be dismissed.

In her submissions Counsel examined the defences advanced by the Defendants. In respect of the defence of lack of consideration Counsel stated that the Defendants had alleged that there was not good consideration for the guarantee given by Traci Betts but that she was submitting that there was good consideration. It seems to me that all this is saying is that there are contrary views on the matter.

In respect of the defence of undue influence the submission in part is that the Defendants cannot allege "a class 2 B relationship" because in order to do so they must show that Traci Betts had normally or usually reposed trust and confidence in the Plaintiff bank. It must not be forgotten that paragraph 4 of the defence is only a pleading and it is expected that evidence would need to follow up in support of that pleading.

Again as to whether or not there is proof of manifest disadvantage to Traci Betts would depend upon the view of the facts taken. In that connection I say that there has been no Exhibit II tendered before the Court.

In aid of the submission that there was a rebuttal of undue influence it is only said that Traci Betts must have received

independent advice from her accountant. That in my view is insufficient to rebut the presumption.

The submission on the loss of the right to rescind is not convincing.

I must now turn to consider the principles which the Courts apply in setting aside default judgments. Paragraph 13/9/14 of the United Kingdom Supreme Court Practice 1995 is as follows:

> "DISCRETIONARY POWERS OF THE COURT - The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant has merits to which the court should pay heed, not as a rule of law but as matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence, and because, if the defendant can show merits, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication. Also as a matter of common sense the court will take into account the explanation of the defendant as to how the default occurred. The foregoing general indications of the way in which the court exercises discretion are derived from the judgment of the Court of Appeal in **The Saudi Eagle** 1986 2 LL.R 221; 223. From that case the following propositions may be derived:
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> (a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction". Thus the court must form a provisional view of the probable outcome of the action.
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> (b) If proceedings are deliberately ignored this conduct,

although not amounting to an estoppel at law, must be considered "in justice" before exercising the court's discretion to set aside".

In the **Saudi Eagle** the Plaintiffs claimed damages for breach of contract by the Defendants who refused to load certain cargo. The Plaintiffs issued with leave a writ for service out of the jurisdiction and served it on the Defendants. No notice of intention to defend was given and interlocutory judgment was signed. An order for assessment of damages was made and damages were assessed. Final judgment was given in U.S.$49,000 and costs in the sum of 3,000 pounds.

It was common ground that a deliberate decision was taken not to defend the Plaintiffs' claim because the Defendants had no assets. Shortly after final judgment was given the Defendants remembered that the Plaintiffs had earlier obtained security in respect of this matter and were holding a bond. The Defendants applied to set aside the judgment and for leave to defend contending that the Plaintiffs had sued the wrong Defendants. Straughton J held that the application would be dismissed. The Defendants appealed. The Court of Appeal held that there was no substance in the suggested defences that it was the wrong Plaintiff and the wrong contract. They held that on the evidence the Defendants had not shown that they had a defence which had any reasonable prospect of success; the conduct of the Defendants in deliberately deciding not to give notice of intention to defend because it suited their interests not to do so was a matter to be taken into account in assessing the justice of the case. The appeal was dismissed.

In this case the Defendants have set up defences which show a real prospect of success if the evidence is forthcoming to support the pleadings. The affidavits give a different version to that indicated in the pleadings but I am not prepared to accept the version there given as gospel truth without more.

The **Saudi Eagle** has shown that the conduct of the Defendant is a matter to be taken into account. The penultimate paragraph of the decision at page 225 is as follows:

> "The conduct of the defendants in this respect and in deliberately deciding not to give notice of intention to defend because it suited the interests of the group to let the plaintiffs proceed against these defendants is a matter to be taken into account in assessing the justice of the case. While it does not amount to an estoppel in law, the Court can and must consider it."

Paragraph 13/9/14 of the United Kingdom Supreme Court Practice records the case of **Allen v Taylor** [1992] P.I.Q.R. 255 where the Court of Appeal held that a judge had misdirected himself by giving too little weight to an assertion of a defendant on merits and too much to conduct. It appears that both criteria have to be considered.

In the present case there can hardly be any condemnation of the conduct of the Defendants. Their behaviour was nothing like that of the Defendants in the **Saudi Eagle** case. The writ of summons was served on them on March 7, 1995. They filed an entry of appearance three days later. By letter of March 27, 1995 their solicitors were asking of the Plaintiff's solicitors documentation in support of the Plaintiff's claim. These were supplied on June 9, 1995. Besides, there were earlier letters on May 11 and May 30 which indicated a desire to set up a defence. Their final request was for consent to file and serve defence by July 14, 1995 and on the preceding day the default judgment was filed.

As I said earlier I am of the provisional view that the Defendants have a real prospect of success in this suit if the evidence is forthcoming at a proper trial. I am also of the view that the conduct of the Defendants in not filing the defence in time was not

deliberate. I think the defence has merits to which the Court must pay heed and it would be an injustice not to allow the Defendants to have a proper adjudication on the merits.

In the exercise of my discretion I set aside the default judgment filed by the Plaintiff on July 13, 1995. I grant leave to the Defendants to file and serve their defence on the Plaintiff within 10 days failing which judgment and costs to be taxed shall be entered in favour of the Plaintiff.

I order the Defendants to pay to the Plaintiff costs in any event to be agreed or taxed occasioned by the setting aside of the default judgment.

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A. N. J. MATTHEW
Puisne Judge