BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0307

BETWEEN:

MICHAEL WILSON & PARTNERS, LIMITED

Claimant

-and-

(1) TEMUJIN INTERNATIONAL LIMITED
(2) TEMUJIN SERVICES LIMITED
3) HAKKISAN FINANCE CORPORATION LIMITED
(4) MYRZALY LIMITED
(5) NORGULF HOLDINGS LIMITED
(6) INCOMEBORTS LIMITED
(7) TIGERKHAN LIMITED

Defendants

Appearances:

Mr Christopher Young of Harney Westwood and Riegels for the Claimant
Mr Richard Evans and Mr Jayson Wood of Conyers Dill & Pearman for the Seventh Defendant

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2007: September 18
2007: September 18, October 18

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 18 September 2007, the Court ordered that the stay of proceedings against the 7th Defendant, Tigerkhan Limited be lifted and service of the Re-Re-Re Amended Statement of Claim and Re- Amended Claim Form be deemed effective as of 18 September 2007. The Court also ordered that the Claimant, MWP & Partners Limited be relieved from the sanction imposed by paragraph 8b of the Order dated 3 May 2007 ("the Order"). Oral reasons were given which are now reduced to writing.

[2] By Notice of Application filed on 5 June 2007, the Claimant applied for an order that pursuant to CPR 26 (1) and the Court's case management powers and/or its inherent jurisdiction, there be an abridgment/extension of time to comply with paragraph 11 of the Order so that what amounts to a stay against the 7th Defendant may be lifted.

[3] The grounds for the application as set out in the Notice of Application are:

1. The Court ordered an interim payment of $250,000 to be paid by 30 May 2007, failing which proceedings against the 7th Defendant would be stayed.

2. A cheque was despatched in good time by the Claimant, however the package was lost by DHL Couriers and subsequently sent to the wrong destination.

3. Given those circumstances, the Claimant cannot be held to blame for the delay and it would be only just that this order be granted.

4. The 7th Defendant has suffered no prejudice as a result of the short delay.

[4] What appeared to be an uncomplicated application was enthusiastically opposed by Mr Richard Evans who appeared as Counsel for the 7th Defendant. The challenge was mounted on two main grounds which will be elaborated upon later in the judgment.

The Order

[5] The hearing of the application to discharge the receivership order against the 7th Defendant was set for hearing on 3 May 2007. On that day, the Court was informed that the parties were in discussion with a view to agreeing to an Order. After some three hours, the Court was presented with an Order in the following terms:

> AND UPON HEARING Mr Lawrence Cohen QC, together with Mr James Drake, Mr Phillip Kite and Mr Andrew Thorp on behalf of the Claimant and Mr Joe Smouha QC, together with Mr David Lord, Mr Mark Forté and Mr Richard Evans on behalf of the Seventh Defendant

IT IS HEREBY ORDERED THAT:

1. The Receivership Order be set aside and the Receiver discharged with immediate effect.

2. The Claimant to pay the remuneration and expenses of the Receiver to be paid within 30 days of rendering of his bill of costs, or within such other period of time as subsequently agreed between the Receiver and the Claimant. Liberty to apply.

3. The Receiver to deliver up to the 7th Defendant all his files relating to the Receivership including without prejudice to the generality of this order all documents generated in the Receivership and all communications to and from the Receiver save that:

    a. The Receiver is at liberty to retain copies of such records if and insofar as he is obliged to do so by law or regulation or internal policy;

    b. The Receiver is not obliged to deliver up his notes, calculations and working papers prepared by him not pursuant to any duty to prepare them but better to enable him throughout to discharge his professional duties.

4. The three Reports of the Receiver dated 12th April, 19th April and 2nd May 2007 and any related documentation submitted to the Court shall be sealed in the Court record.

5. Subject to paragraphs 7 and 8, the Claimant's claims against the 7th Defendant shall be struck out in their entirety.

6. The Claimant shall serve on all remaining defendants a Re-Re-Amended Statement of Claim.

7. The striking out of the claim against the 7th Defendant is without prejudice to the 7th Defendant's entitlement to costs as set out in this order, the further enforcement of the provisions of this order and any claim that the Seventh Defendant may make pursuant to the cross-undertaking included in the Receivership Order by para. 1 of the Order of the Court made on 13th April 2007.

8. The Claimant has liberty to join afresh the 7th Defendant to the action on condition that:

    a. A Re-Amended Claim Form filed and an information copy provided to Conyers Dill & Pearman together with the proposed draft Re-Re-Re Amended Statement of Claim by 31st May 2007;

b. If the Claimant fails to comply with the order made in paragraph 11 below, the proceedings shall be stayed without the need for further order.

9. In the event that the Claimant files and serves a Re-Amended Claim form, it shall not affect the liability of the Claimant to pay the costs of the action against the 7th Defendant to date as provided for in paragraph 10 below.

10. The Claimant to pay the 7th Defendant's costs of the action, to be assessed if not agreed.

11. The Claimant to make an interim payment to the 7th Defendant on account of its costs of the action in the amount of $250,000 by 30 May 2007.

12. For the avoidance of doubt the Claimant is prohibited from using documents or information obtained by it from the Receiver in these proceedings, in any other proceedings or otherwise.

[6] On 5 June 2007, the Claimant sought an order to abridge/extend time by a few days so that the stay of proceedings against the 7th Defendant could be lifted. The brief facts which led to the present application are not in dispute. As appears from the Ninth Affidavit of Andrew Thorp and the exhibits annexed thereto, a cheque in the amount of $250,000 in satisfaction of the interim costs order, was despatched from Kazakhstan by the Claimant on 23 May 2007 via the courier services of DHL. The cheque was post-dated 30 May 2007 and was for payment to Conyers Dill and Pearman. The package arrived in St. Marteen on 28 May 2007 at about 4.47 pm. It was inadvertently sent to Bolivia instead of the BVI and arrived there at 7.10 pm on 30 May 2007. The mistake on the part of DHL resulted in Conyers Dill and Pearman receiving the cheque on 7 June 2007.

Preliminary Point

[7] Mr Evans submitted that the application should properly be categorized as an application by way of relief from sanctions to lift the stay imposed by the Order. I agree with Mr Evans.

[8] CPR 26.7 states:

(1) If the court makes an order or gives directions, the court must whenever practicable also specify the consequences of failure to comply.

(2) If a party has failed to comply with any of these rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.

(3) If a rule, practice direction or order –

(a) requires a party to do something by a specified date; and

(b) specifies the consequences of failure to comply;

the time for doing the act in question may not be extended by agreement between the parties.

[9] In the present application, the Court approved an Order whereby the Claimant was required to do an act by a specified time. The Order specified the consequences of failure to comply. The Claimant has failed to do the act within the specified period and therefore, it should properly have applied for relief from sanctions pursuant to CPR 26.8.

[10] Mr Evans criticized the application for procedural defects. He submitted that the grounds set out in the Notice of Application do not address the issues to be determined under CPR 26.8. He placed reliance on IPOC International Growth Fund Limited v LV Finance Group and Others.[1] According to him, the Court of Appeal recently highlighted the importance of the strict adherence to the requirement in CPR 11.7 (1) that a Notice of Application should set out properly the grounds upon which the application is brought. Rawlins JA stated at paragraphs 27- 28 of the judgment:

> "I think, however, that this issue also highlights a wider concern which I have expressed on prior occasions. The concern relates to an emerging practice in which, contrary to the rules, the grounds on which applications are premised are not stated in the application. Rather, as is evidenced in the present case, there are applications which contain a statement that the grounds are contained in the affidavit in support.
>
> The rules require the grounds to be stated clearly and briefly in applications. This is intended to alert the court and the contra-parties of the grounds and the issues which they raised. An application should contain the grounds and the issues which they raise. An application should contain grounds, not evidence or submissions…."

[1] Decision of Court of Appeal, judgment delivered on 18.6.07

[11] There is no doubt that the circumstances which obtain in the present application are quite different from the IPOC case. The grounds for the application are clearly stated in the Notice of Application and the issues they raise are apparent. This is borne out from the comprehensive and elucidating written submissions of Mr Evans on the issues. The amendment to the Notice of Application that is being considered will not change the issues before the court and the grounds of application will remain the same.

[12] Moreover, the Court cannot be too inconsiderate or uncaring to litigants who approach it imperfectly especially since no hardship and/or prejudice ensues. In the case of Hannigan v Hannigan[2], a party started proceedings in the wrong form and committed many other breaches of the rules in presenting their case. The Court of Appeal held that the defendants knew precisely what was being claimed, and the administration of justice would have been better served if the defendant had pointed out the procedural defects to the claimant in accordance with the duty of the parties to help the court further the overriding objective.

[13] Accordingly, I will amend the Notice of Application and treat it as an application for relief from sanctions.

Relief from sanctions

[14] CPR 26.8 deals with relief from sanctions. Sub-rule 1 provides that an application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-

(a) made promptly; and

(b) supported by evidence on affidavit.

[15] Sub-rule (2) states that the court may grant relief only if it is satisfied that -

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

[2] (2000) ILR 3.

Was the failure to comply intentional and was there a good explanation for it?

[16] Mr Evans submitted that the threshold test in sub-rule (2) has not been satisfied and further, that the Court should not exercise its discretion in favour of the Claimant if it finds that the threshold test was satisfied.

[17] He submitted that the Claimant is not entitled to the relief sought as it has failed to establish that the default was not deliberate and it has also failed to give a good explanation for the delay. According to Mr Evans, the Claimant waited until 23 May 2007 (some 20 days after the making of the Order and only 7 days before its expiry) to send the cheque to Harney Westwood and Riegels (BVI) ("Harneys") from Kazakhstan for onward transmission to Conyers Dill and Pearman (BVI) ("Conyers"). He pointed out that the evidence of the Claimant is silent as to why (a) the method of payment was by cheque which was transferred across the world by courier and not by a simpler and more usual method of telegraphic or electronic transfer and (b) the Claimant chose to wait 20 days after the order was made before sending the cheque leaving only 7 days for it to arrive in the BVI from Kazakhstan. Mr Evans next submitted that it is not clear from the evidence that if the package had been sent to the BVI instead of erroneously to Bolivia, it would have been received by Conyers by 30 May 2007 as the date from which it was despatched by DHL in St. Maarten is unknown.

[18] Mr Evans fervently argued that the post-dating of the cheque to 30 May 2007 is of importance because even if it had arrived on or before 30 May 2007, the 7th Defendant would still not have been in receipt of cleared funds until 6 working days from 30 May 2007. He argued that the dating of the cheque must have been willful because in the normal course of business, cheques are not accidentally post-dated. Learned Counsel however conceded that the delay from 28 May 2007 to the time when the cheque arrived in the BVI appears genuinely to have been beyond the control of the Claimant.

[19] Mr Young appearing as Learned Counsel for the Claimant submitted there is no evidence that what took place was intentional and contumelious non-compliance with the Order and on a true construction, paragraphs 8b and 11 of the Order would have been satisfied had

the cheque been delivered to Conyers by 30 May 2007. He contended that the 7th Defendant is seeking to take a tactical advantage from the late delivery of the cheque by now arguing that what was required was a cheque which had cleared by 30 May 2007. He observed that the email correspondence between Counsel for both parties demonstrated a mutual understanding that the Order would be satisfied by the provision of a cheque by 30 May 2007 and there was no suggestion or indication that the cheque would have to be received by Conyers by some unspecified date prior to 30 May 2007.

[20] He argued that given the tenor of the correspondence, there is no evidence to support the assertion that the Claimant would have known that it was required to deliver a cheque in advance of 30 May 2007 so that in despatching the cheque by courier on 23 May, it was deliberately setting out to breach the Order of the Court. He pointed out that the cheque would have arrived in the BVI by 30 May 2007 (but for the mistake of DHL) as it arrived in St. Marteen (which is only a 30 minute flight away) on 28 May 2007.

[21] The Order required that payment of $250,000 be made on 30 May 2007. The method of payment was not stipulated in the Order but from the email correspondence, it appears that the method was agreed by the parties[3]. There is no indication from the correspondence that the legal representatives of the 7th Defendant expected that the cheque should have been received by them on or before 24 May 2007 (6 days for cheque to clear). In a correspondence on 21 May 2007, Mr Evans wrote to Mr Thorp "to please arrange to make cheque payable to Conyers". There was nothing in the email to suggest to the Claimant that there was a deadline for the receipt of the cheque.

[22] Mr Young correctly submitted that in this jurisdiction, the practice is for costs orders to be paid by cheque, which if delivered by the date specified in the Order is regarded as having satisfied the order. It appears to me that the 7th Defendant is making a mountain out of a molehill.

[3] See Certificate of Exhibit to Andrew Thorp's thirteenth affidavit

[23] There is no dispute that the delay between 28 May and 6 June 2007 was the fault of DHL. The package arrived in St. Maarten on 28 May 2007. I believe that under normal circumstances, the package would have arrived in the BVI by 30 May 2007. I attribute no fault to the Claimant having despatched the package on 23 May 2007 from Kazakhstan, some 20 days after the Order was made. For my part, it demonstrates eagerness on the part of the Claimant to comply with yet another Order of this Court. Consequently, this Court finds that the delay was not intentional or contumelious and that there was a good explanation for it.

Conduct of the Party in Default

[24] Mr Evans submitted that the third threshold test was not satisfied because the Claimant's conduct of the litigation has been woeful. He next submitted that the Claimant's conduct has been akin to a complete abrogation of its obligation under CPR 1.3 to assist the Court to further the overriding objective. He referred to the First and Second Affidavits of Jayson Wood which epitomized some examples of notable conduct on the part of the Claimant. Some of these are:

a. Failure to supply notes of the ex parte hearing; the provision of the notes was tardy and limited;

b. Very serious material non-disclosures at the ex parte stage;

c. Failure to reply to letter of 18.04.07[4] in a timely fashion or at all, it was only at the door of the Court that the Claimant acknowledged that its claim was fatally flawed;

d. A marked failure to reply to reasonable requests and queries raised in correspondence.

[25] CPR 26.8(2)(c) provides that the court may grant relief only if it is satisfied that the party in default has generally complied with all other relevant rules, practice directions, orders and

[4] See page 8 of exhibit to the 1st affidavit of Jayson Wood

directions. It does not contemplate the conduct of the party in default in relation to the other party. Mr Evans has not given one example of the Claimant's failure to comply with an order or direction of this Court or any rule or practice direction. The conduct that was identified may be relevant to the costs assessment application, judgment of which is still pending.

[26] It is no exaggeration to state that since the filing of its first application in December 2006, MWP has unfailingly complied with all orders and directions of the Court. I therefore find that the argument advanced by Mr Evans on this threshold requirement is unsustainable and must fail.

Should the relief be granted?

[27] Mr Evans submitted that in exercising discretion, the interest of justice is likely to feature largely in the Court's deliberation. He further submitted that the 7th Defendant prays in aid of the Claimant's conduct in this context and therefore, the Claimant's conduct disqualifies it from a favourable exercise of the Court's discretion. According to Mr Evans, the Court should show no indulgence to a party that has chosen to litigate in the manner adopted by the Claimant.

[28] Mr Young argued that the Court usually does not look favourably on a party who seeks only to take tactical advantage from a failure on the part of another party to comply with time limits. He asserted that the approach of the Court on an application to extend time is to exercise its discretion with regard to all of the circumstances of the case and in recognition of the overriding principle that justice has to be done. He relied on the cases of Mortgage Corporation Ltd. v Sandoes,[5] Costellow v Somerset County Council[6] and Finnegan v Parkside Health Authority.[7]

[29] Learned Counsel succinctly submitted that absolutely no prejudice has been caused to the 7th Defendant and it would be an appropriate exercise of discretion for an extension of time

[5] [1996] TLR 751 CA.
[6] [1993] 1 All ER 952.
[7] [1998] 1 All ER 595.

to be granted so that the Claimant is not penalized by the error of DHL. He further submitted that if the Court does not grant the extension of time, the result would be that the proceedings are permanently stayed and this would be totally disproportionate and contrary to the overriding objective.

[30] CPR 26.8(3) states:

> "In considering whether to grant relief, the court must have regard to -
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or his legal practitioner;
>
> (c) whether the failure to comply has been or can be remedied within reasonable time;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party."

[31] In Costellow v Somerset County Council, Sir Thomas Bingham MR said at page 560 that:

> "Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

[32] In Mortgage Corporation Ltd. v Sandoes, it was held that time limits imposed by Rules of Court were to be observed but the overriding principle was that justice should be done. Litigants were entitled to have their cases resolved with reasonable expedition and non-compliance with time limits could cause prejudice to one or the other of the parties. In addition the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice. Extensions of time which involve the vacation or

adjournment of trial dates should only be granted as a last resort. The court would not look with favour on a party who simply sought to take tactical advantage from the failure of another party to observe time limits.

[33] Hirst L.J. considered the two cases cited above in Finnegan v Parkside Health Authority. He stated at page 605:

> "If there was any doubt as to the strength and breadth of guidance given by *Costellow's case [1993] 1 All ER 952, [1993] 1 WLR 256* in the general application of Ord. 3 r 5, that in my judgment was finally laid to rest by the *Mortgage Corp case [1996] TLR 751, [1996] CA Transcript 1634*, which follows precisely the same line of principle, and again expressly rejects the notion that the absence of a good reason is always and in itself sufficient to justify the court in refusing to exercise its discretion; that case moreover lays down clear guidelines requiring the court to look at all the circumstances, and to recognize the overriding principle that justice must be done.
>
> For my part I find it impossible to reconcile *Savill's* case, and indeed the judge's judgment in the present case, with those statements, since clearly prejudice forms part of the overall assessment, and is a factor which needs to be taken into account in deciding how justice is to be done."

[34] It is plain from the CPR and the above authorities that the court is vested with the widest measure of discretion in these applications. In the exercise of that discretion, the court needs to look at all the circumstances of the case as each application will be judged on its own facts. I have already found that the delay was unintentional and contumelious and that there was a good explanation for it. In addition, the slight delay was not caused by the Claimant or its legal practitioners. On learning of this delay, the legal practitioners rushed to the Court seeking an abridgement/extension of time to comply with paragraph 11 of the Order. The application was procedurally incorrect but it was not fatal. There was no evidence at all to show that the 7th Defendant suffered any prejudice. In the exercise of my discretionary powers, I will order that the Claimant be relieved from the sanction imposed by paragraph 8b of the Order.

Whether Stay should be lifted

[35] Mr Evans submitted that pursuant to the powers of the Court under CPR 26.3 (2) the Court should order that the claim against the 7th Defendant be stayed until payment of all of the 7th Defendant's costs since the original claim against the 7th Defendant was struck out with costs. He argued further that this requirement is undeniably justified and firmly required in this case because of the history of the Claimant's conduct in the matter.

[36] Much has been said about the Claimant's conduct in this matter. I will repeat that if the Claimant has behaved badly, it will be condemned in costs. However, the facts of this case seem to suggest otherwise. On 3 May 2007, the parties appeared before me on the hearing of the application to discharge the receivership. I was told that the parties are in discussion with a view to agreeing an order. This was staggering but pleasing since generally speaking, applications of this nature are vociferously challenged and it is exceptional in this jurisdiction for commercial matters of this magnitude to result in agreed orders. I have no doubt that the Claimant must have played a major role in the making of the Order because essentially, it was the losing party. It knew, inter alia, that a consequential costs order would follow the event and this is reflected at paragraph 10 of the Order.

[37] The parties could not agree on an amount of the interim costs. It was the only issue for which they sought the guidance of the Court. After hearing submissions from both sides, the Court made an interim costs order. Paragraphs 8b and 11 of the Order required the Claimant to make an interim costs payment to the 7th Defendant in the sum of $250,000 by 30 May 2007 if the stay was to be lifted. The Order did not require that all of the costs (which in any event had to be assessed) be paid for the stay to be lifted. It was open to the 7th Defendant to argue this point especially since it had the expertise of a leading silk and three senior lawyers including the zealous Messrs Forte[8] and Evans. It failed to do so.

[8] Mr Forte argued the interim costs issue on 3 May 2007.

[38] It is trite law that the Court could revisit its Order but the 7th Defendant would have to show that some new or changed circumstances have arisen to justify a variation of that Order. No such new or changed circumstance has been shown.

[39] For all of these reasons, I will order that the stay of proceedings against the 7th Defendant be lifted and service of the Re-Re-Re Amended Statement of Claim and the Re-Amended Claim Form be deemed effective as of 18 September 2007. Having found that the Claimant's application before the Court was procedurally defective, I will make No Order as to Costs. The time for seeking leave to appeal against this Order is extended until 7 days hereof.

[40] For the avoidance of doubt, the Order of the Court is as follows:

1. The Claimant be relieved from the sanction imposed by paragraph 8 b of the Order herein dated 3 May 2007 ("the Order") as a result of the interim payment of costs required by paragraph 11 of the Order having been made on 7 June 2007 rather than by 30 May 2007;

2. The stay of proceedings against the 7th Defendant be lifted and service of the Re-Re-Re Amended Statement of Claim and Re- Amended Claim Form be deemed effective as of 18 September 2007;

3. The time for seeking leave to appeal against this order be extended until 7 days after the date of delivery of a written judgment;

4. There be no order as to the costs of this application

[41] Last but not least, I am grateful to both Mr. Young and Mr. Evans for their tenacity and their enlightening written as well as oral submissions.

Indra Hariprashad-Charles

High Court Judge