[2003]JRC193

ROYAL COURT
(Samedi Division)

27th October, 2003

Before: M.C. St. J. Birt Esq., Deputy Bailiff, sitting alone.

Between	**Berry Trade Limited**	**First Plaintiff**
	Vitol Energy Bermuda Limited	**Second Plaintiff**
And	**Kaveh Moussavi**	**First Defendant**
	Khadijeh Saebi	**Second Defendant**
	Farzaneh Pirouz-Moussavi	**Third Defendant**
	Mohammed Ghadimi Gheshlaghi (also known as Hamid Ghadimi)	**Fourth Defendant**
And	**Barclays Bank plc (Offshore and Expatriate Division)**	**First Party Cited**
	The Governor and Company of Bank of Scotland, Jersey Branch	**Second Party Cited**
	Bank of Scotland (Offshore)	**Third Party Cited**

Application by the fourth Defendant to set aside a default judgment of 6th December, 2002, ordering him to pay the Plaintiff's costs in relation to the amended Order of Justice, including the costs payable by the Plaintiffs to the second and third parties cited, on an indemnity basis.

Advocate R. MacRae for the fourth Defendant.
Advocate D.J. Wilson for the first and second Plaintiff.

JUDGMENT

THE DEPUTY BAILIFF:

1. This is an application to set aside a judgment in default of appearance obtained against the fourth defendant on 6th December, 2002 insofar as that judgment ordered the fourth defendant to pay the plaintiffs' costs and this on an indemnity basis.

2. The factual background is as follows: on 10th July, 2002 the plaintiffs obtained a freezing injunction against the fourth defendant in English proceedings. The claim against him related to existing English proceedings which the plaintiffs had brought against the first to third defendants in England and to which they had now added the fourth defendant.

3. On 12th July, 2002 the Bailiff signed an amended Order of Justice which also added the fourth defendant to some existing ancillary Jersey proceedings and granted a freezing injunction against the fourth defendant's assets in Jersey. As I say, the Jersey proceedings were ancillary to the English proceedings and sought in effect to freeze assets in Jersey pending the outcome of the English proceedings.

4. The fourth defendant initially instructed the firm of SPR Avery Midgen, English solicitors. They made it clear immediately that the fourth defendant did not oppose the Jersey freezing injunction. The plaintiffs' solicitors, Ince & Co., confirmed by letter dated 15th August, that there would be no need for the fourth defendant to attend or be represented at the return date of the Jersey proceedings, which was 30th August, but that it would assist if a letter could be provided consenting to the continuation of the Jersey freezing injunction. Avery Midgen sent such a letter for forwarding to the plaintiffs' Jersey advocates.

5. Although at that stage both Mr MacFarlane of Ince & Co. and Avery Midgen expected the Jersey proceedings to be adjourned indefinitely pending the outcome of the English proceedings with the injunction remaining in place, it appears that Mr MacFarlane was subsequently advised by Mourants, the plaintiffs' Jersey advocates, that the proceedings could not be adjourned generally unless both parties were represented in order to give an undertaking to return to the Royal Court on forty-eight hours' notice. They advised that in the absence of the fourth defendant being represented, the case had to be adjourned to a fixed date and that the Court would not allow this to happen on more than three occasions. Mr MacFarlane explained this to the solicitor at Avery Midgen and it was therefore agreed that the proceedings would be adjourned to 24th October with the injunction to remain in place.

6. By that date Watson, Farley & Williams had replaced Avery Midgen as the plaintiffs' solicitors. Mr Charles Buss was the responsible partner. Much was apparently going on at the time in the English litigation and it was accordingly agreed between the solicitors that the Jersey proceedings would be further adjourned to 6th December and this is what happened. It was handled by Mourants with no one appearing in Jersey for the fourth defendant. Nothing further relevant to this application seems to have occurred until 5th December, 2002 when Ince & Co. sent a fax to Mr Buss saying as follows:

"We refer to the above hearing listed for 6th December, 2002. This hearing has already been adjourned twice. As you are aware we have been advised that the Jersey Court will not allow parties to adjourn the hearing generally, whilst maintaining the injunction, unless both are represented at the hearing and able to give the requisite undertakings. Our clients are no longer prepared to continue to incur the costs of returning to Court following repeated fixed date adjournments. In the circumstances please instruct your client's' Jersey lawyers to contact our client's Jersey lawyers to discuss Friday's hearing."

7. Of course, at that stage the fourth defendant, as the plaintiffs knew, did not have a Jersey lawyer and it is noteworthy that the letter did not actually say, at that stage, that judgment in default would be taken.

8. According to Mr Buss, he was engaged in an unrelated arbitration at the time and did not consider the fax on returning to the office from the arbitration that evening. The next day Mr MacFarlane telephoned and spoke to Mr Buss' secretary to inform her that they had been instructed to make the Jersey freezing injunction final that afternoon. Mr Buss' secretary emailed him to that effect at 12:15. At lunchtime Mr Buss came out of the arbitration and spoke to Ince & Co. on his mobile phone from the arbitration hearing.

9. First he spoke to Mr MacFarlane; we have Mr MacFarlane's file note of that conversation which is accepted as being accurate by Mr Buss. The main concern of Mr Buss appears to have been that by making the injunction final this did not mean that the plaintiffs could enforce against the injuncted assets in Jersey. He was concerned to ensue that they would still have to await judgment in the English proceedings and that the freezing order could be set aside if the fourth defendant were in fact successful in the English proceedings. Mr MacFarlane confirmed that that was indeed his understanding. Mr MacFarlane went on to say that it was also his understanding that making the Order final meant that costs would be assessed and payable by the fourth defendant and it would also be more difficult for any application by the fourth defendant in future to discharge the injunction to succeed.

10. Mr Buss then spoke to Mr Hickey, the responsible partner at Ince & Co. There is no file note of that conversation but it was quite short and there does not seem to be any great dispute about it. According to Mr Buss, Mr Hickey said that he was not prepared to agree to the hearing being adjourned again and that costs would be ordered against the fourth dependant because "that's what happens in Jersey" i.e. it was the usual order in Jersey upon such an application. Mr Hickey did not mention that costs would be on an indemnity basis, that the costs would include costs payable by the plaintiffs to the parties cited, or that such costs could be taxed before conclusion of the English proceedings. Nor was any idea of the size of the plaintiffs' costs discussed. On

that basis and, he says, in reliance upon Mr Hickey's information, Mr Buss gave his consent to the freezing injunction being confirmed in Jersey.

11. That duly occurred that afternoon. The prayer of the Order of Justice had asked that the Court should order:

(i) That the interim injunctions be confirmed.

(ii) That the defendants pay the costs herein including the costs payable by the plaintiffs to the parties cited on a full indemnity basis.

12. Mourants appeared for the plaintiffs, no one appeared for the fourth defendant and the Court granted the prayer in the Order of Justice against the fourth defendant.

13. On 23rd December, 2002, Ince & Co. sent Mr Buss a copy of the Act of the Court dated 6th December. Mr Buss says that he did not protest about the costs order immediately as he assumed that the costs would not be able to be enforced until conclusion of the English proceedings.

14. Nevertheless on 20th February, 2003, he wrote to Mourants to protest at the order. The relevant part of his letter reads:

> *"Finally we note that in the final paragraph of the Act of Court a Costs Order against our client was apparently made. We find it extraordinary that a Costs Order was made against our client at a hearing for an interlocutory injunction in circumstances where (1) the previous hearing fixed for 25th October, 2002 had been adjourned by agreement by ourselves and Ince & Co. and (2) we had spoken to Ince & Co. before the hearing and agreed to the ex parte injunction being confirmed at the inter partes hearing that day. No notice was given to us that costs would be applied for at the hearing or of the basis for such an application. We were simply informed on the day of the hearing by Mr Hickey of Ince & Co. that costs would be ordered against our client because 'that's what happens in Jersey'. The whole purpose of our client not instructing Jersey lawyers to represent him was to save costs, not to incur them. It rather appears to us from the wording of the Order that the Costs Order was made not as a matter of course but because you informed the Court that our client had wasted the costs of the adjourned hearings. If that is so it clearly was not the case".*

15. Mourants replied on 3rd March to the effect that given the prayer in the Order of Justice, it should have come as no surprise to Watson Farley that the Court made the order it did. They said that they would now be seeking to recover the costs.

16. Although costs are meant to be submitted for taxation within three months of a final order nothing further happened until 23rd May, 2003, when Mourants wrote to Watson Farley seeking £27,403.52 in respect of costs inclusive of those which the plaintiffs had to pay the parties cited.

17. Faced with what appeared to be a very large sum for a comparatively modest amount of work, Mr Buss, at long last, instructed Jersey lawyers, Ogiers, and a summons was duly issued seeking to set aside the costs order made on 6th December, no satisfactory response from Mourants having been received to letters from Ogiers as to why a costs order had been made, particularly upon an indemnity basis.

18. Affidavits have been filed by Mr Buss and Mr MacFarlane. In effect, each side blames the other. Mr Buss submits that he was wrongly advised by Ince & Co. about the Jersey position. He and his predecessors as solicitors to the fourth defendant had made clear at all times that the fourth defendant was content for the freezing injunction in Jersey to remain in place until trial of the English action and therefore saw no need to incur the expense of instructing Jersey advocates. He says that they were wrongly advised by Ince & Co, that the matter could not be adjourned indefinitely unless Jersey lawyers were instructed. He was also wrongly advised on 6th December that costs were normally ordered by the Jersey Court against the defendant in a case such as this.

19. The plaintiffs, on the other hand, say that Mr Buss was the sole cause of the problem. Ince & Co. were not advising him on Jersey law or procedure, they were not qualified in Jersey law and in any event were on the opposite side of hostile litigation. If Mr Buss relied on what was said, that was his error. He chose not to instruct Jersey advocates and he consented to the interlocutory injunction being made final on 6th December including a costs order being made against the fourth defendant. The fourth defendant should not now be able to resile from that simply because Mr Buss did not appreciate how much the costs would be or that the prayer in the Order of Justice asked for costs on an indemnity basis.

20. In my judgment a modest element of fault lies with the plaintiffs' lawyers in that, by means of Practice Direction No. 4 of 2002, it would have been possible for the action, when it was first called before the Court on 30th August, 2002, to have been adjourned *sine die* with the injunctions to remain in place. It was not therefore necessary to adjourn to various fixed dates and then seek confirmation of the prayer of the Order of Justice. However Ince & Co. were acting in good faith

on the basis of the advice given to them by Mourants. Mr Wilson has explained before me that it would not have been reasonable for the plaintiffs to have agreed to an indefinite adjournment without an address for service in the Island, as when the plaintiffs wished to bring the matter back before the Court at a later stage, there was some doubt as to whether they would have to, once again, seek leave to serve outside the jurisdiction with the necessary preparation of affidavits, summons, and so forth. Even if leave were not necessary, the plaintiffs would certainly have to go to the trouble, expense, and possible delay of serving on the defendant outside Jersey.

21. It is not clear to me whether in fact a further application to serve out of the jurisdiction would have been necessary. I have not heard argument and cannot reach any conclusion, but if that is thought to be the position, it seems highly desirable, once the Court has decided at the outset that the proceedings justify service out of the jurisdiction, that that should be sufficient for all subsequent interlocutory steps to be taken by serving without leave out of the jurisdiction if there is no address for service within the jurisdiction.

22. As I say, Mr Wilson explained the reasons why he had not thought it right for the plaintiffs to agree to an indefinite adjournment without an address for service. However this underlying thinking does not appear to have been passed on to Ince & Co. or if it was passed on to them, it does not appear to have been passed on to Mr Buss. It seems clear to me that if the concerns had been accurately passed on it would have been a very straightforward matter for the necessary steps to have been taken at very modest cost to ensure that this injunction was continued indefinitely until the conclusion of the English proceedings.

23. A second minor criticism is that Ince & Co. wrongly advised Mr Buss at lunchtime on 6th December that a costs order was usually made in such cases. It may be that there was confusion between Mr Hickey and Mr Buss. Mr Hickey meant to say that costs orders were usually made where a defendant did not appear, whereas Mr Buss understood him to be referring to the fact that a costs order was usually made when an interlocutory *mareva* injunction was confirmed.

24. Be that as it may, I am in no doubt that by far the greater degree of fault lies with Mr Buss and Watson Farley. He chose not to instruct Jersey advocates and to rely on what he was being told at second hand about the position in Jersey by the English solicitors acting for the opposing party. It seems clear that he had forgotten about the hearing on 6th December because he had taken no steps to deal with it at any time prior to being chased on the morning of 6th December by Mr MacFarlane. It also seems clear that he had forgotten that the prayer of the Order of Justice sought costs on an indemnity basis. For whatever reason he agreed to the injunction being made final and he agreed that the fourth defendant would therefore be ordered to pay the plaintiffs'

costs. I suspect that, in the midst of some other arbitration, hearing he simply made a quick and erroneous decision which he has now come to regret.

25. Once he received the Act of the Royal Court on 23rd December, he still did nothing until 20th February. Even then his complaint appears only to have been that the Act suggested that the costs order was made not because it was the usual course, but because the plaintiffs had informed the Court that the fourth defendant had created the costs of the adjourned hearings. In my judgment that is a misreading of the Act which, as usual, merely recites the history of the proceedings. I have no doubt that the order was made simply because the fourth defendant did not appear and the plaintiffs asked for judgment in the terms of the prayer. Even then Mr Buss did nothing until he received Mourants' letters of 23rd May quantifying the costs. At that stage he instructed Jersey lawyers and in due course the necessary summons to set aside the judgment was issued. In my judgment there was no unacceptable delay once the Jersey lawyers were instructed. They first made enquiries of Mourants and then issued a summons when it was not possible to proceed by agreement.

26. This was a judgment in default of appearance; there is therefore power to set it aside under Rule 9/3(1). I must remind myself of the correct tests to be applied when deciding whether to set aside a default judgment. I need only refer to one case, namely Strata Surveys Ltd –v- Flaherty & Co. Ltd [1994] JLR 69. The Court of Appeal, in a judgment delivered by Southwell JA, made it clear that the Court should consider whether the defendant had a reasonably arguable defence and the reasons for the default having occurred. These factors then had to be weighed judicially in order to do justice to the parties, bearing in mind the dictum of Lord Atkin in Evans –v- Bartlam [1937] AC 473 that:

> ***"The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."***

27. Southwell JA made it clear that the Court must have regard to the prejudice which would be caused to either side by any order which the Court might make. In that case the Court of Appeal held that the judgment should be set aside as Strata had a reasonably arguable defence to the claim, the default arose solely through the error of Strata's lawyer rather than through the actions of Strata itself, there was no delay in applying to set the judgment aside, serious injustice would be done to Strata if it were not allowed to defend the action and the plaintiff would suffer no injustice if the default judgement were to be set aside and the claim taken to trial.

28. I turn, therefore, to consider whether the fourth defendant has a reasonably arguable defence. Mr MacRae has referred me to Picnic at Ascot –v- Kalus Derigs [2001] FSR 2, where Neuberger J held that, absent any special factors, where a claimant obtained an interlocutory injunction on the basis of the balance of convenience, the Court should normally reserve the costs. It would seem to me that similar principles should apply in the case of a *mareva* injunction where the defendant has not applied to set aside that injunction. As Neuberger J said at paragraph 15,

> ***"It would be adding insult to injury if an unfavourable order for costs is made against a defendant in addition to the injunction being granted at the interlocutory stage on a basis of a wrong, as it turns out, view of the facts made by the Court."***

29. So, if in this case, the fourth defendant were to be successful at the trial of the English proceedings, why should it be just that he should be ordered to pay the costs of the plaintiffs obtaining an injunction in Jersey which, if the substantive claim is dismissed, would have been wrongly obtained?

30. I consider that the fourth defendant is on very strong grounds for arguing that costs should have been reserved at this stage and should await the outcome of the English proceedings.

31. Furthermore, what possible justification can there be for any costs order having been made on an indemnity basis? In order to award indemnity costs there has to be some special or unusual feature of the case. This can include cases where a party has acted oppressively, in bad faith or in such a way as to incur costs out of all proportion to the issues at stake, see Dixon –v- Jefferson Seal [1998] JLR 47. Mr Wilson was unable to put forward any reason in this case as to why indemnity costs should have been ordered. It was an ordinary case where a freezing injunction was obtained in support of English proceedings and where the fourth defendant had, at all times, been quite content for that freezing injunction to continue. In my judgment it was quite wrong of the plaintiffs to ask for indemnity costs in this case.

32. It follows that, in my judgment, the situation here goes beyond the fourth defendant having a reasonably arguable defence. In my judgment, had he appeared to argue the matter through counsel on 6th December, the overwhelming probability is that costs would have been reserved to await the outcome of the English proceedings. In the unlikely event of costs having been ordered it is inconceivable that they would have been ordered on an indemnity basis.

33. The interests of justice clearly, therefore, point towards this judgment being set aside because to leave it in place would mean that the fourth defendant was subject to an order which should never have been made. Does it make any difference that the default judgment arose because of errors on the part of the fourth defendant's lawyers? Should the fourth defendant be left to pursue a remedy against them? I think not. In Strata the Court of Appeal mentioned the fact that it was the lawyer's error (rather than a decision on the part of the defendant himself) which led to the judgment in default being taken as being a reason in support of setting aside the judgment. It would not be fair in my judgment to leave the fourth defendant to institute separate proceedings for negligence against his lawyers by means of a new action for the comparatively modest sum involved in respect of these costs.

34. There has undoubtedly been delay in bringing this application; it should have been brought promptly after the Act was supplied to Mr Buss at the end of December. But, as against that, the plaintiffs have been slow in quantifying their costs and, on balance, I do not think that the fourth defendant should be prejudiced by his English solicitor's delay in taking the necessary action to set aside the judgment.

35. Next I consider whether the plaintiffs would suffer injustice if the default judgment on costs were set aside. Mr Wilson says that the plaintiffs' case in the English substantive action is strong and relies upon certain comments made by Mr Justice Cooke at the unsuccessful application by the plaintiffs for summary judgment in those proceedings. But I do not think that that is relevant. The fact is that summary judgment was not granted and this action is proceeding in England. If the plaintiffs succeed in those proceedings, they will then recover the Jersey costs against the fourth defendant in connection with obtaining the injunction in Jersey. The freezing injunction will remain in place in Jersey in the meantime so that the assets will still be here. It is true of course, as Mr Wilson says, that the plaintiffs will have had to pay their costs and will therefore remain out of pocket until any order for costs in their favour is eventually made following a successful outcome in England. But given that, in my judgment, the order should not have been made in the first place, I do not see that they will suffer injustice by being put back into the position in which they should have been in the first place. As I have already said, I consider that on the other hand the fourth defendant will suffer prejudice if he is left to pay costs which he should not have been ordered to pay.

36. I therefore consider that all the matters which were mentioned in Strata point towards the judgment in this case being set aside. I therefore set aside the costs order made on 6th December. Both counsel agreed that I should make whatever order seemed appropriate in its place and I have no doubt that the right order is that costs should be reserved to await the outcome of the English proceedings and I so order.

[There followed a discussion about the costs of this application.]

37. This is a case where the fourth defendant has been successful. That would point towards his being awarded his costs. Furthermore I have now been shown some Calderbank correspondence in which Mr MacRae made it clear that his clients would be willing to proceed on the basis that the costs order of 6th December be set aside with the costs of the proceedings being reserved until the conclusion of the English High Court proceedings. This is the order I have, in fact, made. That proposal was on the other hand not accepted by Mourants who were insisting that costs should remain but they accepted it should be on the standard basis rather than the indemnity basis. Both of those factors would point towards an award of costs on the standard basis in favour of the fourth defendant in connection with this application.

38. As against that, I have found that the primary cause of this judgment being taken was that the fourth defendant's English solicitors agreed to it. On 6th December, Mr Buss, a partner of a leading London firm, accepted that judgment would be taken and that an order for costs should be made. In the circumstances I think it would be over harsh to order the plaintiffs to pay all of the costs. I think that they did not act unreasonably in seeking judgment on 6th December in the light of Mr Buss' agreement; however I do find that they acted unreasonably in seeking indemnity costs for which I have found there was no justification whatsoever, and of course, Mr Buss never consented to that.

39. Balancing these two factors, in other words, the fact that the fourth defendant has won, and that a Calderbank offer was made which reflected what I have found to be the outcome, against the finding that the primary fault for the fact that this judgment was taken, was that of Watson Farley, I think that a fair order is that the fourth defendant should have fifty percent of the costs of this application on a standard basis. To the extent that, therefore, the fourth defendant will be out of pocket, I make it clear that I regard that as being the fault of Watson Farley and no doubt they will have regard to this in deciding whether they should bill him and whether or not they should pick up fifty percent of Ogiers' costs.

Authorities

Taunton –v- Planning & Environment Committee (18th April, 2000) Jersey Unreported: [2000/72]

Strata Survey Ltd –v- Flaherty & Co [1994] JLR 69

Evans –v- Bartlam [1937] AC 473

Dixon –v- Jefferson Seal [1998] JLR 47

Picnic at Ascot –v- Kalus Derigs [2001] FSR 2.