

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION  
2011/CLE/GEN/FP/00038

**BETWEEN**

SIDDHARTH SIDDHARTH

1<sup>st</sup> Plaintiff

AND

SHANTI INVESTMENTS LIMITED

2<sup>nd</sup> Plaintiff

AND

E P GRIFFIN GROUP LIMITED

Defendant

**AND BETWEEN**

E P GRIFFIN GROUP LIMITED

Plaintiff by Counterclaim

AND

SIDDHARTH SIDDHARTH

1<sup>st</sup> Defendant by Counterclaim

SHANTI INVESTMENTS LIMITED

2<sup>nd</sup> Defendant by Counterclaim

R RAWLE MAYNARD & CO (a Firm)

3<sup>rd</sup> Defendant by Counterclaim

**BEFORE** The Honourable Mrs Justice Estelle Gray Evans

**APPEARANCES:** Mr R Rawle Maynard for the plaintiff

Mr Christopher Jenkins and Ms Kharin Sears for the defendants

**HEARING DATES:** 2014: February 17; April 8.

## **Gray Evans, J**

1. This action was commenced on 22 February 2011 by a specially indorsed writ of summons in which the plaintiffs claim specific performance of a contract for sale of Unit 703 Oceanview Condominium, Freeport, Grand Bahama; alternately, damages for breach of contract; further or other relief and costs.

2. In its defence and counterclaim filed 22 March 2011 the defendant/plaintiff by counterclaim denies the plaintiffs' claim and counterclaims for a declaration that it is entitled to the return of the deposit held by the third defendant to the counterclaim together with interest thereon pursuant to the Civil Procedure (Award of Interest) Act and costs on an indemnity basis against the first and third defendants to the counterclaim.

3. The plaintiffs/defendants by counterclaim join issue with the defendant/plaintiff by counterclaim on its defence and deny that it is entitled to the relief claimed in its counterclaim, or any relief.

4. By a summons filed 18 January 2012 the defendant/plaintiff by counterclaim applied pursuant to Rules of the Supreme Court (RSC) Order 14 for summary judgment against the defendants by counterclaim for the relief sought in the counterclaim.

5. At the hearing of that summons on 6 November 2012, this Court refused the defendant/plaintiff by counterclaim's application, and, instead conducted a case management conference and gave directions for the further conduct of the action. The pre-trial review conference was set for and conducted on 21 March 2013.

6. On that date, the plaintiff had not complied with the directions order and the Court, on the application of the defendant, ordered that: "unless the plaintiffs by original action and defendants to counterclaim comply with the directions order dated 6 November 2012 and filed on 28 December 2012 within 21 days from the date of this order, the statement of claim and defence to counterclaim to stand dismissed with costs to be taxed if not agreed."

7. Trial dates, 17 and 18 February 2014, were also set at that conference.

8. I note here, parenthetically, that at the time, counsel for the plaintiffs complained that the dates were far away and suggested that the matter may be transferred to New Providence if an earlier date could be obtained. I granted leave to counsel to try for an earlier date in New Providence. Either no attempts to obtain an earlier date in New Providence were made or such attempts were unsuccessful.

9. In any event, the plaintiffs were not ready for trial on 17 February 2014. However, on application by the third defendant by counterclaim on that date, and upon Mr Maynard's undertaking to pay the moneys held by him as stakeholder into court, the Court, on 18 February 2014, struck out the firm of Rawle Maynard & Co. as a party to the counterclaim and adjourned a number of summonses filed by the defendant/plaintiff by counterclaim for hearing on 8 April 2014.

10. By those summonses, the defendant/plaintiff by counterclaim applies for the plaintiffs' action to be dismissed on the ground that the same was commenced without proper authority; alternatively, that the defendant be at liberty to enter judgment on the ground that the plaintiffs' action was dismissed by virtue of their failure to comply with the aforesaid unless order and that the sum of \$52,500.00 be paid to the defendant; alternatively, that the plaintiffs be ordered to pay security for the defendant's costs.

### **Want of Authority**

11. By its summons filed 19 March 2014 the defendant/plaintiff by counterclaim seeks an order under the inherent jurisdiction of the court that:

- (i) The original action in these proceedings be dismissed on the ground that the writ of summons filed herein on 22<sup>nd</sup> February 2011 has been commenced without the authority of the plaintiffs; and
- (ii) That the defendant's costs of this action and of this application be taxed on the indemnity basis and paid by R Rawle Maynard & Co whose name is on the record as the solicitor of the plaintiffs and defendants by counterclaim.

12. In support of that summons the defendant relies on the first affidavit of Jody Wells, an associate at the law firm of Lennox Paton, filed 4 April 2014, in which she deposed, inter alia, as follows:

- 1) The plaintiffs were ordered by orders of this Court dated 6 November 2012 and 21 March 2013 to file and serve the witness statements they wished to rely on at trial. Mr Maynard on 10 April 2013 purported to file a witness statement of Mr Siddharth. The witness statement was not signed.
- 2) This gave rise to a concern that Mr Maynard was in fact not properly instructed by Mr Siddharth.
- 3) This failing, and the absence of witness statements from the second plaintiff, also caused EP Griffin to question whether Mr Maynard was properly instructed by the vendor, Shanti.
- 4) By letter dated 24 February 2014, Ms Sears wrote to Maynard to obtain confirmation that he had been authorized to commence these proceedings on behalf of purported vendor, Shanti and Mr Siddharth.
- 5) The letter specifically required Maynard to provide by 5 March 2014 evidence:
  - (i) That the Board of directors of Shanti had instructed him to commence these proceedings on its behalf; and
  - (ii) Of the basis of its authority to act on behalf of Siddharth Siddharth.
- 6) The aforementioned letter was delivered to Maynard on 24 February 2014 by email, and by fax.
- 7) By 5 March 2014, counsel for EP Griffin had not received any response to its letter. On 12 March 2014, Mrs Marva Moxey, an administrative assistant at R. Rawle Maynard & Co. confirmed by way of telephone conversation with Ms Sears that the letter was received by her Chambers but did not indicate whether any response would be forthcoming.
- 8) To date Maynard has not furnished any evidence to demonstrate that he was properly instructed by either of the plaintiffs.
- 9) EP Griffin has hired an experienced and reputable private investigator licensed in the United States, Mr Kurt Moomau, to investigate with a view to verifying that Mr Maynard was properly instructed by his purported clients. Mr Moomau swore an affidavit on 27 March 2014 providing the results of his investigations, which was filed on 2 April 2014.
- 10) In addition, both Mr Jenkins and Mr Moomau located and made contact with Neera Khanna, a Canadian resident whose parents are the owners and beneficial owners of the second plaintiff, Shanti Investments Ltd, and who has had a power of attorney since 2001 to act on the company's behalf with respect to Unit 703. Ms Khanna herself swore an affidavit on 28 March 2014 (and filed on 2 April 2014 providing evidence confirming that Mr Maynard has never been instructed by Shanti).

13. Mr Maynard objected to the use of Mr Moomau's affidavit and indicated that he would wish to cross-examine Ms Khanna on her affidavit.

14. Counsel for the defendant withdrew Mr Moomau's affidavit and after some argument on the issue, decided that he did not need to rely on Ms Khanna's affidavit either.

15. As it turned out, neither of those affidavits was necessary, in my view, for the determination of the issue of whether or not the firm of Rawle Maynard & Co. was instructed by Shanti Investments Ltd. ("Shanti") to commence these proceedings.

16. The following excerpt from the transcript of proceedings is instructive:

Mr Jenkins: My Lady, I think my learned friend misunderstood the question. The question is, how was he instructed by Shanti not by Siddharth?

The Court: If Shanti is a plaintiff how are you instructed by Shanti?

Mr Maynard: The sole beneficial owner instructed me... I'm not aware that the decision of the court has been reversed. I'm, not aware that anybody contested that.

The Court: I'm understanding you to be saying that Mr Siddharth is the one who instructed you?

Mr Maynard: As the sole beneficial owner.

The Court: So he instructed you on behalf of Shanti to commence this action or on behalf of himself and Shanti?

Mr Maynard: On behalf of himself as the sole beneficial owner of the assets of Shanti.

The Court: Mr Maynard...

Mr Maynard: On behalf of Shanti. In his capacity as the sole beneficial owner. Nobody else is an owner.

The Court: It's the owners that instructed you or the directors? Is he a director of the company?

Mr Maynard: Let me put it like this. I say...the company had no directors to tell you the truth. Because Mr Gape refused to turn over the documents.

The Court: Don't give me evidence please.

Mr Maynard: You can check the records. My Lady, I'm going to submit this is a matter....Mr Siddharth said he is the director. He says he was declared by the court to be the sole beneficial owner of the assets of the company held by Shanti on trust for him; constructive trust. That's the decision. That's a judgment of the court. That is as good as you can get title to anything. And that is the capacity. And that's what he says and he has a right. The actual title document is more than what is in the bank. He had a right to satisfy the court [?] on the mortgage and to give a title to the purchaser. That is the capacity in which he instructed me. That's the capacity. That doesn't require any directors to say that.

Mr Jenkins: My Lady, that's wonderful. It means now that we do not need to rely on the evidence. We now know my learned friend is claiming to act on behalf of Shanti by reason of the default judgment that gives Mr Siddharth, in his view, as a beneficial owner, sole beneficial ownership, of the assets of the company. My Lady, we say that it is trite law that a beneficial owner in whatever capacity, as

opposed to the directors of the company, does not have the authority to commence proceedings on behalf of the company.

17. I then indicated to Mr Maynard that I understood him to be saying that the person who instructed him to commence this action on behalf of Shanti was Mr Siddharth in his capacity as the sole beneficial owner of Shanti. Mr Maynard responded that that was one aspect of the plaintiffs' case, that is, that Mr Siddharth "controlled the company absolutely" and that the other was that Mr Siddharth "had the right to direct the mortgagee and, therefore, he had a right to instruct counsel".

18. Mr Maynard requested and was given an opportunity to provide some authority in support of those contentions. A few days later my clerk handed me a copy of a case which had been delivered to my Chambers by Mr Maynard, presumably as the authority for the aforesaid propositions.

19. That case was *Pearce v Morris* [1869-70] 5 Ch. App. page 227, the head note to which reads as follows:

"(1) Mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title deeds to a person from whom he has accepted payment of principal, interest, and costs, if that person has only contracted to purchase a part of the mortgaged estate, and has not accepted the title.

(2) On tender by a person having a partial interest giving right to redeem the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested.

20. I confess that I do not see the relevance of that case to the issue I have to decide, which is whether the second plaintiff company instructed the firm of Rawle Maynard & Co. to commence these proceedings or to defend the counterclaim on its behalf, and in that regard, whether, if, as Mr Maynard claims, his firm obtained such instructions from Mr Siddharth, Mr Siddharth had the authority to give the same.

21. Mr Maynard contends that the first plaintiff is the "sole beneficial owner" of Shanti by virtue of a default judgment issued in Supreme Court Action No.2006/CLE/GEN/FP0010 between Siddharth Siddharth as plaintiff, Princess Villa Limited as first defendant and Shanti as second defendant, and filed on 5 March 2007, in the following terms:

"With leave of the Court given by Order dated 27<sup>th</sup> February, 2007.

No Notice of Intention to defend having been given by the 2<sup>nd</sup> defendant and no defence having been served by the first defendant herein

It is this day adjudged and declared:

- (1) That the first defendant holds Lots 19 and 19A in the Princess Isle Subdivision, situate at Freeport, Grand Bahama Island, on a resulting or constructive trust for the plaintiff.
- (2) That the second defendant holds Unit 703 in the Oceanview Condominium, situate at Freeport, Grand Bahama Island on a resulting or constructive trust for the plaintiff; and
- (3) That the defendants pay the plaintiff's costs to be taxed."

22. Counsel for the defendant/plaintiff by counterclaim makes the following observations and/or submissions:

- 1) Counsel for the plaintiffs' reliance on the default judgment as his authority to commence proceedings on behalf of Shanti as the true legal owner or the first plaintiff to enforce a contract to which he was not a party for the sale of property owned by another party is misconceived as a matter of law.

- 2) If a wrong has been occasioned to a company, it is the company that has the right of action to sue, since a company acts by its board of directors. *Foss v Harbottle* (1843) 67 ER 189.
- 3) There is no authority for the proposition that a person, who is not a shareholder but merely claims an equitable interest in property legally owned by a company, can perform any act on behalf of that company.
- 4) The default judgment which purports to give declaratory relief as to the legal title to unit 703 is bad and unenforceable. *Re Rolle* [2000] BHS J. No. 31
- 5) The default judgment cannot assist counsel for the plaintiffs nor the first plaintiff on the question of want of authority from Shanti.

23. It appears from counsel for the plaintiffs' arguments that he is of the view that the beneficial ownership of Unit 703 Oceanview Condominium was, by virtue of the aforesaid default judgment, vested in the first plaintiff; therefore, as the person beneficially entitled to ownership of Shanti's sole asset, the first plaintiff is also beneficial owner of the shares in Shanti and, therefore, has authority to instruct counsel to commence proceedings on behalf of Shanti, which he did.

24. If my understanding of counsel's arguments is correct, then I must agree with counsel for the defendant/plaintiff by counterclaim that the default judgment does not assist counsel for the plaintiffs in showing that the first plaintiff had the authority to instruct the firm of Rawle Maynard & Co. to commence these proceedings on behalf of the second plaintiff.

25. It is trite law that a company acts through its duly appointed officers and directors.

26. Mr Siddharth is neither an officer nor a director of Shanti. According to the copy of the minutes of the first meeting of the members of the company held on 10 December 1999, Terence R.H. Gape and Alexandra L. Gape are the shareholders; Peayare Khanna and Rani Khanna are the directors and president and secretary respectively; and Terence R.H. Gape is the assistant secretary. That information is also reflected in the company's annual statement dated 12 December 2000. Declarations of trust executed by Terence and Alexandra Gape are in favour of Mr and Mrs Peayare Khanna. There is no evidence of Mr Siddharth having been appointed an officer or director of Shanti since that date.

27. If, however, as Mr Maynard contends, Mr Siddharth is the sole beneficial owner of Shanti, and as such anyone holding shares in Shanti would have been holding them on his behalf, and any director of Shanti would have been holding at Mr Siddharth's pleasure, and Shanti is "a company over which [Mr Siddharth] had total control", it should, in my view, have been a simple matter for Mr Siddharth either to (i) direct the present directors to give instructions for the commencement of this action on behalf of Shanti; or (ii) call a general meeting to appoint a different slate of officers and directors, including himself, who would then have been in a position to instruct counsel on behalf of Shanti.

28. Clearly that did not happen.

29. It is also clear from Mr Maynard's arguments that these proceedings were commenced by him in the mistaken belief, in my view, that Mr Siddharth had authority to instruct him to do so on behalf of Shanti, which, in my judgment, he did not.

30. A solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under the erroneous assumption as to the authority, does so at his peril; and where proceedings are commenced on behalf of a company by an attorney who has not obtained the authority of that company, either by the approval of the shareholders in a general meeting or by a resolution of the board of directors, such proceedings are a nullity, and may be stayed or struck out. See *Danish Mercantile Co Ltd v Beaumont* [1951] 1 All ER 925. The court is not bound to strike out the proceedings if at the time of the strike-out application the company on whose behalf the action was commenced wishes to continue and to accept responsibility for it. In that regard, the plaintiff on whose behalf those proceedings are commenced may ratify the act of the solicitor and adopt the proceedings.

See, for example *Presentaciones Musicales SA v Secunda* [1994] Ch 271, [1994] 2 All ER 737, where Dillon LJ said: "where a writ is issued without authority, the cases show that the writ is not a nullity. For the nominal plaintiff to adopt the writ or ratify its issue does not require application to the court."

31. Therefore, once counsel for the plaintiffs became aware of the defendant's application he could have had Shanti ratify his actions and adopt the proceedings. Clearly, he did not and there is no evidence in this case that Shanti wishes to accept responsibility for the commencement of this action nor is there any indication from counsel that that company is likely to ratify the same.

32. I am satisfied on the evidence, the comments made by Mr Maynard from Bar table and the authorities cited that the firm of Rawle Maynard & Co. did not have proper authority to commence these proceedings on behalf of the second plaintiff and that the action by the second plaintiff against the defendant should be struck out for that reason.

33. Although the defendant's summons related to both plaintiffs, in light of a copy of an "affidavit" by Mr Siddharth produced by counsel for the plaintiffs, in which Mr Siddharth says, inter alia, "I herein also certify that Mr Maynard is my lawyer who represents me in my best interest and is still my lawyer", counsel for the defendant conceded that the firm of Rawle Maynard & Co. may have been instructed by the first plaintiff to commence this action on his behalf. Consequently, he abandoned the "without authority" application with respect to the first plaintiff. However, counsel for the defendant submits that, as Shanti was the legal owner and the vendor of the property under the agreement for sale to the defendant, and the subject of this action, the substratum of the plaintiffs' case falls away and the original action should, therefore, be dismissed in its entirety.

34. The evidence is that at the time of the commencement of this action, legal title to the aforesaid unit was vested in Shanti. Included amongst the plaintiff's bundle of documents filed in preparation for the trial is a copy of an indenture of conveyance dated 21 February 2000 between Ocean Front Developers (Freeport) Company Limited and Shanti, as well as a mortgage dated 22 February 2000 between Shanti and Barclays Bank, PLC. Both documents relate to Unit 703 Oceanview Condominium aforesaid and each was executed by Peayare Khanna as president and countersigned by Rani Khanna as secretary of Shanti.

35. Further, although Mr Maynard argues that nowhere in the aforesaid sales agreement did Mr Siddharth purport to sign the same as president or director of Shanti, it is clear from the agreement that the vendor was Shanti and that Mr Siddharth executed the same "for Shanti".

36. It seems to me that if, as I have found, the legal owner and vendor of the said unit, Shanti, did not authorize the commencement of this action, or the defence of the defendant/plaintiff by counterclaim's counterclaim, then counsel for the defendant is correct: the foundation of the plaintiffs' case falls away and the action against the defendant must be dismissed in its entirety as Mr Siddharth cannot enforce a contract to which he was not a party and, in that regard, only Shanti was capable of calling for specific performance of the aforesaid agreement or to claim damages for any breach thereof. See *Foss v Harbottle*.

37. In the result, the statement of claim and the defence to counterclaim are struck out with costs to the defendant.

38. It is well settled that where an action is brought without the authority of the purported plaintiff, the solicitor on the record for the purported plaintiff becomes personally liable to the defendant for the costs of the action: *Danish Mercantile Co Ltd v Beaumont supra*.

39. Mr Maynard says he was instructed by Mr Siddharth to commence these proceedings on behalf of Shanti. I have found that Mr Siddharth did not have the authority to give those instructions.

40. I, therefore, order that the costs of this application and the action are to be paid by the first plaintiff and the firm of Rawle Maynard & Co.

41. The defendant/plaintiff by counterclaim asks that those costs be paid on an indemnity basis.

42. As I understand the authorities, costs are assessed on an indemnity basis only if the behaviour of the party is egregious (per Sawyer, C.J., as she then was, in *Levine v Callenders & Co.*[1998] BHS JN 75); or comprise conduct which is unreasonable to such a high degree that it can be categorized as exceptional (per Newman, J. as he then was, in *Wailes v Stapleton Construction and Commercial Services Ltd.*[1997] 2 Lloyd's Rep 112) as cited with approval by of Adderley, J. (as he then was) in *The Central Bank of Ecuador and others v. Ansbacher (Bahamas) Limited and others* 1996/CLE/GEN/00648.

43. Counsel for the defendant does not say why costs should be awarded on an indemnity basis and I am not persuaded that counsel for the plaintiffs' behaviour was so egregious I should order costs on an indemnity basis.

44. Therefore, in the exercise of my discretion, I would order costs on a party and party basis, to be taxed if not agreed.

45. In the event I am wrong in that conclusion, I go on now to consider the defendant/plaintiff by counterclaim's alternative application.

#### **Failure to comply with unless order**

46. By summons filed on 9 May 2013 the defendant applies, in the alternative, for leave, to enter judgment on its counterclaim on the ground that the plaintiffs' statement of claim and defence to counterclaim have been struck out as a result of their failure to comply with the unless order granted by this Court on 21 March 2013. That summons is supported by the affidavits of Chizelle Cargill, then a pupil in the firm of counsel for the defendant/plaintiff by counterclaim, filed 16 April 2013 and 9 May 2013.

47. In her 16 April 2013 affidavit Ms Cargill deposes at paragraphs 5 through 7 inclusive as follows:

- 1) That I am informed that at the close of business on 11<sup>th</sup> April 2013 the defendant by original action and plaintiff by counterclaim had not yet been served with the list of documents or the witness statements of the plaintiffs in the original action and the defendants by counterclaim, as required by the unless order.
- 2) That I am informed that as a result of the failure of the plaintiffs in the original action and the defendants by counterclaim to comply with the unless order dated 21<sup>st</sup> March 2013, that the statement of claim filed on 22<sup>nd</sup> February 2011 and the Reply and Defence to the Counterclaim filed on 20 April 2011 were automatically dismissed.
- 3) That I am advised by Ms Sears that she received a draft and unfiled list of documents by email on 12<sup>th</sup> April 2013, but that this was neither sufficient service nor within the strict time limits prescribed in the unless order.

48. Then, in her affidavit filed on 9 May 2013, Ms Cargill avers at paragraphs 10 through 15 inclusive as follows:

- 1) That I am further advised that on Thursday, 18<sup>th</sup> April 2013 that Ms Sears received a package from Rawle Maynard & Co., which contained the following:
  - i. A list of documents filed on 5<sup>th</sup> April 2013,
  - ii. Plaintiff's bundle of pleadings filed on 12<sup>th</sup> April 2013;
  - iii. Plaintiffs' bundle of documents filed on 10<sup>th</sup> April 2013;
- 2) That I am informed that the defendant has not been served with any filed witness statements. I am further informed that on 18<sup>th</sup> April 2013 Ms Sears received from Ms Mills via email a document purporting to be witness statements on behalf of the plaintiffs filed on 10<sup>th</sup> April 2013.



- 3) That the document entitled "Plaintiff's witness statement" filed on behalf of the plaintiff consisted of the following documents:
  - i. An affidavit of Mr Rajiv Vohra dated April 20<sup>th</sup> 2009; and
  - ii. A statement of Mr Siddharth Siddharth
- 4) That I am informed that the affidavit of Mr Rajiv Vohra is not a witness statement in this action and that it was made prior to 7<sup>th</sup> May 2010, the date on which the conveyance [sales agreement] of Unit 703 from the plaintiffs to the defendant was executed. That the affidavit attests to details not in issue in these proceedings and therefore is irrelevant to these proceedings.
- 5) That I am further informed that the purported witness statement of Mr Siddharth Siddharth which is an unsigned and undated statement also contains assertions which are irrelevant to the facts in issue for the purposes of the proceedings.
- 6) That I am informed that the witness statements filed on behalf of the plaintiff in the original action do not address or support the assertions claimed in the plaintiffs' statement of claim nor do they address the facts in issue in these proceedings.
- 7) That I am informed that the plaintiffs in the original action and the defendants by counterclaim have failed to comply with the unless order dated 21<sup>st</sup> March 2013 by failing to serve its list of documents and witness statements on or before 11<sup>th</sup> April 2013.

49. Counsel for the defendant submits that in light of the aforesaid evidence, the statement of claim and defence to counterclaim were automatically struck out and the Court should, therefore, confirm their dismissal and permit the defendant/plaintiff by counterclaim to enter judgment on its counterclaim.

50. In support of that submission, counsel cited the case of *Daxon v Kerzner International (Bahamas) Limited* [2012] 1 BHS J No. 92, in which Bain, J. dismissed the action on the ground that the plaintiff had failed to comply with the unless order and had not applied either for an extension of the time within which to comply or for relief from sanctions on the failure to comply.

51. No affidavit by or on behalf of the plaintiffs was filed in response to the defendant's application. However, during the course of his arguments, counsel for the plaintiffs, at first, disputed that an unless order had been given in court; then he denied that he had initialed the perfected order; and when a copy of the initialed order along with the contents of the second affidavit of Jody Wells were drawn to his attention, he contended that the order had been complied with within the time specified therefor. In that regard, counsel for the plaintiffssaid:

"My submission is the order was complied with and a faxed copy was sent. The document which I said was a faxed copy was sent to them within the time limit. And the original hard copy was sent by courier. Of course the courier delivered the document out of time but the faxed or emailed version was sent to them within the time frame."

52. Rules of the Supreme Court Order 31A rules 24 provides as follows:

24. (1) Where the court makes an order or gives directions the court may whenever practicable also specify the consequence of failure to comply.

(2) Where a party has failed to comply with -

(a) any of these rules;

(b) a direction or any order,

Any sanction for non compliance imposed by the rule shall have effect unless the party in default applies for and obtains relief from the sanction, and in such case rule 26 shall not apply.

(3) Where a rule, practice direction or order -

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

(b) specifies the consequence of failure to comply.

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

53. RSC Order 31A rule 25(2) gives the Court jurisdiction to grant relief from sanctions upon application therefor being made promptly and supported by evidence on affidavit.

54. RSC Order 31A rule 26 applies only where the consequence of failure to comply with a rule, practice direction or Court order has not been specified by any rule, practice direction or Court order.

55. RSC Order 31A rule 22 applies to cases where the court makes an order which includes a term that the pleading of a party be struck out if the party does not comply with the unless order. Rule 22(2) provides that where a striking out order was made, any other party may ask for judgment to be entered and for costs. Rule 22(3) and (4) provide that a party may obtain judgment under the rule by filing a request for judgment.

56. It is clear from RSC Order 31A that a person affected by an unless order may apply firstly, to have the time within which the particular act is to be done, extended; or secondly, for relief from the sanction for failure to comply. In this case, the striking out of the action. The plaintiffs/defendants by counterclaim made neither of those applications, notwithstanding the defendant's application had been filed since May 2013 and notice thereof had been provided to counsel for the plaintiffs well in advance of the hearing on 8 April 2014. In fact, at the hearing on 17 February, 2014, Mr Maynard acknowledged that he had received the summons.

57. It is also clear from RSC Order 31A that in order for the time for doing the act to be extended, an application therefor must be made to the Court, since the time may not be extended by agreement between the parties.

58. In that regard, as I understand the rules, the Court can only extend the time for compliance with an unless order or grant relief from any sanction for non-compliance therewith upon application by the party in default, and in the absence of such application, the sanction for non-compliance takes effect.

59. In my judgment, therefore, in the absence of an application for extension of time to comply or for relief from sanction for failure to comply, the only question is whether or not there has been compliance with the unless order.

60. A review of the file reveals the following:

1) The directions order given at the case management conference on 6 November 2012, directed the parties, by 20 March 2013, in preparation for the pre-trial review to:

- i. file and serve their respective lists of documents;
- ii. conduct mutual inspection;
- iii. file an agreed, or separate, statements of facts and issues;
- iv. file an agreed, or separate, bundles of documents and pleadings;
- v. file and exchange witness statements;
- vi. file a listing questionnaire; and

- vii. file and exchange skeleton arguments and authorities on which they intended to rely at trial.
- 2) At the date of the pre-trial review conference held on 21 March 2013, the only document filed by the plaintiffs/defendants by counterclaim, in compliance with the directions order was a statement of issues filed on 22 January 2013.
- 3) The unless order was made on 21 March 2013.
- 4) Subsequent to the 21 March 2013, the plaintiffs/defendants by counterclaim filed the following documents:
  - i. List of documents on 5 April 2013,
  - ii. Bundle of documents on 10 April 2013;
  - iii. Witness statements on 10 April 2013.
  - iv. Bundle of pleadings on 12 April 2013;

61. Although Mr Maynard says that the plaintiffs had complied with the directions order within the time limited therefor, it is clear from the filing dates of the above-mentioned documents that the bundle of pleadings was not filed within the specified time.

62. Further, the defendant's evidence is that a copy of an unfiled list of the plaintiffs' documents was received by its counsel, Kharin Sears, via email on the afternoon of 12 April 2013, and "a document purporting to be witness statements on behalf of the plaintiffs filed on 10 April 2013, was received via email" on 18 April 2013, while the filed list of documents, along with the plaintiff's filed bundles of documents and pleadings were not received until 18 April 2013.

63. Indeed, Mr Maynard admitted that "the courier delivered the document out of time", although, he says, "the faxed or emailed version was sent to them within the time frame".

64. Counsel for the defendant/plaintiff by counterclaim submits, and I agree, that neither of those deliveries was sufficient service or within the strict time limits prescribed in the unless order.

65. RSC Order 31A rule 18(2) sub-paragraphs (b) and (d) provide that the Court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even after the time for compliance has passed and may stay the whole or part of any proceedings generally or until a specified date or event. However, the rules are clear: the Court may only exercise its discretion in that regard if an application is made therefor.

66. No such application has, to date, been made.

67. In the case of *Marcan Shipping (London) Ltd v Kefalas and another* [2007] 3 All ER 365, a decision of the English Court of Appeal (Pill, Keene, Moore-Bick LJ), Moore-Brick LJ, in considering the effect of CPR Part 3, which is in all material particulars identical to the relevant provisions of RSC Order 31A aforesaid, opined, at paragraphs [28] and [29]:

"[28] The starting point in the present case must be the terms of the Rules themselves. Rule 3.1(3)(b) expressly gives the court the power when making an order to specify the consequences of failure to comply with its terms and r 3.8(1) expressly provides that where a party has failed to comply with an order any sanction imposed by the order has effect unless the party in default applies for and obtains relief from the sanction. This makes it clear, in my view, that no further order is required to render the sanction effective; on the contrary, the onus is on the defaulting party to take steps to obtain relief. Moreover, in case there should be any doubt about the effect of a failure to comply with an order of this kind para 1.9 of the Practice Direction supplementing Pt 3 states that:

"where a rule, practice direction or order states 'shall be struck out or dismissed' or 'will be struck out or dismissed' this means that the striking out or dismissal will be automatic and that no further order of the court is required."

That is reflected in the following observations of Brooke LJ in *Sayers v Clarke Walker* (Practice Note) [2002] 1 WLR 3095:

"The philosophy underpinning CPR Pt 3 is that rules, court orders and practice directions are there to be obeyed. If a sanction is imposed in the event of non-compliance, the defaulting party has to seek relief from the sanction on an application made under CPR 3.9, and in that event the court will consider all the matters listed in CPR 3.9, so far as relevant."

As a result a clear distinction is maintained in the CPR between the operation of the sanction and the exercise of the court's discretion to grant relief. That is reflected in the terms of r 3.5(1) and (2) which allow a claimant to enter judgment without further order where the claim is for a sum of money or for the delivery of goods or payment of their value and the sanction is the striking out of the defence in its entirety."

[29] In the present case a degree of misunderstanding appears to have arisen from the terms of r 3.5(5) which provides that, except in the cases covered by r 3.5(2), a party must make an application under Pt 23 if he wishes to obtain judgment following the failure by the party to whom it is addressed to comply with a conditional order striking out his statement of case in the event of non-compliance. If it is thought that the party seeking to take advantage of the default must apply to the court in order to render the sanction effective, in my view that is wrong. The sanction takes effect without further order and the statement of case is struck out; it follows, therefore, that it is unnecessary and inappropriate to make an application under r 3.5(5) or r 3.4(2)(c) for an order to that effect.

68. As I understand the law and the authorities, once an unless order is made and a sanction imposed, the effect of non-compliance therewith is an automatic imposition of the sanction.

69. In this case, the sanction was the dismissal of the statement of claim and defence to counterclaim with costs to be taxed if not agreed.

70. As was observed in the Privy Council case of *Attorney General of Trinidad & Tobago Universal Projects Limited* [2011] UKPC 37: "The Court's inherent jurisdiction cannot be invoked to circumvent the express provision of the rule", which is that an application must be made either for extension of time or relief from sanction.

71. In my judgment, therefore, the plaintiffs having failed to comply with the unless order by 11 April 2013, and having failed to apply for an extension of the time for compliance or for relief from sanction for non-compliance, their statement of claim and defence to counterclaim stood dismissed without the need for further order of this Court: See *Marcan Shipping supra*.

72. The plaintiffs' claim having been automatically dismissed, the defendant is entitled, on its alternative application, to judgment, in the original action, for its costs, to be taxed if not agreed, and I so order.

### **Judgment on the counterclaim**

73. Counsel for the defendant/plaintiff by counterclaim submits that whether as a result of the plaintiffs' action being dismissed for want of authority or for failure to comply with the unless order, the defendant/plaintiff by counterclaim is entitled to the relief sought in its counterclaim.

74. In that regard, the defendant/plaintiff by counterclaim applies under the inherent jurisdiction of the Court, in the case of the dismissal for want of authority, or, alternatively, pursuant to RSC Order 31A rule 22, in the case of the failure to comply with the unless order, for judgment on its counterclaim.

75. RSC Order 31A rule 22 provide that a party may obtain judgment under the rule by filing a request for judgment and where the claim is for some remedy other than a specified sum of money; an amount of money to be decided by the Court; delivery of goods; or a combination of those remedies, the judgment shall be such as the Court considers that the plaintiff is entitled to.

76. The defendant/plaintiff by counterclaim's claim arises out of an agreement between the second plaintiff and the defendant/plaintiff by counterclaim for the sale and purchase of Unit 703 Oceanview Condominium, Freeport, which agreement called for the deposit of \$52,500.00 to be paid to the firm of Rawle Maynard & Co., as stakeholders. That agreement was executed by the first plaintiff "for Shanti Investments Ltd" and witnessed by R. Rawle Maynard, neither of whom was at the time, or subsequently, an officer or director of Shanti.

77. The plaintiffs claimed against the defendant/plaintiff by counterclaim specific performance of the said agreement or damages for breach thereof. The defendant/plaintiff by counterclaim denies the plaintiffs' claim, accuses the plaintiffs, inter alia, of failing to deduce good and marketable title in accordance with the agreement and contends that it is, in the circumstances, and pursuant to the terms of the agreement, entitled to the return of its deposit.

78. In that regard, clause 11 of the Agreement provides that if the second plaintiff failed to deduce title to the unit or failed to deliver the assurance provided for, the defendant may require that the deposit be returned to it whereupon the agreement was to be canceled.

79. In his witness statement filed 27 February 2013 Mr Lawrence Hayden Thompson, a director of the defendant/plaintiff by counterclaim, avers, inter alia, as follows:

- 1) On 6 May 2010 Shanti Investments Ltd and E.P. Griffin executed an agreement for sale for Shanti to sell and E.P. Griffin to purchase Unit 703 in the Oceanview Condominium, Freeport, at the price of US\$525,500.00.
- 2) I retained Terence R.H. Gape of DuPuch & Turnquest & Co. (Gape) to represent the interests of E.P. Griffin while Shanti retained R. Rawle Maynard of R. Rawle Maynard & Co. (Maynard), to represent its interests as vendor.
- 3) The agreement for sale was prepared by Lanelle Phillips Real Estate and was executed by myself on behalf of E.P. Griffin and by Siddharth Siddharth for and on behalf of Shanti. Rawle Maynard countersigned the agreement as witness. The agreement for sale provided that the completion date would be on or about 20 June 2010.

80. According to Mr Thompson, several requisitions on title were made on counsel for the plaintiffs, none of which were answered satisfactorily. Consequently, Mr Thompson avers:

- 1) On 21 June 2010 Gape sent a notice to complete to Maynard which required Maynard to complete the sale of the Unit within 21 days, time being of the essence, or else the purchaser would required the deposit of \$52,500.00 to be returned in accordance with paragraph 11 of the agreement for sale.
- 2) On 23 June 2010 I elected to terminate Gape as my attorney for this transaction. I sent an email on the same day to Maynard informing him of this decision and advising him that I wished to cancel the purchase of the Unit as Maynard had failed to deduce good and marketable title to the Unit.
- 3) On 14 July 2010 Maynard by email wrote to me alleging that the only delay in completing this sale was due to the confusion caused by Gape. He also advised that the purchaser [sic] had every intention of completing the sale and had instructed the bank to execute the conveyance and make disbursements including the payment of the condominium maintenance fees.

- 4) I responded to Maynard by email and stated that at no time had he produced clear and marketable title free from encumbrances and that the purchaser [sic] was not in a position to convey. At this time I also requested the return of my deposit.
- 5) On 15 July 2010 Maynard again wrote to me, stating that his client was ready, willing and able to convey a good and marketable title to the purchaser and that the vendor would not accept any withdrawal or rescission from the contract. In a letter dated 22 July 2010, Maynard indicated that my deposit was liable to forfeiture as the expiration of 21 days provided for in the notice to complete had expired.

81. After citing a number of instances in which counsel for the plaintiffs failed to answer requisitions satisfactorily and, therefore, failed to deduce good and marketable title to the Unit, Mr Thompson avers at paragraph 37 as follows:

"To date Maynard has failed to satisfactorily address the requisitions made on behalf of E.P. Griffin Ltd. Maynard has also failed to show that Siddharth is in a position to effectively convey the property to E.P. Griffin Ltd., therefore good and marketable title has not been produced. For these reasons I have repeatedly requested the return of my deposit."

82. No affidavit in response or opposition to the defendant's application was filed by the plaintiff, notwithstanding, in his written submissions filed on 4 April 2014 in support of the aforesaid summonses, counsel for the defendant/plaintiff by counterclaim indicated that he would be relying on a number of affidavits, including the aforesaid affidavit by Mr Thompson.

83. There is, however, on the file a "statement of Siddharth Siddharth" as a part of a document entitled "Plaintiffs' Witness Statements" filed on 10 April 2013. That statement, supposedly filed in preparation for trial, representing the first plaintiff's evidence-in-chief, and which should, therefore, support the plaintiffs' claim as well as answer the defendant's counterclaim, in my view, does neither.

84. The unsigned and undated statement is set out hereunder in its entirety:

Statement of Siddharth Siddharth

- 1) I paid the purchase price of the Unit through my brother-in-law Rajiv Vohra, who at the time resided in Freeport, and my Bank transfers to Dupuch & Turnquest & Co.
- 2) I also paid Dupuch & Turnquest & Co to incorporate the Company Shanti Investments Limited for the purpose of taking title to the Unit. No-one other than myself was to hold any interest in the Company or the Apartment Unit.
- 3) The Company, Shanti Investment Ltd, was incorporated and two shares were issued to Terrance Gape respectively.
- 4) It came to my attention that Dupuch & Turnquest & Co had misrepresented to the Investment Board of The Bahamas government that another person was the beneficial owner of the shares in the Company and of the Condominium Unit No 703 situate in The Oceanview Condominium.
- 5) I made an application to The Supreme Court of The Bahamas for a declaration that I am the beneficial owner of The Apartment and that neither the Company nor the shareholders defended my application and I was given judgment as prayed.
- 6) I have been in possession of the Apartment since the closing of the sale and I have paid Condominium fees and assessments of approximately \$200,00.00[sic] to date.

85. I agree with counsel for the defendant that the statement does not speak to the issues between the parties. For example, nowhere in that statement does the first plaintiff refute the allegation by the defendant/plaintiff by counterclaim of the plaintiffs' failure to adduce good and marketable title to the property; nor is there anything in the statement refuting the defendant/plaintiff by counterclaim's claim to be entitled to a refund of the funds paid to the firm of Rawle Maynard & Co. as stakeholder.

86. Furthermore, notwithstanding the statement at paragraph 6 of the aforesaid statement which suggests that the first plaintiff is in possession of the said unit, the evidence is that Unit 703 Oceanview Condominium was sold to Wolfgang Geiger and Martina Geiger in 2011 by the Oceanview Owners Association Ltd pursuant to a Notice of Charge dated 15 October 2008 and recorded in the said Registry of Records in volume 10615 at pages 91 to 94. The conveyance in favour of Mr and Mrs Geiger is dated 3 October 2011 and has been recorded in the said Registry of Records in volume 11541 at pages 60 to 72.

87. Section 21 of the Law of Property Conveyancing (Condominium) Act, 1965, provides that a body-corporate shall have the same powers of sale for the purpose of enforcing a charge created by section 21(1) as a mortgagee under the provisions of the Conveyancing and Law of Property Act, chapter 138 and that such charge shall rank prior to all other encumbrances on the unit except any charge under section (1) of the Real Property Tax Act or any Act amending or replacing the same.

88. Sections 23(1) and (2) of the Conveyancing and Law of Property Act, provide that a mortgagee exercising the power of sale conferred by that Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage; and where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

89. I, therefore, accept the submission of counsel for the defendant/plaintiff by counterclaim that the sale of the aforesaid unit to Mr and Mrs Geiger is unimpeachable.

90. In my judgment, then, the dismissal of the plaintiffs' action, whether by reason of want of authority or failure to comply with the unless order, coupled with the fact that the unit, the subject of this action, has been sold by someone other than the plaintiffs, is sufficient to entitle the defendant/plaintiff by counterclaim to a refund of the deposit paid to the firm of Rawle Maynard & Co., as stakeholder, and I so declare.

91. The said sum of \$52,500.00 was paid into Court by the firm of Rawle Maynard & Co. on or about 20 February 2014.

92. By a summons filed 9 May 2013 the defendant/plaintiff by counterclaim had requested that the said sum of \$52,500.00 held by the firm of Rawle Maynard & Co. as stakeholder be returned to the defendant/plaintiff by counterclaim and that the plaintiffs/defendants by counterclaim be ordered to pay interest thereon pursuant to the Civil Procedure (Award of Interest) Act (to be assessed).

93. In the circumstances, and in light of my finding that the defendant/plaintiff by counterclaim is entitled to the refund of its deposit paid to the firm of R. Rawle Maynard & Co., as stakeholder, I hereby order that the sum of \$52,500.00 paid into Court on or about 20 February 2014 be paid out to the defendant/plaintiff by counterclaim or its counsel, Lennox Paton, forthwith.

#### **SUMMARY OF ORDERS**

94. In summary, the orders herein are as follows:

- 1) The statement of claim and defence to counterclaim are struck out and the plaintiffs' original action dismissed on the ground that the same was commenced without the authority of the second plaintiff, the vendor and legal owner of Unit 703 Oceanview Condominium, the subject of this action, with the costs of the original action to the defendant, to be paid by the first plaintiff and the firm of Rawle Maynard & Co. on a party and party basis, to be taxed if not agreed.
- 2) ALTERNATIVELY, the plaintiffs' statement of claim and defence to counterclaim having been automatically dismissed as a result of the plaintiffs having failed to comply with the unless order made on 21 March 2013, judgment is to be entered for the defendant in the original action for its costs, to be taxed if not agreed.
- 3) IN ANY EVENT it is declared that the defendant/plaintiff by counterclaim is entitled to the return of the deposit paid to the firm of Rawle Maynard & Co., as stakeholders.
- 4) That the said sum of \$52,500.00 paid into court on or about 20 February 2014 be paid out to defendant/plaintiff by counterclaim or its counsel, Lennox Paton, forthwith.

95. I will hear the parties on the issues of interest and costs on the counterclaim.

96. In light of my decision regarding the disposition of this action and the counterclaim, it was not, in my view, necessary for me to decide the defendant/plaintiff by counterclaim's application for security for costs, although had it been necessary, I would, in the circumstances, have made the order sought by the defendant/plaintiff by counterclaim.

DELIVERED this 27<sup>th</sup> day of June A.D. 2014

Estelle G. Gray Evans  
Justice