COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

Action No.2020/CLE/gen/01128

BETWEEN

ALPHA AVIATION LIMITED

ADVANCED AVIATION LIMITED

Plaintiffs

V.

RANDY LARRY BUTLER

SKY BAHAMAS AIRLINES LIMITED

AVIATION GROUP OVERSIGHT LIMITED

Defendants

Before: Deputy Registrar Carol Misiewicz

Date: 23rd February 2021

Appearances: Mr. Michael W. Horton for the Defendants/Applicants

Mr. Michael Scott for the Plaintiffs/Respondents

DECISION

1. This is an application by the Defendants to set aside a Judgment in default of Defence that was entered on 25 January 2021. That judgment was entered fully two months after the time provided for filing a defence had expired, and after an extension of time of one month had been granted to the Defendants by the Plaintiffs for them to file a defence.

Background Facts

2. To begin this lawsuit the Writ of Summons was filed on 16 November 2020. It was served upon the registered office of the Second and Third Defendants, the chambers of Michael W. Horton, on 19th November 2020. Mr. Horton filed appearances for all three Defendants on 4th December 2020, thereby waiving the need for service upon the First Defendant. (It is unclear whether the First Defendant was ever personally served, but no point was taken by either side on this issue.) Since the Statement of Claim was indorsed on the Writ, this meant that a defence was due from each of the Defendants 28 days after the Writ was served, that is to say, by 17th December 2020.

3. Mr. Horton admitted during argument that there was no communication between counsel for the respective parties between 4th December and 16th December 2020. On 17th December 2020, the last day for filing a Defence, Mr. Horton wrote to Mr. Scott (the attorney for the Plaintiffs) and asked for an extension of time *until the end of January 2021* (my emphasis) within which to file a defence. By this stage the Defendants – or at least the 2nd and 3rd Defendants – had had the Writ and Statement of Claim for a full 28 days.

4. The letter begins: "The time for filing a Defence in this matter on behalf of the Defendants expiring this week, we hereby request an extension of time…" The letter was sent on a Thursday, practically the end of the week, and in fact as already observed above, the 17th December was actually the last day of relevant limiting period. Further, I note that this letter does not mention a request for further and better particulars from the Plaintiffs.

5. Mr. Scott replied to this letter the very next day, indicating that he was instructed to convey that his client would reluctantly agree to an extension to the 22nd January 2021. This was not all the way to the 'end of the month' as the Defendants had hoped, but was a considerable extension nevertheless. In the letter Mr. Scott simultaneously delivered the explicit warning that no further extensions would be agreed.

6. The 22nd January 2021 was a Friday. Rather than filing a defence in the interim or by the agreed deadline, on that day the Defendants filed a Summons for Further and Better

particulars of several of the matters pleaded in the Statement of Claim. There are five pages of questions contained in this Summons.

7. On Monday 25th January 2021 the Plaintiffs entered Judgment in Default of Defence. It was followed immediately by the Defendants' application to set it aside by a summons filed on 26th January 2021.

The Judgment as Premature or in Contravention of Order 14

8. Counsel for the Defendants admitted in his submissions and in argument that the Default Judgment is regular. The Summons for dismissal of the "Summary Judgment" entered by Plaintiffs complains that it was entered without leave and prays for an order that – *"The Judgment in Default of Defence ... be set aside on the ground that the Judgment is premature and invalid, having been entered without leave of the Court, and contrary to the provisions of Order 14, rule 1(2) (b) of the Rules of the Supreme Court."*

9. An application for leave to enter summary judgment may not be made in an action which includes a claim by the plaintiff based on an allegation of fraud: *see* Order 14 rule 1 (2) (b) of the Rules of the Supreme Court ("RSC"). It seems therefore that the Defendants are asserting that since the allegations in the statement of claim are allegations of fraud on the part of the Defendants, then, the Plaintiffs ought to have applied for leave under Order 14 to enter summary judgment. And further, that since no such leave was obtained, then the application is irregular. At least, that seems to be the implication from the assertion, but it was not directly spelled out in that way.

10. In paragraph 3 of the Statement of Claim there are allegations against the Defendants of fraudulent actions committed towards the Plaintiffs. The Particulars of Injury and Of Unlawful Acts under Paragraph 3 set out allegations of dishonesty, breach of duty of honesty and fidelity, and conspiracy. Mr. Horton did not press the argument that these allegations all fell within the prohibition contained in Order 14 Rule (1) (2) (b). In fact in his Further Skeleton Arguments dated 19th February 2021 Mr. Horton said at paragraph 3 "The defendants make no argument as to regularity or irregularity of the judgment under

Order 14." In any event the Plaintiffs were not purporting to obtain judgment by Order 14, so the result in my view is that such argument is not really relevant in these circumstances.

Judgment Premature re Further & Better Particulars Request

11. So, having abandoned that argument about the application of Order 14 summary judgment proceedings, counsel for the Defendants pursued instead their case that the further and better particulars first had to be provided by the Plaintiffs in order for them to file a defence. And that since no such particulars had been provided, the default judgment was premature and therefore irregular (or at least improper) on that ground and should be set aside.

12. The Defendants run into two difficulties with this argument. Applications for further and better particulars are governed by Order 18 Rule 12 of the RSC. Under that Rule there are at least two prerequisites to be satisfied before the Defendants can rely upon their demand for further and better particulars to be provided. First, the defendant would have had to make a request in writing (Rule 12 (6)), and second, if such request was refused the defendants would have to seek an order of the Court that the particulars be provided (Rule 12 (3)). There is also a third condition, which is that the application for such an order shall not be made before service of the defence (Rule 12 (5)).

13. That is the general principle. None of the exceptions to this general principle apply here. The language of the Rule is plain and simple. The Defendants have not complied with the provisions of Order 18 Rule 12 in seeking further and better particulars, therefore their pending application by Summons filed on 22nd January 2021 does not avail them.

14. The fact that the Defendants could have applied for summary judgment under Order 14 does not mean that they ought to have so applied, or that the judgment is irregular because they did not apply under Order 14.

Should the regular judgment be set aside?

15. I therefore come to consider whether this judgment, being regular, ought to be set aside. Order 19 allows a plaintiff to enter judgment against a defendant who has failed to serve a defence as required by the Rules. Rule 9 of this Order provides simply *"The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."*

16. The principles for applications under this Rule have very recently been discussed and applied in **Jonte Augusta v Kristen Duncombe No.2019/CLE/gen/01829** in the unreported judgment of Cooper Burnside, J (Ag) delivered on **26 February 2021**. Beginning at paragraph [22], Cooper Burnside, J (Ag) cited the Court of Appeal decision in **Hanna and another v Lausten (2018) 1 BHS J. no.172** and the classical case of **Evans v Bartlam [1937] AC 473,** on the Court's powers under Order 19 Rule 9.

17. Particularly relevant in the present case are the dicta from **Evans v. Bartlam (1937)** quoted by Cooper Burnside J (Ag) at paragraph [23] sub-paragraphs (iv) and (v) of her judgment. Sub-paragraph (iv) states:

> **"The primary consideration is whether the defendant has merits to which the Court should pay heed …** ***since there is no point in setting aside a judgment if the defendant has no defence…*****" (Emphasis added.)**

18. At sub-paragraph (v) of paragraph [23] the judge says:

> **"Again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant found himself bound by a judgment regularly obtained to which he could have set up some serious defence (per Lord Russell of Killowen at p.482."**

19. Justice (Ag) Cooper Burnside goes on to address the application of **The Saudi Eagle [1986] 2 Lloyd's Reports 221 at 223** at paragraph [24], and in particular the difference in standard when used in relation to Order 14 summary judgment applications and Order 19

rule 9 applications. I will refer to a portion of the case extracted at paragraph [24], quoting from the judgment of the Court delivered by Sir Roger Orman, J:

> **"In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The "arguable defence must carry some degree of conviction."**

20. The upshot of it all is contained in paragraph [25] of Cooper Burnside's judgment:

> **"As may be seen, <u>The Saudi Eagle</u> establishes that the test for permitting leave to defend in a summary judgment application is different from the test applicable to an application to set aside a regular judgment. In the former case, it is sufficient for the defendant to show that there is a "triable issue" between the parties; whereas in the latter case, the defendant must do better than that."**

21. Therefore, in this case the Defendants must show not merely that there is a 'triable issue' but they must meet the higher standard of showing that they have a defence, which, if developed, would carry some degree of conviction.

22. In paragraph 2 of the **Affidavit of Randy Larry Butler** (the First Defendant) sworn and filed on 26 January 2021 ("the Butler Affidavit"), he says that the Defendants were unable to file and serve a defence within the time allowed by law, but no explanation is given as to why this was the case. Then in paragraph 5 of the Butler Affidavit he says his instructions to his Attorney could not be completed in time due to a number of reasons, but mainly because he was quarantined in Andros having contracted the Coronavirus. It seems that in this paragraph (no.5) he is referring to the extension period rather than the Rules period. However, I do not see how he or the other Defendants were able to instruct their attorney on the extensive questions contained in the further and better particulars summons but not be able to give instructions on any kind of defence.

23. Furthermore, it is notable that nowhere in the Butler Affidavit is there set out the barest outline of a defence or any grounds of a defence. I was concerned by the serious allegations in the Statement of Claim. However, the Butler Affidavit does not even condescend to contradict or challenge the allegations of fraud, conspiracy or breach of fiduciary duty.

24. In point of fact, the submissions by Mr. Horton do not address or assert any form or shade or character of a possible defence. He says that the lack of particulars "unfairly prejudices" the Defendants but does not show how they are prejudiced.

25. The Defendants' case seems to be substantially comprised of complaints about what the Plaintiffs ought to have done: they *ought to have* applied for summary judgment, and they *ought to have* answered the request for further and better particulars. Because they did not, Mr. Horton argues that the default judgment *ought to be* set aside. Bearing in mind that the Rules require a defendant to serve a defence *before* being entitled to seek particulars, the argument that the Plaintiffs 'ought to have' provided particulars first, is in the circumstances, without weight or merit.

Explanation how Judgment came to be entered

26. As for the consideration of the explanation of how it came about that the judgment was obtained in the first place, as per the **Evans v Bartlam** principles, I find the following. There have been multiple delays in the present case by these Defendants. They failed to file and serve a defence in the time provided by the Rules and allowed the time to expire.

27. Second, the Defendants delayed in asking the Plaintiffs to agree to allow additional time for them to file a defence, waiting until the very last day to do. It was a short letter from Mr. Horton to Mr. Scott, and so I can set out the content of it in full:

> **"Dear Sir,**
> **Re: Alpha Aviation Limited et al v Randy Larry Butler, et al –**
> **Supreme Court Action No.2020/CLE/gen/01128**
>
> **The time for filing a Defence in this matter on behalf of the Defendants expiring this week, we hereby request an extension of time till the end of January 2021 within which to file the appropriate defences. As you might appreciate, our request is dictated by the complexities of the case, coupled with the constraints which affect communication with the principal defendant named in this action who lives mainly in Andros. The need to consult with him**

as closely as possible is also affected by the limitations imposed by the health conditions in our country at this time.

We await your early response.

Yours truly, [MWH]"

28. I note that in this letter the explanation offered was in vague and general terms of 'the complexities of the case' and 'constraints' with communicating with the First Defendant who lives in Andros. In my view, the casual nature of the letter suggests they considered and expected they were entitled to the extension. I formed this view because of the timing when it was issued – on the very last day a defence was due – and also, because it glosses over the modern methods of electronic communication that are commonly in use, especially during the restricted movements of lockdowns that obtain during this Pandemic.

29. Then, having obtained at the 11th hour an extension of time to file, they again delayed until the last day of the agreed extension to act. But this time it was not to file a defence as they should have under the agreement, rather it was to take a fresh step of filing a summons for further and better particulars. This latter step, being in clear contravention of the Rules, could only be seen as a further delaying tactic, and not, in all of the circumstances, to be a bona fide step in uncovering some ambiguity or unclear facts arising on the pleadings.

Conclusion

30. Bearing in mind the higher bar for setting aside a regular judgment as set out in **Evans v Bartlam (1937)** and **Hanna and another v Lausten (2018)** (above), I cannot find any support in the evidence or as made out in argument, for a defence with a reasonable degree of conviction on which I could rest the exercise of the Court's discretion in favour of the Defendants.

31. Therefore, having regard to all of the circumstances outlined above, I decline to exercise my discretion to set aside the Judgment in Default of Defence, which was regularly entered on 25th January 2021, by the Plaintiffs.

32. I will award the costs of the application to the Plaintiffs/Respondents. I will hear counsel as to quantum prior to fixing the costs.

Dated the 22nd day of April A.D., 2021

Carol D. Misiewicz

Carol D. Misiewicz
Deputy Registrar