ISLAND ENTERPRISES LTD -v- REEF PACIFIC TRADING LTD

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 119 of 1990
Hearing: 27 June 1991
Ruling: 2 July 1991

J. Corrin for Plaintiff
T. Kama for the Defendant

WARD CJ: By a writ of summons filed on 14 June 1990, the plaintiff claims $52,305.52 for goods and services supplied plus interest. The writ was served on the defendant's registered office the same day and, on the 4 July, judgment was entered for the plaintiff in default of appearance and served on the defendant on 9 July. A writ of execution was entered on 8 August and, on 23 August, a summons to set aside the judgment was filed. That application was allowed on 17 September by the learned Registrar but he referred then to the tardiness of the defence and directed a defence be filed within 10 days. Defence and counterclaim were filed followed by a reply and defence to counterclaim and, on 31 January, the Registrar ordered the conduct of the proceedings thereafter. The defendant's solicitor was changed on 20 February and two days later the new solicitor filed a list of documents.

On 20 March the plaintiff filed interrogatories and, having failed to receive any answers within the 21 days set by the Registrar, a summons to strike out the defence was filed on 3 May. It was heard on 9 May and I was told that, in a related action, the defendant company had a receiver appointed. I stated there that I was not sure that had caused the delays but felt there was a risk it had. As a result I refused the application and ordered answers be filed within 14 days or the defence and counterclaim would be struck out. That part of the order is not in the written record but both counsel agree it was made on 9 May.

On 13 May notice of change of defence solicitor was filed. The new solicitor had been present at the hearing on 9 May representing the receivers.

On 24 May he filed a summons seeking an order that the time for filing answers be extended. The application was heard by me on 27 June and counsel for the plaintiff

raised the objection that, once an order has been made by the court, default results in the action being at an end.

She cited *Whistler v. Hancock* (1878) 3 QBD 83 and *King -v- Davenport* (1879) 4 QBD 409 for the proposition that where an order is made that the defence and counterclaim shall be struck out unless some action is done within a prescribed time, the action is at an end and the Court no longer has jurisdiction to consider an application to enlarge the time. Whilst those cases were of failure to file a statement of claim, they have been cited in the White Book as authority for the rule in relation to the present English O.26 r.6(1):-

> *"6-(1) If a party against whom an order is made under rule 1 or 5 fails to comply with it, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment entered accordingly."*

Our equivalent rule, based on the old English O.31 r.21, is O.33 r.21:-

> *"21. If any party fails to comply with any order to answer interrogatories, or for discovery or production or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly."*

It is noteworthy that the two cases cited by Miss Corrin had not been cited in support of the proposition in relation to the old O.31 r.21 because that rule was framed to deal with deliberate failure. Thus the order would not be made unless the court was satisfied the party was endeavouring to avoid fair discovery. I feel that is the position in relation to our O.33 r.21. In such a case, the party interrogating may apply for an order under our O.33 r.9 or for an order dismissing or striking out under r.21.

In this case the plaintiff has not sought such order. The proceedings here are an application by the defendant further to enlarge time and the plaintiff's contention is that, in such circumstances, the Court no longer has jurisdiction to enlarge time and must refuse the application. It does not need an application by plaintiff.

The power of the Court to extend time is set out in O.64 r.5;

"the Court shall have power to enlarge or abridge the time appointed by the Rules, or fixed by an order enlarging time for doing any act or taking any proceeding, upon such terms as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

By that rule the Court has a complete discretion to vary the time limits during an action but it does not apply to cases such as this where the Court has already struck out the defence and counterclaim unless the interrogatories are answered within 14 days.

The difference arises from the fact an order, albeit a conditional one, has been made. If the conditions fail, the order is then effective. In such a case, the action is complete and no application to extend can be considered. This was the basis of the decisions in *Whistler -v-Hancock* and *King -v-Davenport* and it applies here.

In those circumstances, I cannot hear the application to extend time. Application refused. Costs to the plaintiff. As the conditional order was made as a result of the plaintiff's summons of 3 May I am entitled also to direct, in accordance with that, that judgement be entered for the plaintiff with costs.

(F.G.R. Ward)
CHIEF JUSTICE