

JERSEY / JUDGMENT

Randalls Properties & Ors v Rozel Bay Hotel &a [2005] JRC 106 (04 August 2005)

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judgment

the deputy bailiff: 1. This is an application by John William Ellis, the Second Defendant, to set aside a default judgment of the Royal Court which was entered against him on 6 th May, 2005, in the sum of just over £18,000. 2. The background is that a company called Rozel Bay Hotel Limited had the lease of Rozel Bay Public House from the First Plaintiff. Mr Ellis and Mr Ian Hamilton King were directors of the Company, Rozel Bay Hotel Limited, and entered into joint and several guarantees of the obligations of the Company to Randalls in respect both of the rental payable under the lease, and trade debts. 3. There is no real dispute that the sums for which judgment was entered had accrued in terms of unpaid rental and unpaid trade debts. The Court has received an affidavit from Mr Ellis, and indeed one from Mr King. It is clear from this that there were negotiations between Randalls and Mr King and Mr Ellis as to steps which might be taken to salvage the position into which the Company was getting. We do not propose to rehearse those in detail; they are set out in the affidavits. 4. Be that as it may, these negotiations were ended by Randalls, according to Mr Ellis, on 19 th April and a summons was issued on 21 st April, claiming the various sums due from the Company and from Mr King and Mr Ellis as guarantors. The matter came before the Court on 29 th April, when the Company and Mr King and Mr Ellis were represented by a firm of advocates. The lease was cancelled on that occasion but other matters such as amounts allegedly due were adjourned for one week. 5. Mr King has sworn an affidavit to the effect that he dismissed the firm of lawyers because he was very dissatisfied with the outcome of that hearing and he obtained, on legal aid, the appointment of another advocate, Advocate Michel. Mr Ellis, on the other hand, in his affidavit says that following discussion with Mr King he misunderstood the position and he thought that he and the Company were still represented by the original lawyers who would therefore turn up on their behalf the following week. In fact they did not appear because they considered they had been dismissed by Mr King on behalf of everybody, and accordingly on the 6 th May, judgment was entered against the Company and against Mr Ellis, but the case against Mr King was placed on the pending list, Mr King's advocate having asserted that there was a possible defence on the grounds of estoppel. 6. It is in those circumstances that Mr Ellis now applies to set aside the judgment obtained in default against him on 6 th May. The principles which the Court should apply in such cases were authoritatively established by the Court of Appeal in the case of *Strata Surveys Limited -v- Flaherty and Company*

Limited

(1994) JLR 069. Both parties are agreed that pursuant to that judgment the Court must consider a number of matters. 7. First, whether the defendant has a reasonably arguable defence. Secondly, whether the default giving rise to the judgment arose through the fault of the defendant or through his advocates. Thirdly, whether the defendant's application to set aside the judgment is delayed. Fourthly, whether serious injustice will be done to the defendant if he were not allowed to defend the action; and fifthly, whether the plaintiffs would suffer injustice if the default judgment were set aside. 8. We think we can deal with some of these matters shortly. We are satisfied that the default judgment arose simply through misunderstanding and confusion on the part of Mr Ellis; we do not attribute any blame to him in that respect on the basis of the evidence put before us. Nor do we think there has been any material delay. It could conceivably have been done a bit more quickly, but we do not consider delay to be a factor. 9. As to injustice, the injustice to the plaintiff would be that, if judgment were set aside it would have to pursue the claim against Mr Ellis. As against that, it is a substantial enterprise and, of course, if it wishes to recover against Mr King it must pursue the case in any event against Mr King and there will be no difference in the evidence and nature of the case to be brought against Mr King as compared with Mr Ellis. Accordingly, if the plaintiff does do pursue Mr King there will really be no extra cost involved in its also pursuing Mr Ellis. 10. As to injustice to the defendant if he is not allowed to defend the action, this, of course, is closely linked with the merits of any possible defence, but it is worth pointing out that this is an unusual case because there are two defendants in an identical position. They are both guarantors in exactly the same position. Any representations or estoppels would apply equally to them both and, therefore, it does on the face of it seem unjust that one defendant, namely Mr King, should be able to defend, whereas another, Mr Ellis, should not, when the only reason that he is not able to defend is because there was a misunderstanding and he was unrepresented in Court. We regard that as being a very powerful factor in this case. 11. We turn to the question of whether there is an arguable defence. Mr Young was critical of the affidavit put forward. He said it did not show that there was a clear representation of the nature which is needed to support an estoppel. Mr Harris accepted that perhaps all was not as clear as it might be, but he said that the affidavit could at least lead the Court to think that there might well be an argument on estoppel. 12. As we have said we consider this to be an extremely unusual case because of the identical position of the two defendants, and the fact that, through an error, they are now in completely different positions. We remind ourselves that at the end of the day the Court must act in the interests of justice; it must not be hidebound by lists of factors to come to a conclusion that it does not consider to be in accordance with the interest of justice. 13. We remind ourselves of what was said in *Strata* which is that the Court has always to keep in mind that judgments obtained where there is default by a defendant have not been preceded by any trial or other consideration of the merits of the claim, nor of any arguable defence to the claim which the defendants may have. 14. We understand Mr Young's criticisms of the

affidavit and of his assertion that any arguable defence here is weak, but in the unusual circumstances of this case we are going to set aside the judgment because we regard the interests of justice as so requiring so as to put Mr Ellis and Mr King in the same position, when we do not regard Mr Ellis as having been at fault for being in the disadvantageous position in which he now finds himself. 15. We wish to add this. Normally if a court sets aside a default judgment on the grounds that there is a reasonably arguable defence, that is likely to mean that the plaintiffs cannot apply for summary judgment because the test ought to be the same. In the unusual circumstances of this case we wish to make it clear that our decision should not preclude the plaintiffs from applying for summary judgment if they are so advised. We emphasise we are not indicating one way or the other whether such an application would or would not be successful, but we wish to make it clear that our decision does not preclude the plaintiff from doing that. If the plaintiff were to apply for summary judgment against both Mr King and Mr Ellis, we would strongly advise Mr King and Mr Ellis to be rather more precise in formulating any alleged defence. They would be well advised to do this by detailed affidavits, if they can, which set out their very best case in what they say may be any representations or promises made to them and they ought probably to be supported by a draft answer at the appropriate time. 16. These are matters for the future. We make no comment one way or the other, other than to say that our decision is not to be taken as precluding the plaintiffs from doing that in the unusual circumstances of this case. So that is our decision, we set aside the judgment. Authorities Strata Surveys Limited -v- Flaherty and Company Limited (1994) JLR 069. Page Last Updated: 15 Oct 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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