Case No: HT-2016-000120

Neutral Citation Number: [2016] EWHC 3565 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 2 December 2016

BEFORE:

MR JUSTICE STUART-SMITH

BETWEEN:

WYSEPOWER GROUP LTD

Claimant

- and -

PP CO LTD

Defendant

MS BOUSFIELD appeared on behalf of the Claimant

MR ATWAL appeared on behalf of the Defendant

JUDGMENT
(Approved)

Digital Transcript of WordWave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.DTIGLOBAL.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

No of Words: 2448
No of Folios: 34

1. MR JUSTICE STUART-SMITH: In this case, the claimant issued proceedings earlier in the year against the defendant, claiming damages in respect of works carried out at a property in Upper Brook Street.

2. The first thing that happened was an application to the court for an order for alternative service because of difficulties in identifying where service should happen. On 13 May, I made an order which enabled the claimant to serve the documents at 129 Park Lane in London. That was duly done, and on 1 June 2016, which was just within time, an acknowledgement of service was sent to the court on behalf of the defendant indicating an intention to defend all of the claims.

3. As is standard in such cases, at the top of the acknowledgement of service document, it said, "You should read the 'notes for defendant' attached to the claim form which tell you when and where to send the forms". The notes to the claim form also stated as follows, reflecting the requirements of the rules:

> "Address where notices can be sent: this must be either the business address of your solicitor or European lawyer, or your own residential or business address within the UK or in any other European Economic Area state".

4. Despite that clear guidance, the address entered on the acknowledgement of service to which documents about the claim should be sent was a box address in Geneva. When that was received by the court, the court picked up the irregularity, for that is what it was, and rightly rejected the acknowledgement of service. It did so by a letter of 9 June, saying that it was not a valid acknowledgement of service and the court could not accept it.

5. In the meantime, on 3 June, the claimant had written to the court requesting judgment in default. The best that they could say was that the deadline had passed and the defendant had not, so far as they were aware, filed or served an acknowledgement of service. As a consequence of that HHJ Raeside QC, sitting as a judge of this court, entered judgment on 9 June.

6. I was at first concerned, when reading the papers, as to whether the fact that there was an irregularity in the acknowledgement of service meant that there was in fact an acknowledgement of service on the books, albeit one that was subject to an irregularity. However, the proper analysis is that the court was justified and correct in rejecting the acknowledgement of service because of the irregularity, so that when the application for judgment was made the defendant was out of time and did not have an acknowledgement of service on the stocks. That analysis is accepted by Mr Atwal who appears for the defendant today.

7. Before going any further, I should say publicly that Mr Atwal, despite only being instructed at 6 o'clock last night and seeing the papers at 9 o'clock last night, has performed heroically today, and has managed to submit a note for the hearing which, albeit technically out of time, was of assistance to the court and was entirely realistic. It does him credit, if he will allow me to say so.

8. What happened then, judgment having been entered by the order of HHJ Raeside, was that the defendant decided to try to set it aside, with the result that on 22 July 2016, the defendant's solicitors, wrote to the claimant's solicitors, enclosing a sealed application notice said to be dated 14 July, although the copy that I have is sealed by the court on 21 July, and a witness statement from Mr Kalpesh Patel dated 14 July 2016. The first observation to make about the application is that it was not made promptly in the first place. It is clear from Mr Patel's witness statement that the fact of the judgment was brought to the attention of the defendant soon, and no explanation was given as to why it took until the middle or end of July to issue the application to set aside.

9. There is a possible explanation, which is that Mr Patel has the misfortune to be subject to criminal proceedings currently being conducted in the Crown Court in Leicester. He also has the misfortune to be the subject of a restraint order dated 28 October 2015 made by the Crown Court in Lincoln. It is an extensive restraint order reflecting the seriousness of the charges, which I do not need to go into in any detail, but which I have gleaned by making enquiries of the Crown Court at Leicester. The restraint order prevents Mr Patel from removing any assets which are in England or Wales from the jurisdiction, or disposing of or diminishing any of the assets whether they are in or outside England and Wales.

10. Since he describes himself as one of the ultimate beneficial owners of the defendant, and makes clear in his statement that, in fact, he is not the direct owner of the defendant, it seems to me that his assets, so far as they relate to the defendant, are the value of his shareholding or whatever direct route of ownership he has. The defendant itself is not his asset; nor does the restraint order, despite an assertion to the contrary in a letter dated 29 November 2016, prevent the defendant itself from acting.

11. However, I readily accept that being subject to criminal proceedings and being the subject of a restraint order would be inhibiting factors for anybody who is also, at the same time, engaged in civil litigation. I also make absolutely clear that I bear in mind at all times the presumption of innocence. He, as I have said, has the misfortune to be subject to criminal proceedings; he has not been found guilty. I understand, for what it is worth, that the judge is summing-up at this moment.

12. I should say then that on the evidence that I have seen, there has then been a total failure by the defendant to take any steps to progress the application to set aside. Despite being prompted to do so, there has been a resolute failure, by which I mean a positive decision not to proceed with the setting-aside application. The result of that is that, because of the defendant's inactivity, the application to set aside is not technically listed today.

13. However, it is before the court, and it is right that when engaging in a disposal application, the court should take account of any material information before it. I have therefore read Mr Patel's statement and the supporting documentation to which he refers, and I have taken it fully into account when deciding whether or not to take further steps as requested by the claimant in relation to its claim. I agree with Mr Atwal's analysis which is that, in the circumstances that prevail, the court has a discretion to set aside the judgment. It is not mandatory, and I also accept the submission made by Mr Atwal that the underlying problem which led to judgment being entered was an irregularity, rather than a fundamental invalidity, of the

acknowledgement of service; although, as I have said, the court acted properly in rejecting the acknowledgement of service for that reason.

14. So I approach the claimant's request for further orders on the basis that, if I thought there were any good reason to support an application to set aside the original judgment, I would not be prepared simply to push on as the claimant wishes. I take into account and bear in mind the two specific passages and rules to which I have been referred. First of all, CPR Rule 13.3, which sets out the basic principles which are not in doubt.

    The rule states that:

> "(1) … the court may set aside or vary a judgment … if (a) the defendant has a real prospect of successfully defending the claim; or (b) it appears to the court that there is some other good reason why (i) the judgment should be set aside or varied; or (ii) the defendant should be allowed to defend the claim."

15. I take into account also the examples of what might amount to some other good reason set out at CPR Rule13.3(2), and I do not regard those examples as in any way exhaustive. They are at best illustrative of the sort of things which might persuade the court to set aside under CPR Rule 13.3(1)(b). I also accept Mr Atwal's submission that CPR Rule 13.3(1)(b), namely the appearance of “some other good reason”, is separate from and additional to CPR Rule 13.3(1)(a), "the defendant has a real prospect of successfully defending the claim", and should be treated as separate and as a potentially separate reason for setting aside.

16. I was also referred by Mr Atwal expressly to page 456 of Volume 1 of the White Book and to the note at 10.5.4, which says that:

> "Where the acknowledgement of service filed is defective and (1) the claimant enters judgment by default and (2) the defendant applies for an order setting aside the judgment, the nature of the defect is a matter to which the court may properly have regard in determining the application."

17. So, I look first to see whether there is any reason to believe that the defendant has a real prospect of successfully defending the claim. The only positive reason suggested by Mr Patel in his witness statement is that some of the documents, although under the heading of the claimant's name, carry a VAT number and company number which is not that of the claimant but that of another company in what I would loosely call the group including the claimant. That is fine, so far as it goes; but there are other documents which can be found in the bundle at pages 35, 38, 40 and 42, which are the invoices that were submitted to the defendant, where not only is the claimant's name listed but the company registration number is correct, as is the VAT registration number for the claimant. Furthermore, I have positive evidence from the claimant's solicitor that the work was, in fact, done on proper instructions by the claimant, and not by another company within the group. That is evidence which is not subverted or rendered doubtful by the evidence of Mr Patel. I therefore have come to the conclusion that there is nothing in the witness statement of Mr Patel which reasonably suggests

that the defendant would, if allowed to defend, have a real prospect of successfully defending the claim.

18. I therefore turn to the second potential reason why judgment might be set aside. I take into account what is said about the original irregularity being technical. That is true, but the starting point is that the judgment was properly entered because the acknowledgement of service was properly rejected. I can envisage some circumstances in which the court might, even so, think it right to set aside a judgment; if, for example, the technical irregularity had been induced by the claimant with or without aggressive behaviour. But there is no such consideration here. On the contrary, although Mr Patel says that the people in Switzerland who filed the acknowledgement of service were not familiar with English procedure, the fact remains, that they were told what English procedure was by the notes to which their attention was directed. It is not, I think, either unkind or unfair to suggest that, if a person does not know what the procedure is, he should either read the information about what the procedure is as directed by the document, or ask someone who does know.

19. Making all due allowance for the fact that the acknowledgement of service involved a technical irregularity committed by someone unfamiliar with procedure, I am unable to see why that gives rise to a good reason to set aside judgment on the facts of this case.

20. That means that we proceed essentially into the disposal of the claim, and on that Mr Atwal accepts that the defendant is and has to be neutral on the claimant's quantification of the claim as set out in Ms Bousfield note; and interest at 8.5 per cent is appropriate, given that this is the late payment of a commercial debt.

21. The two things that remain are whether an additional sum of £400 should be awarded, as was rather optimistically suggested in her note at by Ms Bousfield. I will hear her when I have finished this ruling, but I do not see that is claimed anywhere in the Particulars of Claim, and on that basis, I would not make an order for its recovery.

22. The last question is a question of costs. Mr Atwal points out that for a straightforward entering of judgment in default, there is a fixed cost of £30 where the judgment exceeds £5,000. He submits that this is a straightforward case. I am afraid to say I do not agree. A straightforward case is something involving simply a claim as outlined in the Particulars of Claim, a failure to acknowledge, and a letter to the court asking for judgment in the sum claimed. That is not what happened here. The procedure that the claimant was obliged to go through here, through no fault of its own, was much more extensive. In my judgment, the appropriate order is that the claimant should have its costs of the litigation including the costs of and occasioned by the application for judgment and this disposal hearing; and the costs of the defendant's application to set aside which is hereby dismissed. I will hear Ms Bousfield in a moment on whether that should be on an indemnity basis or a standard basis. I think otherwise that covers the matters in issue.