

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 171 OF 2019

BETWEEN:

DIANE PATRICE PARSONS

PLAINTIFF

AND

MICHELE LENORE FLEIGER

DEFENDANT

Appearances:

Mr Ian Huskisson and Mr Bhavesh Patel of Travers Thorp Alberga on behalf of the Plaintiff

Mr Guy Dilliway-Parry of Priestleys on behalf of the Defendant

Before: **The Hon. Justice Kawaley**

Heard: **19 February 2020**

**Draft Judgment
Circulated:** **25 March 2020**

**Judgment
Delivered:** **31 March 2020**



HEADNOTE

*Plaintiff's application for summary judgment-enforcement by former wife of consent order in matrimonial proceedings against estate of deceased former husband-whether triable issue-
Defendant's cross-application for Request for Further and Better Particulars*

JUDGMENT (GCR O.14)

Introductory

1. The Plaintiff is the former wife of the late Mr Frank Fleiger, and the Defendant, his sister, is the Administrator of Mr Fleiger's Estate.
2. The divorce took place on September 30, 2015. Mr Fleiger died, seemingly unexpectedly, on December 17, 2017. The Defendant was granted Letters of Administration on February 12, 2018. There is a dispute about the Plaintiff's claim against the Estate.
3. The present action was commenced on October 14, 2019. The Plaintiff seeks to recover US\$250,000 which she would have recovered on her ex-husband's death had he complied with his obligations under a Consent Order dated September 30, 2015 in Cause No. FAM 0120 of 2015 (the "Consent Order"/ the "Divorce Proceedings").
4. By a Summons dated November 5, 2019, the Plaintiff applied for summary judgment under GCR Order 14. A week later, the Defendant filed a Summons seeking Further and Better Particulars of the Statement of Claim. Both applications came before the Court at the same hearing on February 19, 2020.

The Statement of Claim

5. The Plaintiff's claim is essentially pleaded in less than 10 lines:

"Life Insurance Policy

4. *In the months prior to their divorce, the Plaintiff and Mr Fleiger agreed that following their divorce they would each execute life insurance policies in the sum of US\$250,000, naming the other party as the sole beneficiary (the "Agreement"). The Plaintiff has complied with her obligation in this regard.*

5. *The Agreement is evidenced amongst other things by a Consent Order dated 30 September 2015.*

Breach of the Agreement

6. *In breach of the Agreement, Mr Fleiger failed to take out a life insurance policy. The Plaintiff has suffered loss as a result of the breach, namely the sum of US\$250,000 which she should have received upon his death."*



The Evidence

6. The Plaintiff in her First Affidavit deposes as follows:

“7. In the lead up to the divorce, Frank and I had agreed that we would each execute life insurance policies in the sum of US \$250,000, naming each other as the sole beneficiary. This was set out in the Divorce Decree at paragraph 23 (the Agreement).”

8. I complied with my part of the Agreement and took out a life insurance policy via Americo on 10 October 2019...Frank did not comply with his part of the Agreement. Had he done so then I would have received US\$250,000. This is the basis of my claim.”

7. The policy naming Mr Fleiger’s Estate as beneficiary is exhibited. In paragraph 10 of her Affidavit the Plaintiff responds to the Defendant’s Further and Better Particulars Request, most significantly deposing:

“b. The Agreement is set out in the Divorce Decree, though the terms were discussed orally in the lead up to its signing. I am not aware of any documents or information that alter the terms of the Agreement in any way.”

8. The Defendant in her First Affidavit firstly complains that adequate particulars of, *inter alia*, “an oral contract” leading up to the Order are required to enable a Defence to be pleaded. However, the summary judgment application is crucially responded to in the following averments:

“16. On proper pleading of the Statement of Claim other defences may be open to me and further issues of fact may emerge but, in any event, there are defences to the whole of the claim. Refinement of their pleading will depend on the case particularised by the Plaintiff.

17. The Plaintiff failed to perform the ‘Agreement’ either by taking out a policy naming Frank as the sole beneficiary or doing so forthwith after the Consent Order.

18. In the 2 ¼ years after the Consent Order and before Frank’s death, Frank and the Plaintiff evidently varied any agreement about insurance policies so



that they were not taken out. I cannot give particulars of such variation at least until discovery but plainly there is an issue of fact to be tried. There was until after his death no suggestion by the Plaintiff of breach of contract or even any suggestion that Frank should take out such a policy.

19. Alternatively, the Plaintiff waived, expressly or alternatively impliedly by her conduct, performance and waited until after Frank's death and the impossibility of him performing to raise any question about it. I draw the Court's attention to what the Plaintiff said about it in paragraph 4.6 of her affidavit in the winding up proceedings FSD Cause number 142 of 2018 (IKJ) related to her and Frank's business company (p. 17).

20. Further, Frank was induced to enter into the Consent Order both by the Plaintiff's parent's collateral contract with him...and by the Plaintiff's own representations relating to the shares in the company. These are evidenced by contemporaneous emails: (pp.25-35). The Plaintiff and her parents now dispute the transfer of a share by her mother to Frank. The Plaintiff waited until rescission was impossible (divorce proceedings abate on death) until asserting a claim.

21. I respectfully suggest that there are obvious and substantial questions of fact to be decided and real defences. I invite the Court to dismiss the Plaintiff's application and give me unconditional leave to defend."

9. The Defendant's hotly contested waiver defence relied in part upon the following sworn statement by the Plaintiff in her Affidavit sworn on October 2, 2018 in FSD No. 142 of 2018 (Re DFLM Management Ltd):

"4.6 Whilst we meant to implement the Ancillary Order, we never in fact did so, but continued to act within its spirit. The truth is, after our divorce, our relationship actually improved and we continued to trust and work with each other better than we had towards the end of our marriage. We trusted each other so we didn't feel in a rush to action things. For example, we did not get round to entering into the life insurance policies for \$250,000 or transfer any of the properties that we had intended to transfer. Nevertheless, when Frank sold the Shores property, I did not dispute that the sales proceeds would go to him, and endorsed the cheque for him even though the land was still in my name. Similarly, as the various documents show, I thought that we had given effect to our agreement in relation to the shares, but my parents never signed anything and we had not even thought about the necessary formalities for any transfer."



10. It is not disputed that, as averred by the Plaintiff in her First Affidavit herein, Mr Fleiger died “suddenly”.

The main submissions

The Plaintiff’s submissions

11. Mr Huskisson, in addition to complaining that no draft Defence had been exhibited in accordance with the usual practice (*Ebanks-v-Simpson* [2007 CILR Note 3]) commended the following guiding principles to the Court. Firstly, he referred to *ICI Chemicals & Polymers Ltd-v-TTE Training Ltd* [2007] EWCA Civ 725 and the following dicta of Moore-Bick LJ:

“12. ... It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent’s case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant’s case is bad in law, the sooner that is determined, the better.”

13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.”

12. Reliance was also placed on the following dictum of Ackner LJ in *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyds Rep 21 at 23 :

“It is of course trite law that Order 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given



situation which is to be the basis of a defence does not, ipso facto, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence.”¹

13. These principles were clearly sound. It was also argued that no further particulars of the Statement of Claim were properly required because the Plaintiff’s case was clearly and simply an attempt to enforce the terms of an agreement now embodied in the Consent Order. Having regard to the evidence, it was submitted that there was no arguable basis for setting aside the Consent Order, nor was there any basis for the Defendant (who had no personal knowledge of the interactions between the Plaintiff and her late brother) to advance a case of waiver. It was not a sufficient answer to a summary judgment application to “*investigate obscurities and hope that something will turn up*”.

The Defendant’s submissions

14. Mr Dilliway-Parry’s detailed submissions did not entirely amount to a plea to “*investigate obscurities and hope that something will turn up*”. They went some way towards demonstrating that the application had layers of complexity to it that were not immediately apparent on superficial analysis.
15. In the course of the hearing, I was initially unimpressed by the argument that rather than commencing an action by writ, the Plaintiff ought to have applied within the Divorce Proceedings in light of the following provisions of the Matrimonial Causes Rules (2003 Revision):

“23. Unless these Rules otherwise provide, applications in matrimonial proceedings shall be made to a Judge of the Court in Chambers by summons filed in the Registry.”

16. However, irrespective of the merits of the point narrowly construed, this submission served to highlight the fact that the Plaintiff’s present action seeks to enforce a matrimonial Consent Order and to obtain summary judgment without the presently assigned Judge having an opportunity to fully review the wider context in which the Consent Order was made. Mr Dilliway-Parry’s submissions on the governing legal

¹ This passage was more recently cited in England with approval by David Richards J (as he then was) in *OK Aid Limited-v-Damian et al* [2007] EWHC 1052 (Ch) at paragraph 44. It was cited with approval by this Court (Mangatal J) in *Lakatamia Shipping Company Limited-v-Su* [2017(1) CILR 416], quoting Vos JA in the Cayman Islands Court of Appeal decision in *Merren –v- Cayman National Bank* [2008 CILR 248] at paragraph 5.

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principles for GCR Order 14 applications were, like his opponent's, fundamentally sound.

17. The Defendant's counsel invited the Court to have regard to the high hurdle which a summary judgment applicant had to meet by reference to paragraph 14/4/9 of the 1999 *White Book*:

"The power to give summary judgment under O.14 is 'intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay...As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability of that he has a bona fide defence, he ought to be given leave to defend..."

18. Counsel confirmed that this Court is bound to apply this broad test as it has been approved by the Cayman Islands Court of Appeal in *Merren -v- Cayman National Bank* [2008 CILR 248] where Vos JA (at paragraph 8) stated:

"For my part however, I would prefer to regard the test as simply requiring the court to ask whether the defendant has shown a fair or reasonable probability that he has a real, or bona fide, defence."

19. It was accepted that where a summary judgment applicant *"has satisfied all the preliminary requirements of O.14, r.1...[and] has established a prima facie case...The burden, as it were, shifts to [the respondent] to satisfy the court why judgment should not be given against him"*: *Lakatamia Shipping Company Limited-v-Su* [2017(1) CILR 416] (per Mangatal J). The Plaintiff had not established a *prima facie* case here, Mr Dilliway-Parry submitted, because there was no properly pleaded case. However, heavy reliance was also placed on the following judicial pronouncements as regards how one assesses the prospects of the proposed defence. In *Easyair Ltd-v-Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J (at paragraph [15]):

"...v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;



vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63...”

20. The Defendant’s counsel submitted that the Court must take into account the additional material that the Defendant would be able to deploy after discovery. This was a significant factor because Mr Fleiger had not been legally represented throughout the matrimonial proceedings.
21. Finally, as regards general Order 14 practice and procedure, the proposition that a draft defence had to be exhibited to the Defendant’s Affidavit was disputed. At its highest, it was desirable that a draft pleading should be produced. Two other points of legal principle were also addressed.
22. Firstly, the allegedly defective character of the Statement of Claim was addressed. GCR Order 18 rule 12 was referred to, along with the commentary on the equivalent English rule in the 1999 White Book (at paragraph 18/12/2):

“The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly at trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs (a view approved by Edmund-Davies L.J. in Astrovlanis Compania Naviera SA-v- Linard [1972] 2 Q.B. 611)...”

23. As I observed in the course of the hearing, this statement (made some 27 years before the Civil Procedure Rules were introduced in England and Wales), anticipated the Overriding Objective. GCR Order 18 rule 12 itself provides, so far as is relevant, as follows:

“12. (1) Every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words -

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and



(b) where a party pleading alleges any condition of the mind of any person,

whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.”

24. The second substantive area of law which was addressed related to the hazily defined (in evidential terms) waiver defence. Mr Dilliway-Parry submitted that the Defendant was entitled to defend the claim on the grounds that there had been either a waiver by election or an equitable estoppel. It was readily apparent that the doctrine of waiver is itself in legal terms based upon a deliberately fluid set of principles. The Defendant’s counsel referred the Court to *Kosmar Villa Holidays plc-v-Trustees of Syndicate 1243* [2008] EWCA Civ 147, where Rix LJ opined as follows:

“47. Lord Goff of Chieveley returned to the subject in *Motor Oil Hellas (Corinth) Refineries SA v. Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd’s Rep 391 (HL), where he said (at 398/399):

‘Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract. An analogous situation arises where the innocent party becomes entitled to rescind the contract, i.e. to wipe it out altogether, for example where the contract has been induced by misrepresentation...In all cases he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision



out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it. Instances of this phenomenon are to be found in s. 35 of the Sale of Goods Act, 1979. In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in s. 35 of the 1979 Act. This is the aspect of election referred to by Lord Diplock in Kammins...But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see Scarf v. Jardine (1882) 7 App. Cas. 345 at p. 361, per Lord Blackburn, and China National Foreign Trade Transportation Corporation v Evlogia Shipping CO. S.A. of Panama (The Mihaios Xilas), [1979] 2 Lloyd's Rep. 303 at p. 307; [1979] 1 W.L.R. 1018 at p. 1024, per Lord Diplock). Once an election is made, however, it is final and binding (see Scarf v. Jardine, per Lord Blackburn, at p. 360). Moreover, it does not require consideration to support it...

Election is to be contrasted with equitable estoppel, a principle associated with the leading case of Hughes v. Metropolitan Railway Co., (1877) 2 App. Cas. 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.

There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election



applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with facts giving rise to the right. His election once made is final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back on his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to an equitable estoppel is representing that he will not in future enforce his legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel.”

48. In sum, therefore, election is the exercise of a right to choose between inconsistent remedies. It generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that the effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable. Estoppel, however, is a promise, supported not by consideration but by reliance. It is a promise not to rely upon a defence (per Lord Diplock) or a right (per Lord Goff). It requires a representation, in words or conduct, which must be unequivocal and must have been relied upon in circumstances where it would be inequitable for the promise to be withdrawn. The need for such unfairness probably means that the reliance of the representee has to constitute a detriment, but even the detriment has, I would think, to be such as to make it inequitable for the promise to be withdrawn. For these reasons, the estoppel may not be irrevocable, but may be suspensory only. An unequivocal representation without the necessary reliance, and reliance without the necessary unequivocal representation, are each insufficient. It follows that, as concepts each in their own way designed to hold parties to fair dealings with one another, waiver by estoppel is the more flexible doctrine.” [Emphasis added]



25. The Defendant's challenge was to build a solid bridge between the abstract, cloistered world of legal theory and the busy and practical world the main protagonists inhabited. The Defendant cannot give positive evidence of any dealings between her brother and his ex-wife. She can only ask the Court to draw inferences from the contemporaneous documentary record and facts and matters which the Plaintiff in turn admits. She can test but not directly challenge the Plaintiff's version of the crucial events.
26. Nonetheless, it was submitted in the '*Defendant's Skeleton Argument*' that "*on their face, her defences are unanswerable*" (paragraph 32). The defences may be summarised as follows:
- (1) the Plaintiff failed to take out her insurance policy "*forthwith*" and, in any event, belatedly obtained a policy not in favour of Mr Fleiger, but for the benefit of his Estate;
 - (2) the parties agreed to vary the agreement to take out insurance policies, by postponing the obligation until after Mr Fleiger's death (when, implicitly, it effectively lapsed);
 - (3) the parties varied the agreement by postponing the effective date of it to a date to be agreed, and no date was ever agreed;
 - (4) alternatively, the parties agreed not to take at policies at all;
 - (5) the Plaintiff waived any breach of agreement on Mr Fleiger's part;
 - (6) alternatively the Plaintiff affirmed any breach;
 - (7) the sole basis for any agreement is the Consent Order, and the proper forum for enforcing it is in the Family Division;
 - (8) the Plaintiff's Affidavit in the winding-up proceedings undermines her case.
27. These arguments may, evidentially, be divided into the following categories:

- (a) arguments which solely involve the construction of documents presently before the Court or points of law not requiring further evidence: (1), (7) and (8);



- (b) arguments which require the Defendant to advance an affirmative case which is not supported by evidence presently before the Court but which might become available through discovery : (2)-(6);
- (c) arguments which primarily turn on the construction of a document presently before the Court (the Consent Order) but where the wider context of the ancillary relief proceedings is arguably relevant to the key construction question: (1).

28. The third legal area which was addressed was the procedural requirements for enforcing the Consent Order. The Defendant's counsel submitted (in its 'Reply to Plaintiff's Skeleton') that:

"16...the Matrimonial Causes Rules (2003 Revision) expressly provide at Rule 22 that the method for enforcing an Ancillary Order is in accordance with Orders 45 to 51 of the GCR and at Rule 23 that any application in those proceedings (which necessarily must include enforcement) shall be made to a Judge in Chambers by summons in the Registry. The Plaintiff has not followed this mandatory statutory procedure and therefore this fresh action is necessarily an abuse..."

17. By way of further example, by bringing a fresh action, the Plaintiff is inappropriately side stepping the important protections set out in GCR O.45 r.10 in respect of waiver and O.45 r.11 for a stay of execution on the basis of matters occurring after the judgment."

Findings: governing legal principles

Summary judgment

29. I am guided by the general principles concerning summary judgment applications which were commended to the Court by each counsel and which have been summarised above. I would further distill those principles into three strands, the first stating the affirmative rule, the second the other side of the same coin and the third addressing the onus of proof:

- (a) *"if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have*



had an adequate opportunity to address it in argument, it should grasp the nettle and decide it” : ICI Chemicals & Polymers Ltd-v-TTE Training Ltd [2007] EWCA Civ 725 (Moore-Bick LJ, at paragraph 12);

- (b) *“the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case”*: *Easyair Ltd-v-Opal Telecom Ltd* [2009] EWHC 339 (Ch), Lewison J (at paragraph [15]);
- (c) where a summary judgment applicant *“has satisfied all the preliminary requirements of O.14, r.1...[and] has established a prima facie case...The burden, as it were, shifts to [the respondent] to satisfy the court why judgment should not be given against him”*: *Lakatamia Shipping Company Limited-v-Su* [2017(1) CILR 416] (per Mangatal J).

Further and Better Particulars

30. I accept the submission of the Defendant’s counsel that the key principles governing the right to seek further and better particulars of a pleading are to be found in GCR Order 18 rule 12 as read with the commentary on the equivalent English rule in the 1999 White Book (at paragraph 18/12/2):

“The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly at trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimise costs (a view approved by Edmund-Davies L.J. in Astrovlanis Compania Naviera SA-v- Linard [1972] 2 Q.B. 611...”

Findings: the Defendant’s application for Further and Better Particulars and the relevance of the failure to oppose the Plaintiff’s GCR Order 14 application by exhibiting a draft Defence

31. I refuse the Defendant’s application for Further and Better Particulars of the Statement of Claim. In my judgment the ambiguities complained of were more artificial than real. On a straightforward reading of the Statement of Claim, it was or ought to have been



clear that the Plaintiff's claim was solely based on the Consent Order. Any ambiguities which may genuinely have been perceived to have existed were resolved by the Plaintiff's First Affidavit sworn on November 16, 2019.

32. The Defendant could, and perhaps should, have prepared a draft Defence to support her opposition to the Plaintiff's application for summary judgment. However, I accept Mr Dilliway-Parry's submission that this is not a mandatory requirement the breach of which entitles the Plaintiff to summary judgment as of right. The defences raised by the Defendant in her First Affidavit and by her counsel in his Skeleton Argument must be considered on their merits.

Findings: has the Plaintiff established a *prima facie* case for summary judgment?

33. At first blush, the Plaintiff's claim seems simple enough. The case advanced may be summarised as follows. The Consent Order provided that each party was to take out a life insurance policy in favour of the other for US\$250,000. They failed to act promptly and each party delayed until the Defendant unexpectedly died. The Plaintiff has now complied with her financial obligation under the Consent Order and, despite the death of Mr Fleiger, she is entitled to enforce her corresponding financial right against the Defendant who represents his Estate.
34. However, the most important question which to my mind arises is whether or not the Court can *prima facie* conclude that this right is enforceable summarily having regard to the general legal principle that one should only "*grasp the nettle*" where "*the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument*".
35. Although this matter was not fully addressed by counsel in argument, I am willing to assume in the Plaintiff's favour that as a matter of law an ancillary relief order can be enforced by way of a separate writ action as is the practice in relation to ordinary civil judgments. In my judgment a non-family judge required to construe an ancillary relief order in a separate legal action can only adequately discharge that judicial function by having access to the key documents from the divorce file so as to be able to contextualize the specific financial right which is being enforced. Those documents are not presently before the Court and the parties cannot be presumed to have had a sufficient opportunity to address them because it appears that Mr Fleiger was not legally represented at all stages of the Divorce Proceedings. While the Defendant's counsel seemingly has access to Mr Fleiger's emails, it is possible that significant discoverable communications between the Plaintiff and her attorneys in the lead up to the Consent Order being signed may exist.



36. It is not clear on the face of the Consent Order what function the insurance policy obligations were intended to serve and the Plaintiff's First Affidavit herein does not explain this with the sort of particularity that would enable the Court to decide, without considering any possible defences, that breach of the obligation should be construed as sounding in damages if it is not discharged before either party's death. In effect, reliance is placed on the bare assertion that an obligation was breached which if complied with would have resulted in US\$250,000 being paid to the Plaintiff. This is not a standard feature in ancillary relief orders with a notorious function of which judicial notice can be taken.
37. The most plausible function of the life insurance policy requirements (found in paragraph 23 under the heading "*Other*") was to secure the ongoing joint mortgage obligations. These arose under paragraph 17 (in a section of the Consent Order dealing with the restaurant business and its property), which were then in the order of nearly CI\$300,000. However the Consent Order also provided for joint mortgage liability for two other properties totalling nearly CI\$300,000. If this was the purpose of the life insurance policy obligation, it is difficult to understand how it survived Mr Fleiger's death as a freestanding financial obligation. The mortgage obligations would, at least arguably, simply remain as an unsecured claim against the Estate rather than being complemented by a damages claim for failing to take out the contemplated security.
38. As regards the propriety of the Plaintiff's chosen enforcement procedure of issuing a Writ outside the Divorce Proceedings themselves, in my judgment Mr Dilliway-Parry was clearly partly right. His more contentious broader submission that the present action constituted an abuse of process encompassed the narrower implicit contention that the usual way of enforcing an ancillary relief order is in the relevant Divorce Proceedings. There may well be certain obligations that can more conveniently be enforced in a separate action; an obligation to make a lump sum payment in a fixed amount, for instance, could perhaps be enforced as a simple judgment debt with no need to pry into the wider context in which the order was made. Ancillary relief orders are not, in any event, for all purposes analogous to a typical final order and are potentially subject to review and revision in light of a material change of circumstances (such as the onset of unexpected poverty or unexpected wealth).
39. Mr Dilliway-Parry submitted that rule 22 of the Matrimonial Causes Rules (2003 Revision) ("MCR") mandated enforcement of Ancillary Orders in accordance with GCR Orders 45 to 51. In fact, rule 22 of the MRC merely provides that, *inter alia*, GCR Order 45-51 "*shall apply to all proceedings under the Law*". Rule 23 merely prescribes the mode of making applications "*in matrimonial proceedings*". The MCR do not in terms mandate that an application to determine the existence of a disputed right embodied in an order made in matrimonial proceedings can only be made in those proceedings. They do not provide an answer to the question of whether or not it may ever be appropriate to enforce an aspect of a matrimonial order by way of a separate

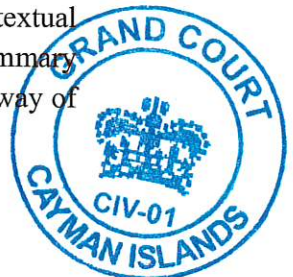


action. I reject the submission that the mode of proceeding constitutes an abuse of process.

40. I also do not accept that the present action improperly allows the Plaintiff to sidestep protections available under the GCR enforcement regime. Because that same regime would have to be invoked if the Plaintiff succeeded in obtaining a money judgment for US\$250,000. But the provisions of the MCR relied upon by the Defendant indirectly illustrate an important point. If the present claim was clearly one which was suitable for summary determination, it is surprising that it is being pursued by way of a separate action. Because GCR Order 45-51 are clearly designed for enforcing judgment terms the existence of which is not subject to any sensible dispute. In my judgment it was appropriate to commence the present application by Writ because the basis of the claim is clearly disputed and the claim itself is, in all the circumstances, a complicated one.
41. In the present case what ultimately matters is not the form of the application but a question of substance. The Consent Order cannot be properly construed without further, primarily factual, analysis of the role played by the life insurance obligations within the wider context of the agreement embodied in the Order as a whole. Absent further evidence and analysis from counsel it is impossible to fairly conclude, on a summary basis, that Mr Fleiger's failure to take out a life insurance policy before his death entitles the Plaintiff to recover \$250,000 from his Estate.
42. I find that the Plaintiff has failed to establish a *prima facie* case for summary judgment and her Summons is liable to be dismissed.

Alternative findings: has the Defendant identified any triable issues?

43. In case I am wrong in finding that the Plaintiff has not established a *prima facie* case, I record my alternative findings on the question of whether the Defendant has either:
- (a) shown that "*reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*"; or
 - (b) "*shown a fair or reasonable probability that he has a real, or bona fide, defence*".
44. As far as the construction of the Consent Order is required, if it was capable of construction on its face as creating a *prima facie* right to \$250,000 as compensation for a breach of the relevant obligation, without the need for exploring the contextual background to the obligation, I would have "*grasped the nettle*" and granted summary judgment in the Plaintiff's favour. This assumes that the only points raised by way of defence relied upon:



- (a) the Plaintiff's own delay in taking out a policy in circumstances where the obligation on both sides was to be performed "*forthwith*". I would regard delay as non-fatal in the matrimonial context and in light of the Plaintiff's explanation of what occurred;
- (b) the procedural complaint that the Plaintiff had not sought relief in the Divorce Proceedings; and/or
- (c) the argument that the Plaintiff had undermined the viability of her claim through her evidence in the winding-up proceedings. I consider that that evidence is in no material way inconsistent with her present claim.

45. In my judgment the Defendant has not shown a reasonable probability of success in relation to the proposed defences based on variation, waiver and affirmation of breach. She can assert no affirmative case on these issues. The only real question is whether there are reasonable grounds for believing that a fuller investigation of the facts at trial might affect the outcome of the case. This assumes that I am required to find, contrary to my actual primary finding, that the Plaintiff had in fact without recourse to extraneous material not presently before the Court established a *prima facie* case. In these hypothetical circumstances, I would on balance (and somewhat reluctantly because these defences appear at this juncture to be somewhat unreal) conclude that a fuller investigation of the facts at trial might affect the outcome of the case. The primary basis for this conclusion would be:

- (a) the unusual factual and legal nature of the claim which creates a risk of an erroneous decision in the absence of a fuller factual and legal inquiry;
- (b) the possibility that material facts might be revealed on discovery and with the benefit of the Court reviewing the divorce file and the winding-up file and
- (c) the fact that neither party's current legal representatives was involved in the Divorce Proceedings upon which the Plaintiff's claim is centrally based. The Court cannot reasonably assume that the Defendant's legal team has access to all potentially important documents, despite the fact they clearly have access to many relevant documents at this stage.



Findings: leave to defend

46. Order 14 rule 4 provides as follows:

“(3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.”

47. In the exercise of my discretion under the Preamble to the GCR as read with GCR Order 14 rule 4(3), I grant the Defendant leave to defend unconditionally in respect of the Plaintiff’s entire claim. However, for the avoidance of doubt, the contention that the present claim to enforce the Consent Order ought to have been brought within the Divorce Proceedings, which I summarily resolve against the Defendant, cannot be pursued by way of defence.

Conclusion

48. The Defendant’s application for Further and Better Particulars is dismissed. The Plaintiff’s Summons under GCR Order 14 is dismissed and the Defendant is granted unconditional leave to defend the substance of the present claim. Unless either party applies by letter to the Court within 28 days of the date of delivery of this Judgment to be heard as to costs, the costs of the Plaintiff’s Summons shall be paid by the Plaintiff and the costs of the Defendant’s Summons shall be paid by the Defendant, to be taxed if not agreed.
49. I shall hear counsel if required on the terms of the final Order and any other matters arising from this Judgment.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

