March 2, 2005
Civil

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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

C.I.C.A. NO. 22 OF 1999
C.I.C.A .NO. 1 OF 2000
CAUSE NO. 817 OF 1997

BETWEEN: (1) ROBERT EBANKS
(2) ARAUNAH POWERY
(3) AUDREY EBANKS
(4) ROXIE BODDEN

PLAINTIFFS

AND: ESAU BROOKS

DEFENDANT

Appearances: Mr. Clyde Allen of Woodward Terry & Company for the Plaintiffs

Mr. Dennis Morrison Q.C. instructed by Ms. Sheridan Brooks of Brooks & Brooks both for the Defendant

Before: Hon. Justice Henderson

Heard: November 19 and 29, 2004

GRAND COURT CAYMAN ISLANDS

JUDGMENT

On August 28, 2003, the Grand Court granted, upon the defendant's application, what is usually referred to as an "Unless Order." The plaintiffs failed to comply with the Unless Order and, as a consequence, the action has been stayed. The plaintiffs now apply to lift the stay, promising to comply promptly. The defendant opposes the lifting of the stay and has asked that the action be dismissed under Order 18 Rule 19 (1). He also seeks his costs on an indemnity basis.

Procedural History

The action has an unhappy procedural history, to which I need refer in some detail.

Some considerable time ago, a benefactor bestowed a piece of land at Breakers at Grand Cayman upon the Church of God. The Registrar of Lands, being of the view that the "Church of God" is not a legal entity capable of owing land, rectified the register to show these four plaintiffs, members of the Executive Council of the church, as the registered proprietors on trust for the Church of God.

Shortly after the register was rectified, the four plaintiffs commenced this action. The statement of claim (which has since been amended considerably) sought an injunction restraining the defendant from entering on the church land at Breakers and preaching, officiating as pastor of the congregation, or conducting any business at the church.

The Church of God is not an incorporated body. It has congregations in George Town, West Bay, Savannah, Breakers, North Side and Cayman Brac. The church at Breakers has been there for over forty years. Governance of the affairs of the church has been placed in the hands of an Executive Council, chaired by an Overseer. The defendant has been a pastor of the congregation and Assistant Overseer for many years.

When the Overseer died on May 5th 1990, the defendant assumed the Overseer's role. He says in his defence that he did so "in accordance with the well established and well recognized custom and tradition of the church."

The plaintiffs deny that the defendant is entitled by custom and tradition to occupy the role of Overseer. They assert that the majority of the Executive Council and of the congregations are opposed to the defendant occupying this position.

The dispute between the parties appears to have simmered for several years and resulted in a complete breakdown in the relationship between them. The plaintiffs say that the Executive Council expelled the defendant from the church in May, 1997. The defendant denies that. The plaintiffs plead in their statement of claim that, notwithstanding the expulsion, the defendant has "trespassed" on the church land at Breakers "by entering to preach and conduct business without the prior permission of the Council." They say he intends to continue doing that.

In November, 1998, the decision of the Registrar of Lands to rectify the register was set aside. Murphy, J. found that the *Registered Land Law* permits unincorporated associations such as the Church of God to hold land in this jurisdiction.

The plaintiffs in the present proceeding had requested the change in the register, and opposed the judicial review proceedings brought to set aside the Registrar's decision. Although section 139 (1) (c) of the *Registered Land Law* (1995 revision) requires such a

change to be made "with the consent of all persons interested", Murphy, J. found as a fact that a "significant faction" of the congregation were not advised of the application to the Registrar and would never have consented. Murphy, J. awarded costs of the judicial review proceedings to be paid by the respondents (the plaintiffs here).

One result of the judicial review proceeding was that the plaintiffs sought leave to amend the statement of claim. The amended pleading alleges that the plaintiffs are "Trustees of the Church of God" and hold the land on trust for it. It also says that the plaintiffs "bring this action for and on behalf of the said church." Leave was granted for this amendment and for consequential amendments to the defence.

On April 1, 1999, the defendant took out a summons seeking to have the claim dismissed on the ground that it has "no prospect of success." Some delay ensued. The plaintiffs changed attorneys. On May 20, 1999 this court adjourned the hearing of the summons and made an "Unless Order": the plaintiffs were directed to file their evidence by June 15, 1999, failing which the order would be granted. The plaintiffs were ordered to pay the costs of the application for the Unless Order.

On June 15, the hearing was adjourned again to June 21st. Another Unless Order was made. The plaintiffs were ordered to inform the defendant's attorneys of any additional amendments they wished to make to the statement of claim by June 21st; if they failed to do so, the order said the claim would be struck out. Costs on this occasion were reserved.

On June 21st, 1999 the hearing was adjourned again, to the following day. On this occasion, the court ordered the attorney for the plaintiffs (who is not their present attorney) to pay personally the sum of $500 in costs to the defendant.

On the following day, the hearing was adjourned for ten days. It is unclear what happened after ten days elapsed. In any event, on July 13, 1999 the hearing was set for August 4th. The minute of order contains the words "final date".

On August 4th, the hearing could not proceed because of "scheduling difficulties" and had to be adjourned. On this occasion, the court ordered that the hearing was to proceed "peremptorily before the end of September" and the plaintiffs were to tell the defendant of any further amendments they planned to make to the statement of claim at least two weeks before the hearing date.

The summary judgment application was heard by Murphy, J. on September 27, 1999. He considered that there was no need to entertain a summary judgment application as the claim was deficient and vulnerable to a strike out application under Order 18 Rule 19 (1) (a). He characterized the statement of claim as a "rambling diatribe" referring to various "non-justiciable disputes" and devoid of any reasonable claim in law. He struck it out. He also refused (on December 21st, 1999) leave to appeal, saying the appeal was frivolous and vexatious and had no reasonable prospect of success.

On August 10, 2000, the Court of Appeal set aside Murphy, J.'s judgment without giving reasons, apparently on the ground that he should not have treated the summary judgment application as a strike out application, given that the plaintiffs had not been warned that the court would approach the question in that manner. In addition, the Court of Appeal set aside the order requiring costs to be paid by the plaintiffs' attorney personally.

There then followed a period of inactivity for 1 ½ years. On February 1st, 2002 the defendant took out a summons to have the action dismissed because of delay. That summons was heard April 30, 2002 by Sanderson, J. of this court. At the same time, he heard an application by the plaintiffs for leave to re-amend the statement of claim. Sanderson, J. dismissed the defendant's application because no prejudice had been demonstrated. He allowed the plaintiffs to amend their statement of claim again. He awarded the costs of the application to the defendant.

Shortly thereafter, a re-amended statement of claim was filed. The amendments are extensive. The Prayer for Relief was supplemented by requests for declarations intended to clarify the role of the Trustees and of the Executive Council in church affairs.

The defendant filed a re-amended defence and then moved for summary judgment (again) on the basis that the claim is statute barred or, alternatively, that it has no prospect of success. Directions for the hearing were given on August 14, 2002; costs of the directions hearing were awarded to the defendant and ordered to be paid within 14 days.

The matter was back before Sanderson, J. on August 28, 2002. He made an Unless Order: after ordering the plaintiffs to pay an additional $350 in costs to the defendant, he ordered that all outstanding awards of costs had to be paid to the defendant by 4:00 p.m. on August 30th or the proceedings would be stayed. That order was complied with.

Sanderson, J. heard the summary judgment application on August 30th and September 6th, 2002 and dismissed it. He also made a detailed case management order designed to move the action towards a trial.

Some considerable time passed. The plaintiffs did not comply with the order for directions. On August 28th, 2003 Sanderson, J. granted another Unless Order, directing the plaintiffs to make discovery of documents and disclose witness statements by certain deadlines, under peril of a stay of proceedings if the plaintiffs failed to comply.

The Unless Order pronounced on August 28th, 2003 was not complied with. The plaintiffs dragged their heels over settlement of the formal order but, at the same time, took the position that the deadlines pronounced by Sanderson, J. did not start to run until the order was settled and signed by the court.

On October 9th, 2003 an application was made to me to settle the terms of Sanderson, J.'s order (as he was out of the country at the time). I did so.

The Unless Order of August 28th, 2003 was not complied with and, as a consequence, the proceeding was stayed.

The subsequent events are set out in my written judgement filed October 18, 2004. The plaintiffs told the defendant they were going to apply to extend the time under the most recent Unless Order, but never did so. After a hiatus of several months, the plaintiffs filed a summons on July 7, 2004 to set aside my "order" of October 9, 2003. That application was heard October 1st and 4th, 2004 and decided by my reasons filed October 18, 2004. After dismissing the plaintiffs application, I said the defendant was at liberty to list his application for his costs of the hearing on an indemnity basis.

The plaintiffs had applied to set aside the stay so that the action could go to trial. That application was heard by me at the same time as the defendant's application for his indemnity costs.

Law

The approach of the courts to a defaulting party's attempt to escape the rigour of an Unless Order has been summarized authoritatively by the Court of Appeal in *Hytec Ltd. v. Coventry City Council* [1997] 1WLR 1666 at 1674 ff as follows:

> "In the light of my observations that each case really should be cited upon its own facts, it may be otiose to try and encapsulate what I understand to be the philosophy underlying this approach. It seems to me it is as follows.

(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.
(2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.
(3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.
(4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.
(5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.
(6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice.
(7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

Analysis

Mr. Allen does not say that his failure to comply with the most recent Unless Order was a result of "something beyond his control." As I explained in my earlier judgment, he takes the position that the time periods specified by Sanderson, J. cannot, as a matter of law, begin to run until a formal order is drawn, approved as to form by both counsel, signed by the court, and served upon the plaintiffs. He says he could not approve as to form the draft order provided to him by Mrs. Brooks until he obtained the Judge's minute of order. He was still waiting to receive that when I settled the form of order. I settled the order on October 9, 2003 in such a way as to render it impossible for Mr. Allen to comply because the ultimate deadline had already passed.

For the reasons given in my earlier judgment, the time period for compliance with an Unless Order which is pronounced in the presence of the defaulting party or his attorney will ordinarily start to run from that moment. Sanderson, J.'s order, which was pronounced in the presence of Mr. Allen, can readily be understood by reading the minute of order together with the summons. He ordered the parties to exchange lists of documents within 24 hours "of the date of this order", which means the date of pronouncement. The parties were to permit inspection of the documents within 10 days of the date of the exchange of the lists. Witness statements and hearsay notices were to be exchanged within 21 days after the date of the inspection.

There is nothing obscure or ambiguous about this order. Mr. Allen could have, but did not, ask Sanderson, J. for clarification of its terms.

The draft order sent to Mr. Allen by Mrs. Brooks for his approval as to form differed from what Sanderson, J. pronounced only in that it provided some small additional time for the plaintiffs to comply. Nevertheless, Mr. Allen failed for some 26 days to respond to the request by Mrs. Brooks that he sign her draft order and then, when he did respond, said he "did not agree with" it but did not say why. When she pressed him on this, Mr. Allen said he would apply to extend the time under the Unless Order (a stance which is wholly at variance with his professed view that the time does not begin to run until the order is approved as to form, signed, and served) and then failed to do so.

In *Hytec*, all three judges of the Court of Appeal expressed the view that "a sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order" (at page 1675). There is nothing in Mr. Allen's explanation, if that is what it is, which satisfies that requirement.

I must consider all of the facts and circumstances of this case, with a view to reaching a decision which is just to both parties. What are the relevant circumstances?

The action was commenced about 8 years ago. On four separate occasions, the plaintiffs have been the subject of an Unless Order: May 20, 1999; June 15, 1999; August 29, 2002; and August 28, 2003. It must be remembered that an Unless Order is "an order of last resort"; it is not made lightly, and is the result of failure to comply with previous orders (*Hytec*, supra, at page 1674). There have been long periods of inactivity. No step in the action was taken between August 10, 2000 and February 1st, 2002. After I settled the form of the Unless Order on October 9, 2003, the plaintiffs viewed that as irregular but waited until July 7, 2004 to take any action at all. They did not appeal the Unless Order, but took out a summons asking me to set aside my "order" settling the terms of Sanderson J.'s order. It thus appears that the plaintiffs have repeatedly failed to prosecute their action in a timely manner even after the "atomic weapon in judicial armoury" (per Ward, L.J., in *Hytec* at page 1676) has been deployed against them on four occasions.

There is one other matter of which I should make mention. It is possible, although there is no evidence on this point one way or the other, that the failure to comply with the most recent Unless Order is the result of ill advised positions taken by the plaintiffs' attorney but does not result from any intentional act of the plaintiffs themselves. Could that, if it were proven, serve to excuse the default?

Everything depends on the circumstances of the individual case, and I would not wish to suggest that there is an invariable rule that the default of an attorney will always be viewed as the default of his client. However, in the ordinary case, there are good reasons for refraining from any distinction between a litigant and his lawyers. In *Hytec*, the Court of Appeal said this on the subject:

> "I turn to the third particular issue, whether or not this defendant is exonerated because the fault was not his personally but that of his legal representative?...
>
> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr. MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

Conclusion

I have come to the conclusion that it would not be just, in all of the circumstances of this case, to permit the action to continue. The failure to comply with an Unless Order will

"ordinarily" result in the sanction being imposed: *Hytec*, supra, page 1674. There are no circumstances here which satisfy me there should be a departure from the usual result. For these reasons, the application by the plaintiffs to set aside the Unless Order and have the action proceed to trial is dismissed.

Application for Dismissal

The summons before my brother Sanderson asked that, in the event of default, "this matter shall stand dismissed or alternatively this matter shall be stayed." Clause one of the Unless Order reads "that unless the plaintiffs comply with the following directions within the times specified herein this matter shall be stayed; with liberty to the plaintiffs to have the stay vacated:...." The defendant has now applied to dismiss the action on the grounds that it is frivolous, vexatious, and an abuse of the process of the court. It is said that a limitation period has now expired, a circumstance which may have influenced Sanderson, J. to direct that the action would be stayed rather than dismissed if the plaintiff failed to comply. It would therefore appear that Sanderson, J. was asked for an Unless Order which would result in the action being dismissed upon failure to comply, but rejected that alternative in favour of an order staying the proceedings.

Little of significance has transpired since Sanderson, J.'s order. The Unless Order was not complied with, but his order anticipates that possibility. In the absence of any material change in circumstances, I can see no justification for granting an order which

he refused to grant in August, 2003. The defendant's application for a dismissal of the action is dismissed.

Costs

Finally, the defendant asks for the costs of this application on an indemnity basis. A recent amendment to the *Grant Court Rules*, 1995 (revised) authorizes such an award in these terms:

> Order 62, rule 4, (11)
>
> "The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

For the reasons given above, I am satisfied that the plaintiffs have conducted this proceeding improperly, unreasonably and negligently since the most recent Unless Order was made on August 28, 2003. This is an appropriate case for an award of costs on the indemnity basis. Sanderson, J. has already made an award of costs as a component of his Unless Order. I now award to the defendant his costs of settling that order and of the present application, on an indemnity basis.

Dated this 2nd day of March, 2005

Henderson, J.

Henderson, J.
Judge of the Grand Court

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