IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)
[2019] EWHC 2231 (Comm)

No. CC-2019-MAN-000003

Manchester Civil Justice Centre
1 Bridge Street West
Manchester ME60 9DJ

Wednesday, 31 July 2019

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

B E T W E E N :

PRAETURA ASSET FINANCE LIMITED — Claimant/Respondent

- v –

DEREK THOMAS HOOD — Defendant/Applicant

MR MARK CAWSON QC (instructed by Addleshaw Goddard LLP) appeared on behalf of the Claimant/Respondent.

MR JOSHUA CROW (instructed by Fieldfisher LLP) appeared on behalf of the Defendant/Applicant.

J U D G M E N T

JUDGE HODGE QC:

1 This is my extemporary judgment on a claim by Praetura Asset Finance Limited against Derek Thomas Hood, claim number CC-2019-MAN-000003. By a claim form issued on 25 January 2019, the claimant sought to recover over £1.5 million said to be due to it from the defendant under an unregulated hire purchase agreement made between the parties. The claim form and particulars of claim were duly served on 27 January 2019. An acknowledgment of service was duly filed indicating an intention by the defendant to defend all of the claim. However, no defence was filed or served and, on 27 March 2019, the claimant entered judgment in default against the defendant for £1,580,345.41, inclusive of interest.

2 It is now accepted that that was a regular judgment. The defendant had received particulars of claim with the claim form which in terms stated that particulars of claim were attached. However, for reasons that have been explained in evidence, the defendant and his solicitors did not at the time appreciate that particulars of claim had been served and that the defence was therefore due to be filed and served.

3 The fact that particulars of claim had been served with the claim form by the court only came to light on 2 July. On 12 July, the present application was issued by the defendant seeking the setting aside of the judgment in default pursuant to CPR 13.3(1)(a) and (b). I accept that if the starting point is 2 July, then the application notice was issued promptly. However, the default judgment had come to the notice of the defendant and his solicitors on or about 29 March. The claimant therefore says that the application notice was not issued promptly.

4 The evidence in support of the application, both as to the reasons why it was thought that there were no particulars of claim served with the claim form and also as to the substantive merits of a defence to the claim, is to be found in the witness statements of the defendant himself, dated 12 July 2019, and of his solicitor, Mr James William Sharkey, also dated 12 July 2019, together with their respective exhibits. On Monday of this week, and thus only one clear working day before the hearing of this application, evidence in answer was served in the form of a witness statement from the legal executive at the claimant's solicitors, Addleshaw Goddard, who has the conduct of the case. That is Patricia Elder and her witness statement is dated 29 July 2019. At paragraphs 10.7 and 10.8 of her witness statement Ms Elder accepts that the claimant has failed to have regard to a 2 per cent discount applicable under clause 7.4.2 of the credit agreement, with the result that the judgment should in fact have been entered in the sum of £1,440,570.85. The claimant accepts that the judgment should be set aside to the extent of £97,557.77. Mr Hood, in the limited time available to him, has served a short, corrective witness statement, dated yesterday, 30 July 2019.

5 The defendant/applicant is represented before me by Mr Joshua Crow (of counsel). The claimant/respondent to the application is represented by Mr Mark Cawson QC. Both counsel have submitted detailed written skeleton arguments which I had the opportunity of pre-reading in conjunction with the contents of the application bundle. That is fortunate because the application has been listed for only two hours, at 10.30 this morning, after I had already had another matter in the list at 10 o'clock, and I have a further two-hour application in the list at 2 o'clock this afternoon. Regrettably, I had to impose time limits on the oral submissions of both counsel. Mr Crow addressed me for an hour, Mr Cawson addressed me in answer for forty-five minutes, and Mr Crow briefly replied for ten minutes.

6 Happily, and save in one minor respect, there is no dispute as to the applicable legal principles. By CPR 13.3(1), the court may set aside or vary a default 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."

By CPR 13.3(2):

> "In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

CPR 13.3 gives the court a discretion to set aside or vary a judgment which has been regularly entered. In that regard it is to be contrasted with CPR 13.2, where the court is directed to set aside a judgment which has been wrongly entered.

7 The position here is that, until 2 July, the defendant and his solicitors considered the judgment had been wrongly entered because no particulars of claim had been served and therefore there was no default in serving or filing a defence. That, in fact, proved to be incorrect. The defendant therefore accepts that he has to invoke the discretionary jurisdiction under CPR 13.3. The defendant also accepts that, in addition to the express requirement that the court should have regard to whether the application to set aside was made promptly, the court must also have regard to the three-stage *Denton* test. Mr Crow accepts that the failure to serve a defence in time is a serious default and is not trivial. However, he submits that there was good reason for the default because the defendant and his solicitors thought that no defence was required because no particulars of claim had been served.

8 In my judgment, there was no good reason for taking the view that there were no particulars of claim that had been served. The defendant clearly had the particulars of claim. He sent them to his solicitors - to two individuals at Fieldfisher - by way of e-mail attachment. Admittedly, the accompanying e-mail did not the refer to the fact that the attachment comprised the particulars of claim, and the e-mail was sent on a Sunday; but in my judgment there is no reasonable excuse for the solicitors failing to open the attachment and seeing that it contained the particulars of claim. Moreover, the claim form expressly stated "Particulars of claim attached". The claim form and particulars of claim were served by the court. Had inquiry been made of the claimant's solicitors as to where the attached particulars of claim were, or to the court as to precisely what documents had been served, the error would have come to light. Indeed, when the default judgment was communicated to the defendant's solicitors, they had written to the court on 2 April pointing out that an acknowledgment of service had been filed and asserting that, as a response to the claim form had been sent within the requisite time period, a default judgment should not have been entered. The writer asked the court to overturn the order and confirm that it was unenforceable. According to the court file (but not placed in evidence by the defendant or his solicitors), on 5 April the court service responded saying:

> "The court processed your acknowledgment of service which extended the time to file a defence to 28 days after service of the particulars of claim. No defence was filed by the deadline, so the claimant's solicitors filed a request for judgment, which was

processed by the court. If you wish to have the judgment set aside, you should file an application notice with the court together with the appropriate fee."

That was on 5 April. No application notice seeking to set aside the default judgment was issued until 12 June. In those circumstances, I am satisfied that the application to set aside was not made promptly.

9 Mr Crow has referred me to observations of Pitchford LJ in *Henriksen v Pires* [2011] EWCA Civ 1720 at paragraph 30 to the effect that it is only knowing or culpable delay that is the relevant factor. In the present case the defendant and his solicitors knew of the default judgment. They thought that it was irregular. They thought that they were entitled to have it set aside under CPR 13.2. In that they were mistaken. But, nevertheless, they knew of the default judgment. They considered that it should be set aside. In my judgment, it matters not whether they thought that the set-aside application should be made under CPR 13.2 rather than CPR 13.3. The fact is that the application had to be made under the discretionary grounds of CPR 13.3. That engages the requirement for promptitude in CPR 13.3(2); and I am satisfied that this application was not made promptly.

10 As I have indicated, I am also satisfied that there was no good reason for failing to file a defence in time. The defendant and has solicitors should have appreciated that a defence was required. The defendant had received the particulars of claim; he had sent them on by e-mail to his solicitors; and it was their failure to open the e-mail that led them to fail to appreciate that. Later on, as I say, they could easily have checked the position with the claimant. They did check the position with the court; and yet they did not act appropriately in response.

11 I have then to have regard to all the circumstances of the case, including the need for the Civil Procedure Rules to be enforced and complied with and also the need for litigation to be conducted efficiently and at proportionate cost. It is at this point that I need also to consider the merits of the proposed draft defence in its revised form. Mr Cawson reminds me that under CPR 13.3(1)(a) it is for the defendant to show that he has a real prospect of successfully defending the claim, or any part of it, and that this requires him to satisfy a test similar to that applicable on an application for summary judgment. He must do more than show merely an arguable defence.

12 Mr Crow has raised a number of defences on behalf of the defendant. The first is that credit should be given for the full proceeds of sale of the Jaguar motor car which formed the subject matter of the hire purchase agreement in the staggering sum of £1.34 million. As to that, it seems to me, at this stage at least - and I accept Mr Crow's submission that one should apply CPR 13.3(1)(a) as at the date of hearing of the application to set aside - that one should look only to the sale proceeds that have actually come into the hands of the claimant.

13 Between the issue of the claim form and the time for service of the defence and entry of the default judgment, the claimant had entered into an escrow agreement with the original seller of the Jaguar motor car, J D Classics Limited (a company in which the defendant had been interested but which had by then entered into administration), under which the Jaguar was to be sold, but of the sale proceeds the first £450,000 were to be held in a retention account, to be released only in accordance with the provisions of clauses 7.1 and 7.2. As a result of the entry into that agreement, which I am satisfied was a reasonable response to the assertion by J D Classics of a vendor's lien in respect of what was said to be the unpaid balance of the original purchase price, the £450,000 was not to be released to the claimant unless and until a court determined whether or not the company was entitled to a seller's lien in respect of the

Jaguar. Under clause 7.4.6 of the terms of the hire purchase agreement: "If the Owner has repossessed and sold the Goods the net proceeds of sale (or the Owner's estimate of the proceeds if the Goods have been returned to the Owner but not at that time sold) after deducting all of the costs of sale and the Purchase Fee …" are to be credited to the hirer. Mr Cawson submits that that clause is not engaged because there was no "repossession" of the goods. I reject that submission. In my judgment, "repossession" has to be given a very wide meaning in its context. The words in parenthesis assume that return of the goods to the owner is the equivalent of "repossession".

14 Clause 7.4.6 also has to be viewed in the context of the agreement as a whole. If the goods have been sold and the proceeds received by the owner (in this case the claimant), then clearly, looking at the agreement as a whole, he must give credit for them. Mr Crow argued that the owner should have put an estimate on the sale proceeds; but it is clear that that requirement only applies if the goods have not, at the relevant time, been sold. I accept Mr Crow's argument that one has to look at matters as at the date of this hearing. As at the date of this hearing, the Jaguar has been sold and therefore there is no question of any estimate being put on its value. What has to be credited to the defendant is the net proceeds of sale in the hands of the owner. At the moment, the escrow amount in the retention account is not in the hands of the owner. Credit may have to be given for it at some future date; but, at the moment, it is only the balance of £890,000, plus the admitted £97,000-odd excess referred to by Ms Elder, for which credit has to be given. So, I reject the suggested defence that credit has to be given for the full sale proceeds at this stage.

15 The second suggested line of defence is an estoppel. It is said that the claimant, through its representatives, represented to the defendant that there was only £1.34 million due and owing in respect of the Jaguar motor car and that, in reliance upon that representation, the defendant found a buyer at that level. He says that had he known that more was due and owing, then he would have found a purchaser who would have paid the full outstanding balance. The evidence is to be found at paragraphs 9 to 11 of the defendant's witness statement.

16 Mr Cawson has pointed to the requirement for establishing a promissory estoppel as set out at paragraphs 12-018 and 12-024 of *Snell's Equity*. He submits that the evidence gets nowhere near to satisfying the requirements stated in those paragraphs. However, Mr Crow submits that what is relied on here is a common-law estoppel by representation, as explained at paragraph 12-005 of *Snell's Equity*. He relies upon an estoppel where, by words or conduct, there has been a representation of existing fact, namely of the level of debt, which is intended to be acted upon and was in fact acted upon to his prejudice by the person (in this case the defendant) to whom it was made. In such circumstances, the representor will not then be allowed to allege in proceedings against the representee that the facts were other than he or she had represented them to be. Mr Cawson points to the fact that: (1) there was, to the defendant's knowledge, a subsisting judgment debt in a sum in excess of the £1.34 million; and (2) that in a letter from the defendant's solicitors, Fieldfisher, of 29 May 2019 to Addleshaw Goddard, the claimant's solicitors, there is no suggestion of any representation as to the amount owing under the hire purchase agreement. Reference is made to the defendant's full co-operation in relation to the sale of the Jaguar race car and to the claimant's receipt of £1.35 million; but there is no suggestion in the letter that it was represented that that was all that had been due and owing under the hire purchase agreement. Those may be powerful points to be made at trial. But, in my judgment, the unchallenged evidence of the defendant, as set out at paragraphs 10 and 11 of his witness statement, does raise, in my judgment, a triable issue with a real prospect of success.

17 There is a claim under the Consumer Credit Act 1974, s.140A and s.140B. I would accept Mr Cawson's submissions that those allegations add nothing to the earlier allegation of an estoppel by representation and disclose no independent credible basis for defending the claim. I accept Mr Cawson's submission that the circumstances alleged in the proposed defence fall well short of those in which the court might conceivably find an unfair relationship, having regard to the guidance to be found in Professor Goode's work on *Consumer Credit: Law and Practice*. I am satisfied that, particularly in the context of a lending of this scale, and of a commercial or quasi-commercial nature, the claimant's conduct, following the formation and leading up to and in the process of enforcement, has given no rise to unfairness justifying the intervention of the court under ss.140A and s.140B of the 1974 Act.

18 I also accept Mr Cawson's submission that the proposed counterclaim and set-off is inconsistent with the very nature of the representation alleged, although Mr Crow pointed out that it is intended as an alternative to the representation defence. I accept Mr Cawson's submission that it is inconceivable that there was ever any intention that the defendant should ever receive any commission for his efforts in finding a purchaser for the Jaguar race car. He was assisting in the process of realising the car for his own financial benefit as much as that of the claimant. Moreover, if he was doing so because it had been represented that all that was owed was £1.34 million, in arranging a sale at that level there is no conceivable basis upon which the defendant (or the claimant) could ever have thought that that sale figure should be reduced by the payment of commission to the defendant, leaving a shortfall on the hire purchase account. In my judgment, the proposed counterclaim and set-off has no real prospect of success.

19 For the reasons I have given, however, I do consider that the estoppel defence has a real prospect of success. I have indicated that I am satisfied that the application to set aside was not made promptly; and I have to weigh that in the balance when exercising my discretion. I have also to bear in mind that I have found that there was a serious procedural breach of the Rules in failing to serve a defence in time, and that there was no good reason for it. However, I do have to have regard to all the circumstances of the case; and where I consider that there is an arguable defence to a substantial part of the claim, then I should allow that defence to be asserted. Had I not found that there was that arguable representation defence, I would have taken the view that good reason had been shown for varying the judgment by reducing it by the amount accepted by Ms Elder of £97,000-odd; but, in addition, I would have also reduced it by the amount of £890,000 now received by the claimant from the proceeds of sale of the Jaguar car.

20 Given, however, that I have found that there is an arguable representation defence, it seems to me that the judgment can only stand as to the sum of £450,000 which the claimant has not yet received from the sale proceeds. The representation alleged is that only £1,340,000 was owed under the hire purchase agreement. Of that only £890,000 has as yet been received by the claimant and therefore £450,000 is still outstanding. Mr Crow submits that I should not allow the judgment to stand even in relation to that sum because that sum is presently held in escrow and it may fall to be paid over to the claimant in due course. Mr Crow submits that the claim to a vendor's lien would appear to be a very weak one in the light of the invoice from J D Classics dated 23 May 2017, which records that the full amount had been paid because there had already been a deposit of £350,000 received by the company. Mr Crow relies upon the strength of the claimant's case that there was no seller's lien as amounting to a good reason why the entirety of the judgment should be set aside and the defendant allowed to defend the claim. With some hesitation, I accept that argument. The £450,000 is held in a retention account and will fall to be paid over to the claimant if, as on the evidence presently before the

court seems likely, the claim by the administrators, on behalf of the company, to a seller's lien is rejected.

21 In those circumstances, it seems to me that it would be wrong for the judgment to stand whilst the claimant has that security in the form of the retention account. So, for those reasons, I will allow the application and set aside the default judgment.

(Later)

22 Having delivered my extemporary judgment on the substantive set aside application, I now, inevitably, have to address the question of costs. I must bear in mind that if, in the exercise of its discretion, the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. In deciding what order, if any, to make about costs, the court will have regard to all the circumstances of the case, including the parties' conduct and whether a party has succeeded on part of its case, even if that party has not been wholly successful. I have not been referred to any admissible offers to settle.

23 In the present case, it is clear that the successful party is the defendant. He has succeeded in having the default judgment set aside. However, the need for this application was the defendant's failure to serve a defence, which gave rise to the entry of the default judgment. In the course of my judgment, I have held that there was no good reason for the failure to serve a defence, and that that failure amounted to a significant breach of the Civil Procedure Rules. I have also held that there was a lack of promptness in making the set aside application. I have rejected the proposed set-off and counterclaim, and I have rejected the proposed defence founded upon the Consumer Credit Act 1974. So, the defendant has not succeeded on all of his case.

24 In my judgment, the most significant factor is the defendant's failure to serve a defence, which brought about the need for this application. The claimant readily accepted, when the point was raised, that the judgment was excessive to the extent of some £97,000; and I am satisfied that that error in over-stating the amount of the judgment debt could have been corrected by correspondence between the parties without the need for a court application.

25 The defendant has been successful, but by the narrowest of margins, and with some hesitation on my part. It is the defendant's conduct that has brought about the need for the present application. The defence has yet to be tested at trial and it may prove to be without factual merit. In those circumstances, it seems to me, in the interests of justice, that the appropriate costs order should be costs in the case, so that the ultimate incidence of costs will depend upon who ultimately is successful at trial, whether the claimant or the defendant. That seems to be me to be preferable to the alternative of no order as to costs.

26 So, the costs order I will make is "costs in the case". As a result, it does not fall to me to undertake any summary assessment of those costs.

CERTIFICATE

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