CSR South East Asia Pte Ltd (formerly known as CSR Bradford Insulation (S) Pte Ltd) v Sunrise Insulation Pte Ltd
[2002] SGHC 106

Case Number : DC Suit 1771/1998, RA 600006/2002

Decision Date : 13 May 2002

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Jason Lim (Michael Khoo & Partners) for the appellants; M Segaram (Segaram & Co) for the respondents

Parties : CSR South East Asia Pte Ltd (formerly known as CSR Bradford Insulation (S) Pte Ltd) — Sunrise Insulation Pte Ltd

Civil Procedure – Judgments and orders – Default judgment – Regularity of judgment – Judgment failing to take into account debtor's payment in satisfaction of debt – Whether judgment irregular and to be set aside ex debito justitiae

Contract – Remedies – Creditor accepting and retaining debtor's cheque – Whether creditor's conduct evidences acceptance of satisfaction of debt – Whether creditor's remedies in suspension until dishonouring of cheque

Courts and Jurisdiction – Court judgments – Consent order following settlement agreement – Nature of consent order – Whether consent order evidences contract between parties – Whether defendants in breach of consent order

defendants were in breach of consent order Whether plaintiffs entitled to enter default judgment

Civil Procedure

Entering of default judgment Failure of plaintiffs to take in account sums paid by defendants Whether judgment should be set aside ex debito justitiae

Facts

On 18 June 2001, the plaintiffs and the defendants arrived at a negotiated settlement in relation to their claim and counter-claim in DC Suit 1771/98. A consent order recorded by the court provided inter alia that the defendants were to pay the plaintiffs the sum of $21,718.92 in 4 equal instalments of S$5,429.73 each commencing on the 30th day of June 2001 and thereafter on the 30th day of each succeeding month; and in the event of default in any of the instalment payment on the part of the defendants, the plaintiffs shall be at liberty to enter judgment on the plaintiffs claimed sum of S$36,343.92 less any payments received from the defendants together with interest and costs. The defendants paid and the plaintiffs received the first three instalment payments in compliance with the terms of the consent order. The fourth and final instalment fell due on 1 October 2001 (30 September 2001 being a Sunday). A cheque drawn by the defendants dated 29 September 2001 was reportedly mailed to the plaintiffs at about 6.30pm on 1 October 2001 and was received by the plaintiffs only on 3 October 2001. The plaintiffs deemed the late arrival of the cheque to be in breach of the consent order and entered judgment against the defendants for the sum claimed originally by them in the suit less the amount of the three instalment sums. The defendants applied to set aside the default judgment, submitting that the posting of the cheque at 6.30pm on 1 October 2001 would have constituted compliance with the said consent order. Their application was dismissed by the Deputy Registrar and the defendants appealed unsuccessfully to a District Judge. The defendants appealed again to the High Court. In the course of the appeal, another feature suddenly surfaced. The High Court was informed that the plaintiffs, after having received the defendants cheque that was

forwarded for the purposes of meeting the defendants fourth and final instalment obligation, retained possession of it and without telling the defendants what they were going to do with the cheque, proceeded to enter default judgment against the defendants for a sum which did not include the amount of the said cheque. Whilst the terms of the draft judgment forwarded to defendants counsel for their approval was still under contest, the cheque was banked in by the plaintiffs and had the sum stated in the said cheque credited into the plaintiffs account.

Held

, allowing the appeal:

(1) The consent order expressly provided for a strict time frame for the instalment payments and a default clause spelling out the consequences of non-compliance with the said instalment arrangements. The defendants argument that the posting of the cheque at 6.30pm on 1 October 2001 would have constituted compliance with the said consent order, to say the least, was both untenable and disingenuous. The order was unequivocal and stipulates payment by the 30th of each succeeding month. In regard to the fourth instalment, the payment should have been made to the plaintiffs on or before 1 October 2001 but in the present case the cheque did not reach the plaintiffs until 3 October 2001. The terms of the consent order imports a clear implication that time is indeed of the essence in relation to the instalment payments and any default thereof would trigger the consequences stipulated under cl 4 of the said consent order. There could be no other interpretation. The consent order did indeed evidence a contract between the parties and given the factual background thus far, there was no justification to vary or modify the said order, without the consent of both the parties (See 11-12).

(2) The plaintiffs holding on to the defendants cheque for the fourth instalment was no mere accident or inadvertence but a conscious act. They had misjudged the legal implications of their action in retaining and subsequently cashing the said cheque. By proceeding to enter judgment for a sum which did not take into account the amount stated in the fourth instalment cheque was irregular and ought to be set aside ex debito justitiae (See 21).

Case(s) referred to

Siebe Gorman & Co Ltd v Pneupac Ltd [1982] 1 All E R 377 (CA) (refd)

Australasian Automatic Weighing Machine Company v Walter [1891] WN 170

Hughes v Justin [1894] 1 QB 667

Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd [1964] 2 QB 10 (CA)

Legislation referred to

Rules of Court, Order 3 r 3

Judgment

GROUNDS OF DECISION

1 The issue in this appeal revolves around a default provision in relation to instalment payments contained in a consent order made by the court, following a settlement agreement between the plaintiffs and the defendants in this suit.

2 The background facts which give rise to the appeal before me are set out by the Learned District Judge in her grounds of decision and they could be summarised as follows.

3 On 18 June 2001, the plaintiffs and the defendants arrived at a negotiated settlement in relation to their claim and counter-claim in the suit herein. Following the settlement on the same day, a consent order was recorded by the court as follows:

> 1. the Defendants to pay the Plaintiffs the sum of $21,718.92 in 4 equal instalments of S$5,429.73 each commencing on the 30th day of June 2001 and thereafter on the 30th day of each succeeding month;
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> 2. each party to bear [its] own cost;
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> 3. the Notice of Discontinuance for the Plaintiffs and the Defendants to be filed within 14 days from the date of the last payment;
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> 4. in the event of default in any of the instalment payment on the part of the Defendants, the Plaintiffs shall be at liberty to enter Judgement on the Plaintiffs claimed sum of S$36,343.92 less any payments received from the Defendants together with interest at the rate of 6% per annum from the date of Writ of Summons to the date of Judgment, costs to be agreed or taxed and the Defendants counterclaim shall be deemed to be withdrawn.

4 Following the consent order the defendants paid and the plaintiffs received the first three instalment payments in compliance with the terms of the consent order. The fourth and final instalment fell due on 30 September 2001 which was a Sunday. However, since the due date for the last instalment payment fell on a Sunday, the provisions of O 3 r (3) of the Rules of Court which stipulate that where the time prescribed by these Rules or by any Judgment, order or direction for doing any act expires on a day other than a working day, the act shall be in time if done on the next working day, became applicable. Consequently, the due date for payment for the last instalment was 1 October 2001. Unhappily for the defendants, a cheque drawn by the defendants dated 29 September 2001 was reportedly mailed to the plaintiffs at about 6.30pm on 1 October 2001 and was received by the plaintiffs only on 3 October 2001. The plaintiffs deemed the late arrival of the cheque to be in breach of the consent order. Consequently, they purported to exercise their rights reserved under clause 4 of the consent order and entered judgment against the defendants on 11 October 2001 for the sum claimed originally by them in this suit less the amount of the three instalment sums. Insofar as material, the relevant segment of the judgment so entered by the plaintiffs against the defendants on 11 October 2001, following the said breach, reads as follows:

> And default having been made in that the Defendants had failed to pay the final instalment of $5,429.73 by the 1st day of October 2001, IT IS THIS DAY ADJUDGED that Judgment be entered against the Defendants for:-
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> > 1. the sum of $20,054.73 being the balance of the Plaintiffs claimed sum of $36,343.92 less payments of $16,289.19 received;
> >
> > 2. interest at the rate of 6% per annum from the date of Writ of Summons to the date of Judgment;

3. costs to be agreed or taxed,

and the Defendants counterclaim shall be deemed to be withdrawn.

5 The defendants applied to the court on 19 October 2001 to set aside the said default judgment contending that the cheque sent out by them allegedly on 1 October 2001 was in compliance with the consent order. Their application to set aside the judgment was heard on 13 November 2001 and turned down in the first instance by the Deputy Registrar of the Subordinate Courts. The defendants appeal to the District Judge which was heard on 21 December 2001 was equally unsuccessful. It would appear from the grounds delivered that the main argument advanced by the defendants before her was that inasmuch as the cheque in relation to the fourth instalment payment was mailed at about 6.30pm on the 1 October 2001, the defendants should not have been held to have committed any breach of the terms of the consent order.

6 The learned District Judge in her grounds said:

> The consent order was a compromise agreement reached between the parties towards the final settlement of their action. Being a consent order the parties were bound by it. The terms of the agreement were clearly set out in the consent order. Under the order the defendants shall pay the plaintiffs on 30th June 2001 and thereafter on 30th of each succeeding month. The consequences for not complying with the orders were also set out in the consent order. I did not accept the defendants contention that payment was made upon posting the cheque on 1 October 2001. The defendants were not in compliance with the terms of the consent order. The plaintiffs were entitled to insist on the strict compliance of the terms of the consent order. Hence the plaintiffs were entitled to the judgment.

7 In the appeal before me the self-same argument was rehearsed by appellants counsel, stating that the mailing of the cheque by the defendants at about 6.30pm on 1 October 2001 should have been sufficient compliance with the consent order so entered.

8 The nature and concept of the phrase by consent had received considerable judicial attention over the years. Lord Denning MR, in ***Siebe Gorman & Co Ltd v Pneupac Ltd*** [1982] 1 All E R 377 (CA), after a brief survey of the earlier decisions, observed at page 380a-c:

> It should be clearly understood by the profession that, when an order is expressed to be made by consent, it is ambiguous. There are two meanings to the words by consent. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson* [1942] 2 All ER 315 at 317, [1942] 2 KB 321 at 324. One meaning is this: the words by consent may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words by consent may mean the parties hereto not objecting. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?

> We were referred to several cases. In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, [1895-9] All ER Rep 868 there was a consent order dealing with a large amount of machinery and plant. Everyone had agreed that it should be sold on certain terms. That was clearly a contract between the parties with which the court would not interfere except on the same grounds as any other contract. In *Purcell v F C Trigell Ltd* [1970] 3 All ER 671, [1971] 1 QB 358 the correspondence (which is set out in the facts of the case) showed that there was a real contract agreed between the parties that, unless a particular order for interrogatories was complied with, the matter should be struck out. In that case I said that the court has a discretion to vary or alter the terms of the order for interrogatories, even though made by consent. There is a case mentioned in *The Supreme Court Practice* 1982, vol I, p 16, para 3/5/1, namely *Australasian Automatic Weighing Machine Co v Walter* [1891] WN 170. That concerned an order by consent to transfer shares. Again it was a case in which there was a real contract between the parties. Equally, in *Intervale Group of Companies Ltd v Knighton* [1976] CA Transcript 302, Bridge LJ, after analysing all the facts, came to the conclusion-
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> > that there was here an unconditional binding contract in law between the parties that the order of 10 February should be made, as it was.
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> Scarman LJ added that, in the circumstances of the case, from Bridge LJs analysis of the facts, there was here a contract. The most recent case was in the same category: see *Chanel Ltd v F W Woolworth & Co Ltd* [1981] 1 All ER 745, [1981] 1 WLR 485. It seems to me that all those cases can be, and should be, explained on the basis that there was a real contract between the parties evidenced by the order which was drawn up.

9 It is perhaps instructive at this stage to refer to the case of ***Australasian Automatic Weighing Machine Company v Walter*** [1891] WN 170 which was referred to by Lord Denning in ***Siebe Gorman***. In the ***Australasian Automatic Weighing Machine*** case, the plaintiffs applied to the court to enlarge the time limited for the defendants compliance with an order dated the 7th day of August, 1891. The order was made in chambers on the hearing of an application by the plaintiffs, and it was by consent ordered that the defendant should, on or before the 31st day of August 1891, transfer to the plaintiff company, or their nominee, certain shares in the company. The order was passed and entered, but it had not been complied with and not been served on the defendant.

10 Subsequently, a motion was filed on behalf of the plaintiffs praying that the time limited by the order for the defendant to transfer the shares be enlarged to the 2nd day of November 1891, or four days after service of the order that was to be made on the motion. North J who heard the motion, refused to make any order on the motion, on the ground that an order made by consent could not be altered without consent.

11 The consent order recorded with the sanction of the court on 18 June 2001 in the present case expressly provides for a strict time frame for the instalment payments and a default clause spelling out the consequences of non-compliance with the said instalment arrangements. The argument advanced on behalf of the defendants that the posting of the cheque at 6.30pm on 1 October 2001 would have constituted compliance with the said consent order, to say the least, is both untenable and disingenuous. The order is unequivocal and stipulates payment by the 30th of each succeeding

month. In regard to the fourth instalment, the payment should have been made to the plaintiffs on or before 1 October 2001, since the scheduled date of payment ie, 30 September 2001 happened to be a Sunday and the provisions of O 3 r (3) of the Rules of Court (*supra*) applied. In the case before me the cheque did not reach the plaintiffs until 3 October 2001.

12 Another aspect which warrants mention at this stage is that the defendants claim that the cheque in respect of the fourth instalment was mailed at about 6.30pm on 1 October 2001 seemed to have emerged much later when in fact what was claimed in the very first affidavit of Ong Teck Beng, a director of the defendants filed on 19 October 2001 was that his wife who had prepared the cheque on 29 September 2001 did not come to work on 1 October 2001 as she was ill on that day and consequently the said cheque in respect of the fourth instalment was mailed only on 2 October 2001. Only when the appeal from the Deputy Registrar to the District Judge was in train, did the defendants shift their position and come up with a claim that the said cheque was probably posted at about 6.30pm on 1 October 2001. Quite apart from this volte face which did not seem to have impressed the District Judge who heard the appeal, the terms of the consent order imports a clear implication that time is indeed of the essence in relation to the instalment payments and any default thereof would trigger the consequences stipulated under cl 4 of the said consent order. There could be no other interpretation. In my view, the consent order does indeed evidence a contract between the parties and given factual background thus far, there was no justification to vary or modify the said order, without the consent of both the parties.

13 The matter did not, however, seem to end there. In the course of the appeal before me, another feature suddenly surfaced. I was informed by counsel that the plaintiffs who after having received the defendants cheque that was forwarded for the purposes of meeting the defendants fourth and final instalment obligation on 3 October 2001, retained possession of it and without telling the defendants what they were going to do with the cheque, proceeded to enter default judgment against the defendants on 11 October 2001, for a sum which did not include the amount of the said cheque.

14 The plaintiffs decision to enter judgment for a sum disregarding the purported last payment would indeed make sense, if the plaintiffs did not intend to appropriate the said cheque. But what happened in fact was that the plaintiffs who were holding on to the cheque, ever since 3 October 2001, proceeded to bank in the said cheque on 21 November 2001, at the time the defendants were disputing the validity as well as the regularity of the judgment entered by the plaintiffs against them on 11 October 2001. Whilst the terms of the draft judgment forwarded to defendants counsel for their approval was still under contest, the cheque was banked in by the plaintiffs and had the sum stated in the said cheque credited into the plaintiffs account. It would appear that the fact that the said cheque had been banked and cashed out by the plaintiffs was not placed before the District Judge at the time she heard the appeal.

15 The fact that the judgment entered by the plaintiffs, purportedly under cl 4 of the consent order did not take into account the amount of the cheque so received, retained and subsequently appropriated by the plaintiffs, gave a different perspective to the issues presented to the court for resolution. The question presently was not so much as to whether the court could or ought to vary a consent order which was most certainly in the nature of a contract but whether the plaintiffs by their conduct, however unwitting it might have been, waived their right to the benefit of cl 4 of the consent order. Additionally, a subsidiary yet important question was whether the judgment entered by the plaintiffs on 11 October 2001 could be regarded as regular on the face of it, when it omitted to take into account the amount of the cheque, consciously retained and appropriated by the plaintiffs.

16 In ***Hughes v Justin*** [1894] 1 QB 667, it was held by the Court of Appeal in England that where judgment is entered for too large a sum, the defendant in the action is entitled to have it set aside *ex*

debito justitiae and to have all his costs. The cheque sent by the defendants, inasmuch as it had been retained without communication of any reservation thereto, operated, in my view, as a conditional acceptance of satisfaction of the debt due and owing.

17 In ***Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd*** [1964] 2 QB 10 (CA), the facts as appear in the headnotes of the report are as follows.

18 The defendants sold goods supplied to them by the plaintiffs on the terms of a stocking agreement, and there was a running account between the parties. In August 1962, the plaintiffs issued a writ for 4,012 12s. 7d. against the defendants in respect of goods sold and delivered. Shortly afterwards the defendants paid 1,699 18s. 5d. by cheque, so reducing the plaintiffs claim to 2,312 14s. 2d., but they did not enter an appearance to the writ. On September 11, 1962, there was a meeting between the parties at which the plaintiffs were given and accepted a cheque for 1,179.19s. 11d., thereby reducing the claim to 1,132 14s. 3d. On September 13, 1962, the plaintiffs signed judgment in default of appearance for 2,312 14s. 2d., ignoring the cheque for 1,179 19s. 11d. given to them two days earlier, and which subsequently on September 18, 1962, was cashed through the clearing office of the bank. On July 29, 1963, the defendants applied to set aside the judgment as being irregular on the ground that it was entered for an amount in excess of that which was due when it was signed. The district registrar set aside the judgment upon the payment by the defendants of 600 into court; on appeal the judge in chambers set aside the judgment unconditionally but ordered that the costs of the application to the district registrar and the costs thrown away be the plaintiffs in any event, and that the costs of the appeal to the judge be the defendants costs in the case. Subsequent to his order the defendants obtained leave ex parte from the judge to appeal against his order as to costs.

19 On appeal, it was held that the ordinary rule that acceptance of a cheque was a conditional payment of a debt and that it operated to suspend a creditors remedies in respect of the debt until it was met or dishonoured applied to the case; that, therefore, the plaintiffs could not ignore the cheque accepted by them two days before signing judgment and, accordingly, the judgment being entered for too large a sum was irregular and the defendants notwithstanding their delay, were entitled to have it set aside *ex debito justitiae* and to have the costs of the application to set it aside and the costs thrown away in any event.

20 Danckwerts LJ observed at pages 21 and 22:

> Now the law is perfectly well settled that, in the absence of some special circumstances indicating that the cheque is accepted in absolute satisfaction of the debt which I imagine is unusual a cheque is accepted as a conditional payment of the debt, that is to say, conditional on the cheque not being dishonoured when presented for payment in the ordinary way. This cheque was not dishonoured, because it was in fact paid when presented and cleared through the proper banking method.
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> The short point in this case is whether the judgment, being signed for the amount for which it was signed, was incorrect and was irregular, so that the defendants were entitled to have it set aside as of right. The general rule, if applied in this case, would make it irregular, in my view, because the law is well settled that the acceptance of a cheque as conditional payment suspends the remedies of the creditors. But Mr. Warren claims that a case like the present is an exception to the general rule. He makes a distinction between a payment, as I understand it, before the action is begun and a payment made after the action

> is on foot, when the plaintiffs would normally be in a position to sign judgment in default of appearance or defence. The cases on which Mr. Warren relies seem to me to be very technical and special cases cases of rent where a landlord has a right of distress, and the right of distress is regarded as a better remedy than an action upon a cheque, and so it is taken that his acceptance of the cheque is conditional not only upon the cheque not being dishonoured, but upon the further condition that he should be entitled to pursue his other remedies. The same is said to apply in the case of a bond, or possibly in the case where a man has security. But those cases, in my opinion, are plainly distinguishable from the present case. The plaintiffs had not in fact a better remedy at the moment when they accepted the cheque.

21 In my evaluation, the plaintiffs holding on to the defendants cheque was no mere accident or inadvertence but a conscious act. In my opinion, they had misjudged the legal implications of their action in retaining and subsequently cashing the said cheque. In my determination, the plaintiffs proceeding to enter judgment, as they did, for a sum which did not take into account the amount stated in the fourth instalment cheque was irregular and ought to be set aside ex debito justitiae. In my view, the decision below would have been different if the Deputy Registrar as well as the District Judge were in fact apprised of the retention and cashing of the cheque by the plaintiffs.

22 For the reasons I have given, I allowed the appeal of the defendants and set aside the judgment entered against them. Although the defendants had succeeded on appeal, I ordered that each party shall bear its own costs on appeal in view of the fact that the aspect of the retention and the subsequent realisation of the amount of the said cheque was not raised before and surfaced only mid-way through the appeal hearing before me.

Order accordingly.

Sgd:

M P H RUBIN
JUDGE