**Judgment 40/2006** **Braun (as Insolvency Administrator of Walter Marketing GMBH & Co KG) v Brantridge Estates Limited – Royal Court (Civil Action File 996) – 25 August 2006**

---

**Requête Civile – default judgment set aside – both parties applied for costs on indemnity or alternatively recoverable basis - registered office of defendant company had changed while the summons was being served – exercise of discretion as to costs – see paragraphs 21 to 25 of the judgment - (See also Judgment 50/2006)**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

Civil File 996

The 25th day of August, 2006, before Richard John Collas, Esquire, Deputy Bailiff, sitting alone.

In the matter of

Between:

**DR EBERHARD BRAUN** Plaintiff
**AS INSOLVENCY ADMINISTRATOR**
**OF WALTER MARKETING GMBH & CO.KG**
V
**BRANTRIDGE ESTATES LIMITED** Defendants

Whereas on the 8th August 2006 the Deputy Bailiff considered an application by both Plaintiff and Defendant for Costs on an indemnity basis or alternatively on a recoverable basis and having heard thereon Advocates C.H. Edwards and K. Le Cras counsel for the Plaintiff and Defendant respectively the Deputy Bailiff this day gave judgment in the terms attached hereto and

DECLINED to order that either of the Parties should have to pay the Costs for which this matter makes them liable, on an indemnity basis.

S.M.D.ROSS

Her Majesty's Deputy Greffier

 

Final Judgment
25 August 2006

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**Between** **DR EBERHARD BRAUN AS INSOLVENCY ADMINISTRATOR OF WALTER MARKETING GMBH & CO.KG** **Plaintiff**

-v-

**BRANTRIDGE ESTATES LIMITED** **Defendant**

**REQUETE CIVILE – COSTS ORDER**

**Judgment handed down: 25 August 2006**

**Before: Richard John COLLAS Esq., Deputy-Bailiff**

Advocate for Plaintiff: Advocate C H Edwards
Advocate for Defendant: Advocate K Le Cras

1 The Companies (Guernsey) Law, 1994, s. 24(4).
2 Royal Court Civil Rules, 1989, Rules 4 and 48.
3 Hulme v Matheson Securities (Channel Islands) Ltd (No. 2) [1997] 24 GLJ 80
4 Thompson and Le Noury v Masterton and Bourne, Royal Court, 1 December 2003. (Judgment 63/2003)
5 Saromaje Ltd v Janet Holdings Ltd, Royal Court, 11 January 2000. 28 GLJ 29

1 Both parties have applied for costs on an indemnity basis or alternatively the recoverable basis. The costs in issue are in respect of a Requête Civile in which, on 17 March 2006, the Defendant successfully obtained an order setting aside a default judgment of 3 February 2006.

2 I remind myself that costs are at the discretion of the court, a discretion which must of course be exercised judicially in the light of the facts of the particular case.

3 I have been referred to a number of decisions where default judgments have been set aside by the Royal Court: either on a Requête Civile in the case of Royal Court judgments or on appeal from the Magistrate's Court in respect of petty debt judgments of that court.

4 In a great number of cases where a default judgment has been set aside, the petitioning defendant has been ordered to pay the plaintiff's costs, frequently on an indemnity basis. Very often that is because the defendant has been at fault in allowing the judgment to be granted, for example

 

where the plaintiff has obtained proper service and the defendant has been aware of the hearing but nevertheless has failed to appear because of some error on the part of itself or its Advocate.

5 I do not consider there to be an inflexible rule that the petitioning defendant will always have to pay the costs. For instance, a plaintiff might wrongly give HM Sergeant an incorrect Address for Service or the wrong Registered Office and thereby obtain an 'A' certificate of service under Rule 4 of the RCCR 1989 by directing HM Sergeant to leave the summons at the incorrect address. If the defendant could not reasonably have become aware of the summons, it would be wholly unjust if the defendant had to pay the costs of a Requête Civile in order to have set aside a default judgment obtained as a result of such incorrect service.

6 I conclude therefore that I must take account of all the facts of the case, including the circumstances in which the summons was served and the default judgment obtained.

7 In this case the problem arose largely because the Defendant's Registered Office was moved from one accountant's office to another on the day the summons was handed to HM Sergeant for service. It was an unfortunate coincidence and neither party can be blamed that both events happened on the same day.

8 The change in Registered Office resulted from the appointment of new company administrators the previous year. On 19 July 2005 the directors of the Defendant resolved to change the Registered Office. The Defendant has not satisfactorily explained why it took over six months to notify the Greffe of the new address but it can not properly be suggested that the purpose of the delay was to frustrate service.

9 The change of address was not effective until notice thereof was given to H M Greffier (s. 24(4) of the Companies (Guernsey) Law, 1994). A letter was sent to the Greffe on Friday 27 January 2006 and on Monday 30 January the Greffe noted the change in the Company Register. On that day the Plaintiff handed the summons to HM Sergeant and he served it on the following day, 31 January 2006, at the old address and gave an 'A' certificate of service, being unaware of the change in the Registered Office.

10 When the summons was served, a principal of the accountancy firm who had forgotten that the Registered Office had been changed accepted it. He forwarded it to an associated firm in Jersey who used to act as the administrators of the Defendant. He says he sent it by fax and post although the Jersey office have no record of receiving the fax and say they first became aware of the summons when it arrived in the post on Wednesday 1 February. They forwarded it to the Company Secretary in London at 8.00 pm the same day.

11 The fax addressed to the Company Secretary was placed on the desk of a Ms Schoenenberger on the morning of Thursday 2 February. She unfortunately was away on business and did not find it until 11.00 am the

 

following morning, Friday 3 February. She informed Herbert Towning, the Sole Director of the Defendant, but by then the default judgment had already been granted. He promptly instructed London lawyers who in turn instructed Carey Olsen to take steps to set aside the judgment.

12 Advocate Le Cras of Carey Olsen e-mailed Advocate Edwards of Ozannes acting for the Plaintiff at 5.51 pm that afternoon advising him that service had been defective because of the change of Registered Office.

13 Correspondence was then exchanged between the Advocates with a view to setting aside the judgment and on 9 February Advocate Le Cras emailed Advocate Wessels asking for a reply the same afternoon so that a consent order could be tabled in court the following day. He replied, *"agreed in principle – please provide draft Order to agree; I am sure we can get this done "out of turn" if need be"*. On 13 February Advocate Le Cras sent him a draft Consent Order setting aside the judgment with an undertaking that the Defendant would not dissipate assets up to the value of the Plaintiff's claim without consent or further order of the Court and reserving costs. Advocate Wessels replied the same day with some proposed amendments to place the action on the Pleading List with an address for Service for the Defendant. He also amended, and strengthened, the terms of the undertaking in terms which the Defendant found unacceptable.

14 On 14 February Advocate Le Cras wrote to Advocate Wessels enclosing an amended draft Consent Order in which she accepted many of the amendments requested but she wrote that in the opinion of the Defendant the Plaintiff had sought an undertaking in terms that amounted to a freezing of its assets and which it described as unworkable. The Defendant was only offering to undertake not to diminish its assets to a level that would prevent the Plaintiff enforcing a judgment. The Plaintiff rejected the terms of the proposed Consent Order. I note that if the Plaintiff had accepted the proposal it would have been in a better position than it is now because I later granted the Requête Civile unconditionally without requiring any undertaking.

15 I will first analyse the costs incurred up to and including 14 February before analysing the costs incurred after that date.

16 Counsel have been unable to refer to any previous case in which the Registered Office of a company has changed whilst a summons is in the process of being served. After very careful deliberation I have concluded that in such circumstances a defendant company should normally be responsible for the costs of setting aside a default judgment unless on the facts of the case that is unfair or unjust. I so decide because the plaintiff could not reasonably be expected to know the Office has moved and because I consider the defendant company is responsible for taking steps to ensure a summons or other formal document which is in the process of being served when the address is changed is forwarded without delay to the new address. In this case service was on an accountancy firm whose business includes the provision of registered offices and it is expected to have the systems and resources necessary to enable it properly to provide

 

such facilities. It should also have advised HM Sheriff that the Registered office had moved.

17 There were delays in bringing the summons to the attention of the Defendant's sole director; in the non-receipt of a fax at the office of the administrators in Jersey; and in leaving the Summons on the unattended desk of Ms Schoenenberger in London. The Defendant must also accept responsibility for the consequences of those delays.

18 The Defendant argues that the Plaintiff or its lawyers or Advocates were at fault in not advising the Defendant or its lawyers that proceedings were being issued in Guernsey even though their respective German lawyers had been in correspondence over the dispute. As a matter of courtesy one would have expected them to be notified but that is not a procedural requirement and not something for me to take into account.

19 The Defendant, through its director Mr Towning, alleges Advocate Edwards misled the court by not informing me the matter was in dispute and by failing to produce to me when applying for the default judgment any of the correspondence between the lawyers. The transcript of the hearing records that I asked Advocate Edwards if he was expecting anyone to appear in Court and he replied "*I haven't had any communication sir"*. Mr Towning also said in his affidavit (at paragraph 20) he is greatly concerned I may have been misled as to the Plaintiff's ability to have judgment awarded in its favour. The first head of relief sought was a declaration. I asked Advocate Edwards whether I could grant the judgment requested without first satisfying myself that the declaration could properly be made. He replied *"I don't think the declaration is a necessary pre-cursor for that Sir, it's really just a belt and braces trying to cover up all eventualities Sir."* In his affidavit Mr Towning explains why he says a declaratory order was needed. I can not at this stage of the proceedings form a view as to whether he is correct. I accept that what Advocate Edwards told me may be in accordance with his instructions and hence that he can not be said to have intended to mislead me.

20 It might have been prudent of Advocate Edwards to adjourn the original summons for one week to ensure the Defendant was aware of it but there was no procedural requirement for him to do so and his client should not be penalised in costs for not seeking an adjournment.

21 I therefore find no reason to displace the presumption that the Defendant should pay the initial costs of the Requête Civile which I limit to those incurred on and prior to 14 February.

22 The Plaintiff chose not to agree to the terms of the draft Consent Order proposed on 14 February. Instead it decided to oppose the Requête Civile in the hope of gaining an advantage by seeking to have the defence thrown out for lack of merit and by seeking an order that the Plaintiff provide security for the amount of the claim. Its opposition was unsuccessful. The well-established normal rule is that costs are ordered to follow the event and the Plaintiff must expect to bear the costs of its decision to oppose the Requête Civile.

23 I also have to decide the basis on which costs are to be paid, either on an indemnity or a recoverable basis. The Court's power to order costs on an

 

indemnity basis is in Rule 48(3) of the Royal Court Civil Rules, 1989 and the power may be exercised in the circumstances set out in Rule 48(4).

24 I am grateful to counsel for referring me to a number of Guernsey authorities including the decisions of the Court of Appeal in *Hulme v Matheson* *Securities (Channel Islands) Ltd*; of Lieutenant-Bailiff Day in *Thompson and Le Noury v Masterton and Bourne*; and Mr Day's earlier judgment, when Deputy Bailiff, in *Saromaje Ltd v Janet Holdings Ltd* where I was involved as counsel for the unsuccessful party.

25 I am not persuaded that the circumstances of the case are such as to justify an order that either of the parties should have to pay the costs for which this judgment makes them liable on an indemnity basis. In many situations where a default judgment is obtained, there may be fault on the part of the defendant that justifies indemnity costs but that is not so on the unusual facts of this case. As for the Plaintiff, it need not have defended the Requête Civile after 14 February but its decision to do so does not bring it within any of the circumstances set out in sub-Rule 48(4)(b).

 