

Judgment 8/2009

**Bank of Scotland v Moed; Bank of Scotland v West
Cliff Ltd – Royal Court (Civil Action File 1219) – 12
February 2009**

Royal Court Civil Rules, 2007 (Rules 51 and 52) – applications for summary judgment not pursued – plaintiff’s failure to comply with Court Orders – Court considered of its own motion striking out both sets of pleadings – defendants awarded costs in respect of the applications for summary judgment now deemed abandoned – directions given for progress of the substantive action

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil Action File 1219

The 12th day of February 2009 before Richard John Collas Esquire, Deputy Bailiff, sitting alone

Between:

BANK OF SCOTLAND

Plaintiff

and

PAUL HARRY MOED

Defendant

Between:

BANK OF SCOTLAND

Plaintiff

and

WEST CLIFF LIMITED

Defendant

The Deputy Bailiff having given consideration to exercising his power, under Rule 51(1) of the Royal Court Civil Rules 2007 (“the 2007 Rules”) to make an Order under Rule 52(2) (c) to strike out both sets of pleadings and having received representations thereon from Advocates M G A Dunster and J A S White counsel for the Plaintiff and responses thereto from Mr. P Moed this day handed down judgment in the terms attached hereto and ORDERED:

1. That the said Mr P Moed and West Cliff Ltd should be allowed their costs incurred in connection with the summary judgment application of the Plaintiff in these proceedings including travel costs, to be paid at the conclusion of the case, whatever the outcome.

2. In order to progress the substantive action the Deputy Bailiff further ORDERED

- a) Disclosure of documents by both parties limited so “standard disclosure” (as defined in Rule 65 of the 2007 Rules) by exchange of list of documents, by 4.00 pm on 6 March 2009.
- b) Inspection of documents by 4.00 pm on 13 March 2009 or if Mr Moed is unable to travel to the Island, copies of any documents to be requested by that time and date and to be supplied to the opposite party by 4.00 pm on 20 March 2009.
- c) A trial bundle to be lodged by the Plaintiff by 4.00 pm on 9 April 2009.
- d) A pre-trial review is to be held before the 15 May 2009 and Mr Moed is directed to advise the Deputy-Greffier by 4.00 pm on 20 February 2009 of any dates between 20 April and 15 May when he would be unable to travel to Guernsey for such a review.

S M D ROSS
Her Majesty’s Deputy Greffier

representation, the Plaintiff has not contested that conclusion and in its suggested further directions, it makes no mention of those applications. I therefore conclude that the applications for summary judgment have indeed been abandoned.

5. Mr Moed persists in claiming that he has applied for all actions to be struck-out, see for example, an e-mail from him to HM Greffier dated 30 January 2009 at 13:53 and several mentions of such an application in his response to the Plaintiff's representations. However, no such application has been brought by him in the manner prescribed by Rule 81 of the 2007 Rules, despite having been requested to do so, for example in Mr Ross' e-mail of 29 September 2009 at 17:13.
6. The Court will always endeavour to make allowances for parties who are unrepresented to assist them as much as it reasonably can. Mr Moed appears to have been testing the limits of the Court's tolerance in this matter by not lodging a formal application.
7. My understanding of his e-mails is that there are, in essence, possibly two bases he would seek to rely upon. First, the Plaintiff's failure to comply with Court Orders and second, that the Plaintiff's claims are without merit and are bound to fail.
8. As far as the latter is concerned, although Mr Moed has indicated the claims will be vigorously defended, I am not entirely sure whether he seeks to have them summarily dismissed as being without merit. However, even if that is what he is alleging, I would not be minded to agree. The Plaintiff's pleadings disclose at least a strong prima facie case against each of Mr Moed and West Cliff Limited. It will be for the Plaintiff to establish its claims in evidence at trial, as Mr Moed appears to accept in his reply to paragraph 4 of the Plaintiff's representations.
9. The main issue for me to decide is whether to strike out either or both of the claims, or what other action to take, in light of the Plaintiff's failure to comply with Court Orders. The failures to which I refer are detailed in Mr Ross' letter of 18 November and I do not need to repeat them here. The Plaintiff appears to accept and acknowledge its failings, but without showing any regret.
10. I believe it is not significant whether I deal with this under the powers contained in Rules 51 and 52 of the 2007 Rules or in the context of an application by Mr Moed, if I were to regard him as having tabled such an application. I believe the outcome will be the same in either case.
11. The principles governing the exercise of the English Courts' discretion to dismiss an action for non-compliance with a Rule, Practice Direction or Court Order are considered in paragraph 3.4.4 of the 2008 White Book.
12. The principles are addressed in the Plaintiff's representation and in Mr Moed's response to the representations.
13. The Plaintiff claims that its failure to comply has not prejudiced the Defendants. Mr Moed's response is that the Defendants have suffered a great deal of inconvenience and disruption as well as wasted costs and asks me to remember that they are not legally represented. Costs can of course be compensated with an appropriate Order.

Mr Moed does not explain what other inconvenience and disruption he has suffered. Mr Moed's e-mails indicate that he is very busy with a number of demands on his time. In that context I can understand that he may well have found it inconvenient and disruptive to deal with those matters, especially as he is acting without the benefit of legal advice.

14. Such prejudice to him must be weighed against the prejudice to the Plaintiff if it is unable to pursue a claim for the monies it alleges are owed to it by one or both of the Defendants.
15. Mr Moed disputes the Plaintiff's contention that it could issue fresh proceedings if the present actions are struck-out. He does so, apparently, on the basis that the proceedings are mis-guided and ill-funded. As I have said, it is not for me to make any factual findings at this stage. Determination of the merits will be for the Court to determine after a full hearing.
16. I entirely agree with Mr Moed's view that parties should at all times be respectful of Court Orders.
17. The Royal Court and the Court of Appeal have repeatedly stressed the importance of parties, and their Advocates, ensuring full compliance with Rules of Court, and the same applies to Orders of the Court. That is especially so following the introduction of the 2007 Rules, pursuant to which the Court is managing the litigation process to a greater extent than ever before.
18. Rule 43 of the 2007 Rules provides for variation of the dates by which certain matters are to be done and allows the parties to agree to vary certain dates without reference to the Court. Where it is necessary to apply to the Court, the Court will give due consideration to any good reason put forward. The Court endeavours to treat all such applications fairly and reasonably, recognising that there can be many good reasons why time periods that were set down with the best of intentions may be impossible to comply with either by the parties or their Advocates. I believe that generally the opposing parties and Advocates are aware of that and, where possible, they will agree to reasonable requests for an extension of time, without troubling the Court.
19. So, there is no excuse for an Advocate to find that he is in breach of a direction of the Court. If he knows that, for good reason, he is running out of time he should first ask his opponent to agree an extension. If his opponent refuses, or if it is one of those situations where only the Court can vary the date, he must without delay apply to the Court or else ensure that he pulls out all the stops to achieve what needs to be done by the date ordered by the Court.
20. Those who fail to do so and who allow a date to pass without complying throw themselves on the mercy of the Court and, to some extent, their opponent.
21. That having been said, how am I to deal with the present case? The conduct of the Plaintiff's case has been unacceptable but I do not believe it can be characterised as such a dereliction of duty on the part of its Advocate as the Court of Appeal faced in *E v E [2007 – 08] GLR 133*.

22. I have to balance the relative prejudice to the parties and I take account of the Plaintiff's abandonment of its application for summary judgment. In the circumstances, Mr Moed and West Cliff Ltd should be allowed their costs incurred in connection with the summary judgment application, including travel costs. I have to decide whether such costs should be payable forthwith or in any event. I might normally order them to be paid forthwith, but having regard to all the circumstances, including the circumstances in which the alleged debt is said to arise, I will order them to be paid at the conclusion of the case, whatever the outcome.

23. The substantive action needs to be progressed. I order:

- a) Disclosure of documents by both parties limited so "standard disclosure" (as defined in Rule 65 of the 2007 Rules) by exchange of list of documents, by 4.00 pm on 6 March 2009.
- b) Inspection of documents by 4.00 pm on 13 March 2009 or if Mr Moed is unable to travel to the Island, copies of any documents to be requested by that time and date and to be supplied to the opposite party by 4.00 pm on 20 March 2009.
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