No. 293

In the Court of Appeal of Guernsey

(Civil Division)

The 18th day of April, 2002 before Peter David Smith, Q.C. Presiding, Sir Philip Bailhache, and David Arthur John Vaughan Q. C.

GRAHAM CARROLL

Appellant

V.

HIGHSEAL WINDOWS LIMITED

Respondent

In the matter of the Appeal by GRAHAM CARROLL from the decision of the Royal Court made on 2nd January, 2001;

THE COURT, having heard the Appellant in person and Advocate St. J. A. Robilliard for the Respondent thereon, GAVE JUDGMENT in the terms attached hereto, DISMISSED the Appeal, AFFIRMED the decision of the Royal Court and AWARDED COSTS, on the standard basis, to the Respondent.

Registrar of the Court of Appeal

THURSDAY 18TH APRIL 2002

B

COURT OF APPEAL

C **Before**

Peter David Smith, Esq., QC, Presiding
Sir Philip Bailhache,
David Arthur John Vaughan, Esq., CBE, QC

D

GRAHAM CARROLL

- v -

E

HIGHSEAL WINDOWS LIMITED

(Civil Appeal No. 293)

F

Judgment delivered by Peter David Smith, Esq., QC

PETER DAVID SMITH, QC: The judgment that I am about to deliver is the judgment of the Court. On the 10th March 1999, an entity called "The Conservatory Centre" G instituted proceedings in England against the Respondent in the instant appeal, Highseal Windows Limited, hereafter called "Highseal". Shortly afterwards Highseal issued a counter-claim in those proceedings. On 25th October 1999, the Great Grimsby County Court, which was by then seized of the proceedings, ordered "The Conservatory Centre" to reply to a request for further and better particulars and serve a list of documents and provide copies thereof. The sanctions for failure to H comply were that the claim was to be struck out and Highseal was to be at liberty to enter judgment on the counter-claim. By an Order dated 13th December 1999, the English Court ordered that the claim be struck out and that there be judgment for Highseal against "The Conservatory Centre" in the sum of £72,046.43 plus costs of £1,889.78 and interest in the sum of £3,647.72, a total of £77,583.93, on the ground of failure to comply with the Order of 25th October 1999.

I

On 19th May 2000 Highseal issued a summons in Guernsey seeking to enforce the English judgment against the Appellant and a Mr Gary Martel who were alleged to trade together as "The Conservatory Centre". On 14th July 2000 the Appellant filed defences which, by reference to Highseal's cause, admitted among other things that the Appellant and Martel had at all material times traded as a partnership known as "The Conservatory Centre". The defences went on to make a number of allegations as to the merits of the claim brought by "The Conservatory Centre" against Highseal in England and purporting to explain why the order of the English Court was not complied with or the full judgment appealed against.

In response to these defences Highseal brought an application for summary judgment against the Appellant. Thereupon the Appellant sought and was granted leave to amend his defences by deleting his original defences in full and substituting one sentence in their place in the following terms: "There has been no judgment entered in the Great Grimsby County Court against Graham Carroll and as such there is no case to answer."

The summons for summary judgment duly came on for hearing before Mr A R W Hancox, Lieutenant Bailiff, sitting alone and on 2nd January 2001 he gave judgment in favour of Highseal. In his judgment the Lieutenant Bailiff pointed out that, by virtue of the Judgments (Reciprocal Enforcement) (Amendment) Ordinance, 1991, the Judgment (Reciprocal Enforcement) (Guernsey) Law, 1957 applies only to judgments of the High Court and not to those of the County Courts of England and Wales. However, he held that the English judgment constituted a debt upon which Highseal was entitled to sue in Guernsey. The Lieutenant Bailiff held that an application for summary judgment was an appropriate procedure. He considered that the admissions comprised in the Appellant's original defences that the Appellant and Mr Martel traded as a partnership known as "The Conservatory Centre", that they instituted proceedings in England in that name and the presumption that they were continuing to trade as partners when judgment was entered on the counter claim had not been displaced. He concluded that the defence raised by the Appellant in his substituted defences was a spurious one, that there was no fairly arguable case and no fairly triable issues. He therefore granted the summary judgment sought against the Appellant with costs.

In his Notice of Appeal the Appellant complained that the Lieutenant Bailiff allowed his original defences to be used in evidence not withstanding that the Appellant had substituted "these incorrect defences" by means of the successful application to Court to which we have referred. Secondly, he asserted that he had requested that Mr Martel, the first named Defendant to the instant proceedings (the Appellant being the second named Defendant), be joined as a third party under Rule 33, Sub-rule 7 of the Royal Court Civil Rules, 1989 but that this application was not mentioned in the Lieutenant Bailiff's judgment and seemed to have been ignored by him.

The Appellant appeared in person before us to prosecute his appeal. He developed his first ground of appeal in a document he had prepared and supplemented this with oral submissions on both grounds. We are grateful to him for the clarity and economy of everything he placed before us.

A

It emerged in the course of his submissions to us that, as far as the Appellant is concerned, he did indeed trade in partnership with Mr Martel as "The Conservatory Centre", although it seems that Mr Martel disputes this. The Appellant told us that there was even a written partnership agreement. The Appellant ran the sales side of the business and Martel was responsible for the manufacture of the conservatories. The Appellant was aware of the purchase of goods from Highseal and that there was a dispute as a result of which he assumed that Martel would not have paid Highseal invoices. The Appellant appears to be aware that proceedings against Highseal in England were at least contemplated. The Appellant's first defences were drafted after discussion with Martel and included information supplied by him.

B

C

When it came down to it the Appellant's essential complaint was that Highseal ought to have been required to prove that he was a partner in "The Conservatory Centre" referred to in the English judgment, without reference to his original defences. We cannot accept this submission. The original defences were drafted by the Appellant and were not just the suggestions of his lawyer. It may well be that much of the material came from Martel, but the crucial admission that the Appellant traded as "The Conservatory Centre" patently came from the Appellant himself and once made could not be retrieved merely by the expedient of amendment. The same applies to the admission that the Appellant was a partner in that business. The Appellant conceded before us that even if Mr Martel were successfully to contend that he was not a partner, this would only mean that the Appellant was the principal of "The Conservatory Centre" business. It follows that in our view, the Lieutenant Bailiff cannot be faulted for having taken the original defences into account. Therefore, he was correct in concluding that the English judgment against "The Conservatory Centre" was a judgment against the Appellant.

D

E

Even if the English proceedings were initiated by Martel, the Appellant's assertion of partnership means that he cannot be heard to say that Martel was not acting as his agent. The English judgment is enforceable against the Appellant as a debt, because in the circumstances described all the merits of the case must be deemed to have been open to the Appellant in the English proceedings. Neither the fact that the English judgment was obtained by default, nor the reasons why this occurred and no appeal was pursued, may be raised by way of defence to Highseal's claim. See Nouvion v Freeman 1889, 15 App. Cas. 1 at pp. 9 and 10.

F

G

As far as the Appellant's request to join Mr Martel as the third party is concerned, the Appellant told us that he wished to establish by this procedure that Mr Martel was indeed his partner so that he would take his share of the responsibility for the Highseal judgment. However, this is an issue between the Appellant and Martel and does not provide a ground for refusing the application for summary judgment. Advocate Robilliard, who appeared for Highseal and to whom we are grateful for his helpful submissions, indicated in the course of the hearing before us that his client would not object to the Appellant pursuing this in their continuing proceedings against Mr Martel. If the Appellant decides to adopt this course it will be necessary for him to take the requisite procedural steps in the Royal Court in due course. Accordingly we dismiss this appeal and affirm the Order of the Royal Court. Is there anything further?

H

I

ADVOCATE ROBILLIARD: Sir I would apply for costs.

PETER DAVID SMITH, QC: Well I think costs follow the event do they?

ADVOCATE ROBILLIARD: Yes Sir, could I just say one thing about costs? The scale of costs has not been changed in this Court since 1991. It is a very low scale of costs compared with the scale of costs that apply in the Royal Court. It is possible for the Court to depart from that scale.

PETER DAVID SMITH, QC: Well Mr Robilliard. I don't think we would be prepared to depart from the costs that follow the event Mr Robilliard, in this particular case.

ADVOCATE ROBILLIARD: In that case I would apply for costs on the normal basis Sir.

PETER DAVID SMITH, QC: Is that the equivalent of the standard basis then? What we would understand to be the standard basis? Greffier, that is the appropriate order?

H.M. GREFFIER: Yes Sir.

ADVOCATE ROBILLIARD: I would like to bring to this Bench's attention that the scale has not been changed for many years.

PETER DAVID SMITH, QC: Mr Robilliard you are perfectly entitled to do that. The way that I would suggest that you deal with that is that you write to the President of the Court here, the Bailiff, and draw that to his attention. The other way of dealing with it, I am not sure whether is requires a rule change or a practice direction. Greffier, what do you think?

H.M. GREFFIER: The rule is made by the Bailiff, Sir.

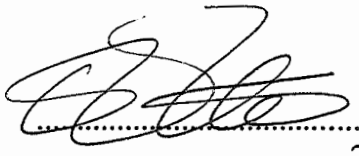
PETER DAVID SMITH, QC: Obviously Mr Robilliard, what cannot be done in a case involving, if it is a matter for it to be dealt with in an individual case, it would be quite inappropriate that some major change should be considered or contemplated in a case involving an un-represented applicant.

ADVOCATE ROBILLIARD: I was getting up to an application for indemnity costs, but I won't pursue that in this case and as you rightly say Sir, I will take it up through the appropriate channels, perhaps through our Bar Council.

PETER DAVID SMITH, QC: But thank you for mentioning it to us in any event. So that concludes this matter as far as this Court is seized of it. We are going to rise now and we are going to sit again in a different format.

oooOOOooo

I, Emma White, hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceeding in this case.



..... Emma White
29th May 2002