BERMUDA

SUPREME COURT

Peirce Capital -v- W Stewart et al [2016] SC (Bda) 33 Civ

DEFAULT JUDGMENT - APPLICATION TO SET ASIDE - DEFENCE WITH REAL PROSPECTS OF SUCCESS - LITIGATION OF ISSUES DECIDED IN NEW YORK DIVORCE PROCEEDINGS BETWEEN THE DEFENDANTS - UNDERTAKING BY PLAINTIFF TO ENFORCE LOCAL JUDGMENT IN CONFORMITY WITH NEW YORK EQUITABLE DISTRIBUTION ORDER

This case involved two Defendants which were debtors to the Plaintiff Company, which sought to recover sums totalling some US$43.6 million lent to the Defendants in connection with their purchase of a property. After entering appearances in relation to the originating summons, the Defendants did not effectively file Defences in the 14 days after their respective appearances, and the Plaintiff became entitled to enter judgment in default of defence for its claim under Order 19 Rule 2 of the Rules of Court. The Plaintiff entered Judgments in Default of defence against both Defendant 2 ("D2") and Defendant 1 ("D1"), each in respect of the full sum of the debt with costs to be taxed. Subsequently, D2 issued a Summons seeking to set aside the Judgment in Default of Defence. However, concerns arose from the fact that as the Plaintiff company was controlled by D1, who had been involved in "acrimonious" divorce proceedings with D2, the Plaintiff might seek to recover the full judgment debt from D2.

Kawaley CJ considered the basis upon which default judgments may be set aside and found, based on the authorities and the principles set out in the 1999 White Book (page 160), that any defences entered as to default judgments must have a 'real prospect of success' before they may justify leave to defend under Order 14. The Court therefore examined the proposed Defence filed by D2, which proceeded on substantially similar grounds to those raised by D2 in the New York Divorce Proceedings between herself and D1 regarding the equitable distribution of marital debt. In those proceedings, the contentions made by D2 that she held no liability for the debt resulting from the property purchase because she had revoked power of attorney for the purpose of entering the agreements with the Plaintiff at the material times, because she had not entered into an agreement with the Plaintiff in 2011, and because she had no knowledge of relevant transactions entered into by D1 alone, were all expressly rejected in the Special Referee's report on the basis of substantial documentary proof to the contrary. However, the Referee then recommended that the marital debt, including the sums awarded to the Plaintiff in the present proceedings, ought to be borne 70% by D1 and 30% by D2 (the "New York Order"). This recommendation was later upheld in both the first instance of the Supreme Court of the State of New York and subsequently in the Appellate Division.

On these facts, Kawaley CJ considered that any evidence adduced by the Bermuda Court to evaluate the defence offered by D2 would likely come to the same conclusions reached by the New York Court, and hence that she had "palpably failed" to bring a defence with a realistic chance of setting aside the Default Judgment. Therefore, her application to set aside the Default Judgment was dismissed.

However, due to the legitimate concerns raised regarding D1's control of the Plaintiff Company and the potential of the Plaintiff to enforce the Default Judgment in a manner inconsistent with the New York Order, thereby misusing the processes of the

Bermuda Court, Kawaley CJ adjourned the hearing in February 2016 for the Plaintiff to take instructions regarding potential undertakings. At the resumed hearing in March 2016, D1 agreed to supplement an undertaking offered by the Plaintiff not to take enforcement against D2 beyond her 30% share of the judgment debt.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.