

IN THE COURT OF APPEAL OF BELIZE, A.D. 2022
CIVIL APPEAL NO. 2 OF 2021

CINSTEN INVESTMENTS LIMITED

APPELLANT

AND

CARENZO TRADING LIMITED

RESPONDENT

BEFORE

The Hon Madam Justice Hafiz-Bertram
The Hon Madam Justice Woodstock-Riley
The Hon Mr. Justice Foster

President (Ag.)
Justice of Appeal
Justice of Appeal

N Ebanks for the appellant.
A Jenkins for the respondent.

13 June 2022 and 30 August 2022

REASONS FOR JUDGMENT

HAFIZ-BERTRAM, P (Ag.)

[1] I had the opportunity of reading the draft judgment of my learned sister Woodstock-Riley, JA and I agree with her reasons for the disposal of the appeal and the Order made therein.

HAFIZ-BERTRAM, P (Ag)

WOODSTOCK-RILEY, JA

Introduction

Claim

[2] The Respondent filed Claim No. 726 of 2018 against the Appellant to recover the principal debt of US\$4,865,000.00 and interest at the contractual rate or pursuant to sections 166 and 167 of the *Supreme Court of Judicature Act*.

[3] The debt claimed is pursuant to a Loan Agreement dated the 9th January, 2012 as pleaded, and referred to in the Claimant's Statement of Claim as follows:

“3. Carenso and Cinsten entered into a Loan Agreement dated 9th January, 2012, by which Carenso agreed to lend, and Cinsten agreed to borrow US\$4,865,000 (“the Loan Agreement”). A copy of the Loan Agreement is attached hereto as Annex 1.

4. Pursuant to the Loan Agreement, Carenso loaned US\$4,865,000 to Cinsten with an effective date of 10 January, 2012 (“the Debt”).

5. According to clause 4 of the Loan Agreement (i) Cinsten agreed to repay the Debt in installments or a lump sum at its discretion before the 9 January, 2015, in effect a three-year loan, and (ii) Interest accrued on the Debt at 2.5% per year and was chargeable on a monthly basis until the debt was fully repaid.”

Defence

[4] The Appellant's Defence to the claim is ultimately contained in its Amended Defence dated August 30, 2019. In the main, the Appellant says that the Loan Agreement on which the Respondent relied in the Supreme Court is a forgery. It further contends that, in any event, it has

never intended to nor did it ever, create legal relations with the Appellant. An alleged repayment, it says, was not a bona fide repayment of any loan allegedly made with the Respondent. Rather, persons who are now associated with the Respondent, and at the time of repayment also associated with the Appellant, made those payments with the objective of perpetrating the false appearance that such a loan existed when it did not.

[5] The Appellant applied to the Supreme Court for Specific Disclosure of the original of the document that the Respondent referred to in its Claim Form as the Loan Agreement.

[6] By an Order of the Court of the 11th December, 2019, the following particular orders were made:

“(1) That the Claimant do make specific disclosure of the original of that document referred to in its Statement of Claim as the “Loan Agreement.”

...

(5) That the experts are to determine the authenticity of signatures of Mr. Ievgen Prokopenko and Mr. Oleksandr Paryshkura and, for that purpose, to review and consider signatures from official contemporaneous documentation including passport or other documents of public record and in addition and/or in the alternative review and consider no less than 20 specimen signatures to be given in the presence of a notary public and the Respondent’s representative, and duly apostilled.”

[7] By the Respondent/Claimant’s List of Documents dated 29th January, 2020, the Claimant disclosed as document numbers 1 and 2,

“1. Copy of Original Loan Agreement #CTL-CIL/2012-01 dated 9th January, 2012 in the possession of the Claimant.

2. Copy of the scanned Loan Agreement #CTL-CIL/2012-01 dated 9th January, 2012 that was annexed to the Statement of Claim that was one of two that the parties had executed.”

[8] On the 4th February, 2020, the Appellant’s attorneys wrote to the Respondent’s attorneys requesting clarification of the documents disclosed, requesting confirmation as to which of the two disclosed documents was in the possession of the Respondent’s counsel.

[9] The Respondent’s counsel replied on the 14th February, 2020, indicating that the original Loan Agreement that was couriered to the Respondent’s counsel was that disclosed at number 1 of the List of Documents. Therefore not the one annexed to the Statement of Claim and not a ‘copy’ as described in number 1 of the List of Documents, but an original.

[10] By letter dated the 28th February, 2020, the Appellant’s counsel objected and indicated its view that the Order for Specific Disclosure was not complied with because the original Loan Agreement, which would be produced for inspection by the experts is not the identical Loan Agreement that was annexed to the Statement of Claim.

[11] The Defendant filed a Notice of Application dated the 5th March, 2020 for an Unless Order on the following grounds:

“1. On the Defendant’s application, the Honourable Court on December 11, 2019 ordered the Claimant to “make specific disclosure of the original of that document referred to in its Statement of Claim (and herein) as the ‘Loan Agreement.’”

*2. On 29 January, 2020, the Claimant served the Defendant, through its attorneys, with a List of Documents dated 29th January, 2020 (the “**List of Documents**”) in purported compliance with the Order.*

3. The Claimant has failed to comply with the Order and remains in breach of it because it has failed to produce, and make available for the experts’ inspection, the document required by the Order. That is to say “the original of that document referred to in its Statement of Claim as the ‘Loan Agreement’”.

4. It is in the interest of justice that the Orders prayed herein be granted.”

[12] The said application for an unless order was dismissed, and instead, the Court indicated that the Respondent could only rely on the original copy which it disclosed and produced for inspection. This was not reflected in the final Order however, but Counsel for the Respondent confirmed this to be the case and gave his undertaking not to rely on that copy of the Agreement.

[13] The Appellant appealed the said Order by Notice of Appeal filed on 15th March 2021 and sought that the decision of the Trial Judge be set aside.

[14] At the hearing of the Appeal on 13th June 2022 this Court dismissed the Appeal and undertook to give its reasons in writing. We do so now.

[15] There was merit in the Appellant's Submissions that the Order for specific disclosure was not complied with. The Statement of Claim referred to **a Loan Agreement** dated 9th January 2012 and that '**a copy of the Loan Agreement is attached hereto**'. The order made was for the specific disclosure of "**that**" document referred to in its Statement of Claim as the Loan Agreement and for inspection by the experts. The original of that document was not disclosed and presented for inspection. The Respondent asserts the Agreement was signed in counterpart, it does not have the original of the one it exhibited annexed to its Statement of Claim and it only has the original of the counterpart referred to at number 1 of its List of Documents.

[16] Even accepting this however the issue would arise as to what are the consequences for the inability to provide the original of the one annexed to its Statement of Claim. Counsel for the Appellant despite being pressed was unable to articulate the prejudice to the Appellant, especially in light of the determination that the Respondent would not be allowed to rely on that copy of the Agreement it had annexed to the Statement of Claim.

[17] An Unless Order is an extreme measure. The CPR clearly sets out the possible consequences for a failure to disclose as follows, (though the Respondent asserts that it did disclose the Loan Agreement as required)

- a. *a party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial (rule 28.13 (1) of the CPR);*
- b. *A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out (rule 28.13(2) of the CPR); and*
- c. *the Court may make an unless order (rule 28.13(4) of the CPR).*

[18] The options available to the Court in these circumstances was noted in ***RBTT Caribbean Limited v Olson Robertson et al*** High Court Civil Claim No. 17 of 2003, at paragraphs 9 and 10:

“[9] Part 28.4 in effect provides that a party must comply with the direction of the court to make disclosure. If a party fails to comply with the direction of the Court, Part 28:13 provides the sanctions that may be imposed on that party. The sanctions are prevention of use of the document, the party’s statement of case or part of it may be struck, or the Court may make an “unless order”.

[10] It must be noted that “may” in Part 28:13 is not mandatory but permissive. The Court has a discretion whether to impose the sanction. This discretion must be exercised in keeping with the overriding objective of CPR 2000. In exercising this discretion the Court must take into account the circumstances of the case.”

[19] The Respondent will not be allowed to rely on the document it cannot produce and the Appellant will still have the opportunity for its experts to inspect the original of the document the Respondent will have to rely on and the opportunity to establish the issue of forgery. In the circumstances, it is this Court’s view that the Trial Judge’s decision in the exercise of her discretion not to impose the sanction of an unless order was not unreasonable. In the circumstances and

accordingly it was for these reasons the appeal to set aside her decision was dismissed. The Order of the Court follows in light of the dismissal:

[20] Order

- (1) The Appeal is dismissed.
- (2) The Respondent is restricted to relying on the original of the Agreement it disclosed and the matter remitted to the High Court for case management orders and any amendments required.
- (3) Costs in the cause.

WOODSTOCK-RILEY, JA

FOSTER, JA

[21] I have had the opportunity to read the judgment of my sister Justice of Appeal Marguerite Woodstock-Riley and I concur with her reasons and the orders made.

FOSTER, JA