In The Supreme Court of Bermuda

CIVIL JURISDICTION
2023 No: 309

BETWEEN:

HILLCREST PROPERTIES LTD.

Plaintiff

And

IAN ROBERT MACDONALD-SMITH

Defendant

RULING

Dates of Hearing: Wednesday 16 July 2025
Date of Ruling: Wednesday 03 Dec 2025

Plaintiff: Mr. Paul Harshaw (Canterbury Law Limited)
Defendant: Mr. Conor Doyle (Conyers Dill & Pearman Limited)

Application to set aside judgment entered in default of appearance / Whether judgment was irregular / Application for permanent stay of proceedings pursuant to section 7 of the Arbitration Act 1986 / Application for security of costs

RULING of Shade Subair Williams J

Introduction

1. Having filed a summons dated 16 January 2025, the Defendant makes two applications before this Court, namely (i) an application to set aside judgment in default of appearance and (ii) an application for a permanent stay of proceedings pursuant to section 7 of the Arbitration Act 1986.

2. The Plaintiff, Hilcrest Properties Ltd ("Hilcrest"), by its summonses dated 14 April 2025 and 19 June 2025 seek an order that the Defendant be required to provide security for costs pursuant to RSC Order 23 Rule 1(1(a)) and / or (b) and / or Order 13 Rule 9 and / or the inherent jurisdiction of the Court.

3. All three applications were argued before me and at the close of the hearing I reserved my decision which I now give with reasons.

Background Facts to the Plaintiffs Claim

4. On the underlying facts, this is a landlord and tenant dispute.

5. Hilcrest owns and manages "Hilcrest Apartments" which is a residential development comprising six units at 5 Clarendon Lane in Hamilton Parish.

6. By a deed of assignment dated 7 December 1994 (the "Deed of Assignment") the Defendant came to hold a long leasehold interest in Unit 1 of the Hilcrest Apartments. The Deed of Assignment refers to a lease agreement of 22 December 1988 (the Unit 1 Lease") between Hilcrest and the Defendant together with his predecessors. However, the Defendant deposed that he does not recall ever having received a copy of the Unit 1 Lease. That being the case, the Court was never shown a copy of the Unit 1 Lease as the Plaintiff, having obtained a default judgment, was never required to produce a copy of the Unit 1 Lease at this stage of these proceedings.

7. By Specially Indorsed Writ of Summons dated 18 September 2023, the Plaintiff claimed for unpaid maintenance expenses said to be due and owing to the Plaintiff pursuant to Byelaw 24.1.4. The Plaintiff's pleaded case was that its Byelaws constitute a statutory contract between the Plaintiff and, *inter alia*, the Defendant.

8. The Defendant states that it disputes the Plaintiff's claim in its entirety.

Litigation History Giving Rise to the Entry of Judgment in Default

9. On the Defendant's first affidavit, he deposed that when these proceedings commenced, he was outside of Bermuda. At paras [8]-[10] the Defendant stated:

   "*I was not in Bermuda when the Plaintiff issued the present proceedings. I understand that, in January 2024, the Plaintiff obtained an order permitting substituted service by way of an advertisement in The Royal Gazette. I was still abroad when the notice appeared in the newspaper. A friend of mine happened to see the notice, however, and informed me of it in or around March 2024.*

   The Plaintiff obtained judgment in default of appearance against me on 6 March 2024…I was still out of the jurisdiction at that time. I returned to Bermuda in June 2024. I had assumed initially that the judgment against me was final irrevocable. It was not until I took legal advice some months later that I came to understand my ability to apply to set aside the default judgment."

10. Counsel for the Defendant, Mr. Doyle, pointed to the affidavit evidence of 19 September 2023 sworn by Mr. Richard Harold Goodwin, a Director of Hilcrest. That affidavit was previously filed by the Plaintiff in support of its application for an order for substituted service. Mr. Doyle argued that this evidence establishes that the Plaintiff was aware that the Defendant likely resided overseas when these proceedings were issued. At paras [10]-[13] Mr. Goodwin deposed:

    "*The Defendant has variously claimed to be resident in New Zealand and in England over the past 5 years. I do not know where he lives now. I only know that his condominium unit at the Property is currently tenanted. It is tenanted by a Ms. Ana-Maria Lucyshyn, an employee of Deloitte Bermuda. I believe she has a 1 year tenancy agreement.*
    By letter dated 29 August 2023 Cantebury Law Limited wrote to Christopher E. Swan & Co., attorneys for the Defendant in relation to other actions between the parties, asking if that firm was authorised to accept service of the Writ of Summons herein on behalf of the Defendant... I am informed by Paul Harshaw of Cantebury Law Limited and believe that Christopher E. Swan & Co. has not responded to that letter.

    I believe that the Defendant owns a property in or near Farnham in Surrey in the United Kingdom but I do not know the address of that property nor am I aware of any way of discovering that address.

The Defendant has a Facebook page. He posted on that Facebook page as recently as 25 June 2023… I believe that if notice of the Writ of Summons is sent to the Defendant's Facebook page it will come to the attention of the Defendant."

11. Based on this evidence, Mr. Doyle argued that the Plaintiff ought not to have sought an order for substituted service which was granted by Mussenden J (as he then was) on 26 October 2023 in answer to the Plaintiff's 18 October 2023 summons. Instead, he argued, it would have been more appropriate for the Plaintiff to have engaged in a more thorough search for the Defendant. Such steps could have entailed an enquiry of the Defendant's sub-tenant as to his whereabouts.

12. Under Mussenden J's 26 October 2023 order (the "original Substituted Service Order"), the Plaintiff was permitted to serve the Defendant by way of a posting on his Facebook Page. Service of the Writ of Summons was to be deemed effective once a period of 7 days expired after the posting on the Defendant's Facebook page. Thereafter, the Defendant was entitled to file a Memorandum of Appearance within 28 days.

13. A further summons, dated 28 September 2023, was filed by the Plaintiff. The application was for the original Substituted Service Order to be varied to provide for substituted service by way of publication of notice of the Writ of Summons in the Royal Gazette newspaper in Bermuda. That application was supported by the affidavit evidence of Ms. Chelsea Catherine Cooke, sworn on 30 November 2023. Ms. Cooke, an employee of Canterbury Law Limited ("Canterbury"), deposed that the law firm was unable to make a posting on the Defendant's Facebook Page on behalf of the Plaintiff because the ability to make postings were restricted to Facebook friends of the Defendant. Against that background, the Plaintiff sought an order for substituted service by way of a Royal Gazette public notice.

14. On 11 January 2024 Mussenden A/CJ (as he then was) granted the application to vary his previous order (the "varied Substituted Service Order"). The result of which was that notice in Bermuda newspaper was to be given to a Defendant, who, on the evidence before the Court, was likely residing outside of Bermuda.

15. The application for the Default Judgment followed on the strength of Ms. Anita Perry's affidavit of 29 February 2024. Ms. Perry's evidence was filed in her capacity as an employee of the Plaintiff's law firm, Canterbury. In her evidence, she referred to the Royal Gazette Notice but made no mention of the previously deposed facts about the Defendant's sublet arrangement or the fact that he was likely residing between England and New Zealand over the preceding 5-year period. Judgment in Default of the Defendant's appearance was thus entered administratively by an Acting Registrar or Assistant Registrar on 6 March 2024.

16. On 31 January 2025 the Defendant swore a second affidavit to clarify that he was of no fixed residence and did not reside in the Hilcrest apartment. He stated that he had been subleasing his Unit 1 apartment since 2023 and that he regards that property as his home; however, he was of no fixed abode because, as a professional photographer, he travels all over the world and does no remain in any one place for more than a few months at a time. The Defendant stated in his evidence that on occasion he returns to Bermuda and when he does, he lodges with friends.

The Arbitration Clause and the Application for the Stay

17. The Plaintiff produced a copy of a lease agreement between the Hilcrest and the leaseholders of Unit 4, dated 20 January 1989. (the "Unit 4 Lease"). Under Clause 4(e) of the Unit 4 Lease, it states:

    "*That all or any part of Hilcrest Apartments leased or to be leased by the Landlord shall contain substantially the same covenants stipulations and conditions as are herein set forth except as to the dates of such leases and the amounts of the consideration payable on the granting of such leases and the commencing date of such leases*…".

18. The Defendant relies on Clause 4(e) to support an inference that the Unit 1 Lease is expressed in materially identical terms to the Unit 4 Lease. The Defendant argued that this inference is particularly compelling given that the Unit 1 Lease predates the Unit 4 Lease by only one month.

19. Under Clause 5(c) of the Unit 4 Lease there appears the following arbitration clause:

    "*If any dispute or question whatsoever shall arise between the parties hereto the matter in difference shall be submitted to a single arbitrator and each submission shall be considered a reference to arbitration within the meaning of the Arbitration Act, 1924 or any Act for the time being in force amending or replacing the said Act. The decision of such arbitrator shall be final and binding upon the parties hereto*."

20. The Defendant contends that the Unit 1 Lease would also, in all likelihood, contain this same arbitration clause, having regard to Clause 4(e) of the Unit 4 Lease.

21. In terms of the scope of the arbitration clause, Mr. Doyle argued that the clause is in the broadest possible terms as it covers "*any dispute or question whatsoever…between the parties hereto*". Mr. Doyle pointed out that the clause is not restricted to disputes arising out of the Unit 1 Lease and that it would equally apply to maintenance payment disputes arising out of the Byelaws.

22. In Mr. Doyle's written submissions at para [18]-[19] he argued:

"*18. …For the avoidance of doubt, however:*

a. Clause 1 of the Unit 4 Lease provides that the Tenant shall pay "maintenance expenses" to the Landlord…It is therefore clear that any obligation to pay maintenance expenses is an obligation imposed by the Head Lease [what I refer to as the Unit 1 Lease].

b. By-Law 24.1.4 simply empowers its Board of Directors to "collect maintenance expenses from Members". Contrary to the Plaintiff's later assertions, this provision does not allow for the imposition of maintenance charges, it simply authorizes the Board to collect them. The verb 'to collect' envisions a far more managerial or passive exercise than 'to impose' or 'to require', or even 'to charge'.

c. The Bye-Laws themselves clearly recognise that the Members' obligations arise out of their leases. By-Law 7 sets out that "The Company shall at all times have a first and paramount lien upon the shares owned by each Member for all indebtedness and obligations owing and to be owing, by such Member to the Company, arising under the provision of any Lease issued to the Company, and at any time held by such member, or otherwise arising" (emphasis added). This reflects the plain fact that the principal source of a tenant's obligations to their landlord is the lease."

19. The arbitration clause is also expressed in mandatory terms ("shall be submitted"). Given that the parties' dispute is captured by the arbitration clause, the commencement of these proceedings constituted a breach of that mandatory provision."

The Relevant Law

The Procedural Law on Judgment in Default of Appearance

23. RSC Order 13/1(1) is the procedural rule which governs applications for judgment in default of an appearance to a writ where the claim is for a liquidated demand. It provides:

"*13/1 Claim for liquidated demand*
(1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any."

Section 7 of the Arbitration Act 1986

24. The Court's power to stay proceedings under section 7 of the Arbitration Act 1986 (the "1986 Act") applies to domestic arbitration agreements. Section 7 provides:

"*Staying court proceedings where there is submission to arbitration*
7 If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, and any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the [p]roper conduct of the arbitration may make an order staying the proceedings."

25. In *Canevale Management Ltd v Pearman* 2000 Civ. Jur. No. 357 Meerabux J said at page [7]:

"*I will next consider how the Courts view parties' choice to refer disputes or differences to arbitration and arbitration clauses.*

I think where the parties have chosen to refer their disputes or differences to arbitration the Courts will enforce such a reference by staying legal proceedings concerning any matter agreed to be referred 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement'. See section 7 of the 1986 Act. In other words to arbitration they should go in the ordinary course unless there is some good reason to the contrary.
...
I think that the Court has to start on a strong bias in favour of maintaining the special bargain between the parties (citing the House of Lords decision in Heyman v Darwins Limited (H.L.(E.)) [1942] AC 356)"

Decision on the Application to set aside Judgment in Default of Appearance

26. Mussenden J made the original Substituted Service Order on evidence which established (i) that the Defendant was subletting Unit 1 of the Hilcrest apartments and (ii) that there was a strong likelihood that the Defendant was residing outside of Bermuda in either the United Kingdom or New Zealand.

27. There is no suggestion on the evidence which was before Mussenden J that the Plaintiff made enquiries of the sub-tenant as to the Defendant's whereabouts or as to the date of his next return trip to Bermuda. Notwithstanding, it was made known to the Court that the Defendant had made very recent use of his Facebook account. As I see it, an Order for substituted service via a Facebook posting was not unreasonable under those circumstances. However, when the Plaintiff discovered that the Defendant's Facebook page would not accept postings from persons external to the Defendant's list of Facebook friends, further efforts should have been made by the Plaintiff to locate the Defendant before seeking the varied Substituted Service Order which entailed service by a single public notice in the printed edition of the Royal Gazette newspaper.

28. The varied Substituted Service Order did not make provision for online or multiple public notices. Even if it had, better efforts ought to have been employed to at least ascertain the country in which Defendant was currently living. The evidence before the Court also should have demonstrated the Plaintiff's efforts to transmit a message to the Defendant, via the Defendant's sub-tenant, disclosing the Plaintiff's intention to serve the Writ of Summons. Additionally, it would have been reasonable for the Plaintiff to make efforts to secure the Defendant's email contact information or a mobile telephone number for the Defendant. Again, this may have been achieved by the Plaintiff contacting the sub-tenant or by more persistent contact with the Defendant's former attorney.

29. Had these measures been undertaken by the Plaintiff, it would have likely led to more successful and fairer document service methods. For example, had the enquiries revealed where the Defendant was then residing, an Order for service out of the jurisdiction pursuant to RSC Order 11 may have proved more suitable. Depending on the grade of detail obtained from such enquiries, it may likely have proved more suitable to seek an Order for substituted service via (i) service on the Defendant's sub-tenant at the Unit 1 Hilcrest apartment and or (ii) service via email, WhatsApp or any similar text or other instant chat platform to which the Defendant might have been privy. Additionally, the Order for substituted service ought to have required, at the very least, notice of the Writ of Summons in no less than 2 separate Royal Gazette print-outs in addition to the online editions. Instead, the varied Substituted Service Order provided for minimal opportunity for the Defendant to receive actual notice of the proceedings.

30. In my judgment, the varied Substituted Service Order deprived the Defendant of real and significant procedural fairness because the Order was made on evidence which did not address any of these potential or available measures of reaching him and because the substituted service adopted engaged a most ineffective mode of service. The Judgment in Default which was later entered was morphed from the unfairness created by the making of the varied Substituted Service Order.

31. Mr. Harshaw submitted that the Defendant must show that he has a defence to the claim that has a realistic prospect of success. However, in this case the 'realistic prospects of success test' does not apply as the judgment entered was irregular. Alternatively, as Russell LJ put it in *White v Weston* [1968] 2 QB 647 at 659 B (and cited by Hellman J in *Lydia Caletti (as Sole Executrix and Trustee of The Estate of Lorenzo Caletti, Deceased) v Ralph Desilva* [2017] Bda LR 102 at 28):

> "*I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this 'irregular' or 'a nullity.' The defect is in my judgment so fundamental as to entitle the defendant as of right ex debito justitiae to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment, 'in accordance with settled practice, the court can only exercise its discretion in one way, namely by granting the order sought,' to quote Upjohn L.J. in In re Pritchard, decd*.".

32. For all these reasons, I am bound to find that the Default Judgment ought to be set aside.

Decision on the Stay Application

33. I find that, in all likelihood, the Unit 1 Lease contained an arbitration clause in the same terms as that which appears in the Unit 4 Lease, having regard to clause 4(e).

34. In my judgment, there is no sufficient reason why the matter should not be referred in accordance with the agreement made between the parties. I am satisfied that the Defendant disputes the claim for maintenance fees and is ready and willing to submit to adjudication by arbitration, as contractually agreed.

35. For these reasons, I make an order staying these proceedings.

The Plaintiff's Application for Security for Costs

36. The Plaintiff's application for security for costs has been rendered nugatory by reason of my order of stay.

Conclusion

37. For the reasons outlined in this Ruling, the following decisions were made:

(i) I granted the Defendant's application to set aside the judgment entered in default of appearance.

(ii) I granted the Defendant's application for a stay of these proceedings for the dispute to be referred to adjudication by arbitration.

(iii) I refused the Plaintiff's application for security for costs.

38. Either party may be heard on the issue of costs upon filing a Form 31TC within 7 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Defendant on a standard basis to be taxed if not agreed.

Dated this 3rd day of December 2025

HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT