JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC : TCC. 8th December 2006.

Introduction

1. This is an application by the Defendants, dated the 16th November 2006, to set aside the order for summary judgment made against them on the 11th March 2005 by His Honour Judge Havery QC. The application is made pursuant to CPR 24 PD.8.2. The order for summary judgment was based on an unpaid decision of an Adjudicator. If I am minded to set aside the order for summary judgment, the Defendants seek further orders that the Claimant's statement of case should be struck out and that judgment be entered for the Defendants. What lies behind all of these related applications is the Defendants' case that they did not know about the adjudication, or the subsequent enforcement proceedings, until some time after the relevant events.

Chronology

2. The story in this case is more than usually difficult to piece together. In that context I should say that I am extremely grateful to Mr Lazur, who appeared on behalf of the Claimant to oppose these applications, for his careful and detailed chronology.

3. The Claimant, Mrs Nageh, engaged the Defendants to act as architects in respect of the rear extension to her house in Fulham. The project went wrong and the Defendants terminated their contract with her by a letter in December 2003. The Claimant, for her part, alleged that the Defendants had been negligent and she commenced adjudication proceedings against them. On the 24th November 2004 the Adjudicator produced a decision which required the Defendants to pay to the Claimant a total of £23,372.43. The sum was not paid.

4. On the 15th February 2005, the Claimant commenced proceedings in the TCC to enforce the Adjudicator's decision. On the 11th March 2005 His Honour Judge Havery QC gave summary judgment for the sum due together with interest and costs in the total sum of £29,460.57. On the 6th May 2005 the Claimant obtained a final Charging Order in the total sum of £30,115.02 in respect of the Defendants' interest in their former matrimonial home in Fulham. I shall refer to that property again later.

5. It appears from her statement that the Second Defendant, the First Defendant's former wife, became aware of the judgment against the Defendants no later than June 2005. On the First Defendant's evidence he did not become aware of the judgment until October 2005 when he saw the Statutory Demand which had by then been issued. The Statutory Demand set out in some detail the various events to which I have referred in paragraphs 3 and 4 above.

6. The First Defendant instructed Manches, solicitors, to act for him in respect of the Statutory Demand. They dealt with the Claimant's solicitors in trying to resolve that dispute. On the 4th November 2005 it appeared that the solicitors had been able to reach an accommodation. In the words of the Manches' letter of the 4th November, the principal agreement was described as follows: *"Our client will pay £10,000 to your client on or before the 18th November 2005 with the outstanding balance of the Statutory Demand being £20,115.02 plus interest to be paid on or before the 31st December 2005."*

   It is right to note that that total amount, the sum of £30,115.02, was the full value of the Statutory Demand.

7. The First Defendant told me that he was willing to honour that agreement and that a cheque had even been drawn up for the first instalment of £10,000. However, as a result of the freezing order obtained by the Second Defendant, the cheque was not honoured. Thus, not least amongst the curious features of this case is the fact that, but for the divorce proceedings which are plainly nothing to do with the Claimant, the summary judgment in the Claimant's favour (which the First Defendant is now seeking to set aside) would have been met in full by the First Defendant last year.

Relevant provisions of the CPR

8. CPR 24 PD.8 provides as follows:

   "8.1 If an order for summary judgment is made against a respondent who does not appear at the hearing of the application, the respondent may apply for the order to be set aside or varied (see also rule 23.11).

   8.2 On the hearing of an application under paragraph 8.1 the court may make such order as it thinks just."

9. I respectfully agree with Mr Lazur that the relevant guidance as to the proper exercise of the court's discretion can be found in CPR 3.9(1) under the heading 'Relief from Sanctions':

   "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—
   - *(a) the interests of the administration of justice;*
   - *(b) whether the application for relief has been made promptly;*
   - *(c) whether the failure to comply was intentional;*
   - *(d) whether there is a good explanation for the failure;*
   - *(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;*
   - *(f) whether the failure to comply was caused by the party or his legal representative;*
   - *(g) whether the trial date or the likely date can still be met if relief is granted;*
   - *(h) the effect which the failure to comply had on each party; and*
   - *(i) the effect which the granting of relief would have on each party."*

10. In the present case I consider that the material parts of CPR 3.9(1) are subparagraph (b) (whether the application to set aside has been made promptly) and subparagraph (d) (whether there was a good explanation for the Defendants non-attendance before Judge Havery on the 11th March 2005).

Has the application to set aside been made promptly?

11. I am in no doubt that the Defendants' application to set aside the summary judgment has not been made promptly. The Second Defendant became aware of the judgment in June 2005 and the First Defendant became aware of it in October 2005. Neither of the Defendants made any attempt to set aside the judgment until November 2006. As I have said, even more damningly, over a year ago the First Defendant, instead of trying to seek to set aside the judgment in question, wanted to pay the debt created by the summary judgment order.

12. On these indisputable facts, taken from the Defendants' own statements, it cannot possibly be said that the Defendants' application has been made timeously. I note that in ***Regency Rolls Ltd v Carnall [2000] EWCA Civ 379*** the Court of Appeal held that a Defendant's delay of 30 days before seeking to set aside a judgment in default was too long to permit an application to be considered by the Court. I acknowledge that every case is different and that this is an application to set aside a summary judgment, and not an application to set aside a judgment in default. However, it does seem to me that when considering questions of delay there is no difference in principle between the two applications. I consider that the delay here, which is after all more than 10 times the delay in ***Regency Rolls,*** is sufficient on its own to justify the exercise of the Court's discretion against the Defendants in the present case.

13. The First Defendant's statement, and his helpful oral submissions this morning, relied on the fact that he was suffering from a nervous breakdown which affected the Defendants' ability to make the present application until relatively recently. However, on a careful analysis of the material before me, I am unable to accept that submission. That is because

    a) The Second Defendant, who knew about the judgment in June 2005, was unaffected by any such considerations and yet never made a formal application to set aside judgment until November 2006.

    b) From the medical records that I have seen the First Defendant's nervous breakdown occurred in the period between 2003 and 2004. By November 2005, when an application to set aside the summary judgment should plainly have been made, the First Defendant was well enough to recommence his architectural practice.

    c) The First Defendant's psychiatrist's letter of the 1st November 2005 made clear that he had not seen the First Defendant in consultation since December 2004.

    d) As previously noted, the First Defendant had instructed solicitors to act for him in connection with the statutory demand, and it was they who drew up the agreement to pay the summary judgment sum. It does not appear that Manches had any difficulty in understanding and acting upon the First Defendant's instructions. I have no doubt that, had he instructed Manches to seek to set aside the order, they would have sought to do so.

14. Accordingly, to the extent that the First Defendant seeks to rely on his mental condition to justify the delay in making the application to set aside, I am afraid that I cannot accept such a submission. In those circumstances there is no reasonable excuse for the delay of over a year in the making of the application.

Whether there was a good explanation for the Defendants non-attendance before his Honour Judge Havery QC., on the 11th March 2005?

15. The Defendants contend that they did not know about the commencement of the proceedings in the TCC or the summary judgment hearing on the 11th March, and they raise a series of points about service. The issue is whether the Claimant served the claim form and other court documents in accordance with CPR rule 6.5(6). The provisions are as follows:

"(6) Where —

(a) no solicitor is acting for the party to be served; and

(b) the party has not given an address for service,

the document must be sent or transmitted to, or left at, the place shown in the following table:

Nature of party to be served	**Place of service**
Proprietor of a business	Usual or last known residence; or Place of business or last known place of business
Individual who is suing or being sued in the name of a firm	Usual or last known residence; or Principal or last known place of business of the firm

16. The Claimant served the claim form and the other Court documents by First Class post on 3 Lonsdale House, Carnwath Road, London, SW6 3EH which, according to the Certificate of Service, was the Defendants' last known address. It was, in fact, their former matrimonial home. The Claimant also served the same documents on Unit 8, Elysium Gate, 126 New King's Road, Fulham, SW6 4LZ described by the relevant Certificates of Services as the Defendants' principal place of business. Thereafter, both the order for summary judgment and the subsequent

applications for Charging Orders were also served on those two addresses and there are appropriate Certificates of Service in respect of those documents.

17. The notes at paragraph 6.5.4 of Volume 1 of the CPR suggest that the Claimant must take reasonable steps to locate the Defendant. This obligation was dealt with by His Honour Judge Toulmin CMG QC., in ***Mersey Docks Property Holdings & Others v Michael Kilgour*** [2004] EWHC 1638 (TCC). The relevant parts of his judgment read as follows:

> *"62. I have therefore the two alternatives: either to construe 'last known place of business' as the last place known to the claimant (the claimant's contention), or alternatively the last known ascertainable place of business or, put another way, the last place of business known generally, which is the defendant's primary contention. The defendant's contention is that these words envisage the situation where the person to be served no longer has a usual place of business and the proceedings must therefore be served on the last known place of business.*
>
> *63. It seems to me that the proper construction is last known place of business in the sense of last place of business known to the claimant. This is, in itself, a relatively onerous provision, since in order to acquire the requisite knowledge a party must take reasonable steps to find out at the date of service what is the current place of business or the last place from which the party carried on its business. It will be a matter of evidence whether or not a party has discharged the obligation to have the requisite knowledge at the time of service. On balance, this seems to me to be a fairer and more workable test than one which refers to an objective standard of general knowledge or ascertainability.*
>
> *64. I am confirmed in this view both by the fact that a similar test was operated under the previous rules involving similar wording with little difficulty, and by the fact that although they did not address the issue directly, this appears to have been implicit in the approach taken by Dyson LJ in* ***Cranfield v Bridge*** *and Mummery LJ in* ***Arundel v Khakher****."*

18. On the evidence before me it would appear that the Claimant's solicitors did all that they reasonably could to locate the Defendants prior to service. In particular:

    a) The Claimant's solicitors served the documents on both the last known address, Carnwath Road **and** the principal place of business, Elysium Gate.

    b) As to the Elysium Gate address, the Claimant's solicitors only served it there having had it confirmed by the RIBA in late 2004 that that was the last contact address which the RIBA had for the Defendant architects. The same address was also independently confirmed by Companies House, which had a company called Area Architects Ltd registered at the Elysium Gate address.

    c) As to the Carnwath Road address, the Claimant's solicitors only served it there having had it confirmed by the Land Registry that this was a property owned by the Defendants. Indeed, significantly, when the Claimant sought a Charging Order against the Defendants, the address in the Certificates of Service matched precisely the Carnwath Road address noted at the Land Registry.

19. Despite this, the Defendants seek to make criticisms of the Claimant's solicitor's service. As to the Elysium Gate address, the complaint is that the Defendants had left that address in June 2004. The answer to that, of course, is that the Defendants had failed to leave any sort of forwarding address and failed to notify either the RIBA or Companies House of a new address at which that firm of architects could be contacted. Whilst it is true that the Claimant's solicitors later said to Manches that they had, by the summer of 2004, learned that "the landlord of your clients' business premises had forfeited the lease due to non-payment of rent" they had no way of knowing whether or not that was true, and consequently, it was after that that they made their checks with the RIBA and Companies House and were given the Elysium Gate address again.

20. As to the address in Carnwath Road, the First Defendant accepts that he lived there (albeit not all the time) until May 2005, which was after the commencement of the proceedings, the summary judgment application and the Charging Order applications. The First Defendant's complaint in relation to that address was that the documents were addressed to 3 Lonsdale House, Carnwath Road when, in fact, the block had changed its name so that the address was 3 Broomhouse Dock, Carnwath Road. However, it seems to me intrinsically unlikely that documents addressed to Lonsdale House would not get to the right address, particularly given that the post code remained precisely the same and that Lonsdale House was just a reference to an older name for the same block of flats. Moreover, as we have seen, the Claimant's solicitors checked with the Land Registry and it was the Lonsdale House address that was registered.

21. Accordingly, I find that there was nothing else which the Claimant's solicitors could reasonably have done in respect of the service of the Court documents; that service was in accordance with CPR 6.5(6); and that, if the documents did not find their way to the Defendants, then this was principally the Defendants' own responsibility for failing to give any sort of forwarding or other contact address for their business.

22. Finally on this point I should note that, even if service was in accordance with CPR 6.5(6), a Defendant may be able to set aside judgment if the Defendant can show that the Claimant deliberately used an address which it knew was not the right one. In ***M Rhode Construction v Markhan-David*** [2006] EWHC 814 (TCC) the Defendant sought to challenge an Adjudicator's decision on the ground that the adjudication documents were served on an address he had vacated, and not on another address which he said was known to the Claimant and where he could easily have been contacted. The Defendant claimed that the Claimant had deliberately avoided using the

address where he was working so as to ensure that the adjudication documents never reached him. Jackson J., said:

> *"34 The defendant contends that the claimant deliberately avoided contacting him via the quarry. The claimant deliberately used a method of service, which was unlikely to bring the documents to the defendant's attention.*
>
> *35 In the context of the present application, where there is no witness statement at all from the claimant, I am certainly not prepared to make any finding of disingenuous conduct on the claimant's part. There is, however, a serious factual issue to be tried in this regard. I would formulate the issue in these terms: did the claimant have available during the adjudication a ready means of contacting the defendant, which the claimant chose neither to use nor to communicate to the adjudicator...*
>
> *38 If, after hearing evidence in the present case, it turns out that the claimant took a deliberate decision, which deprived the defendant of the opportunity to make representations in the adjudication, then I consider that this may be one of those rare and exceptional cases in which the court will decline to enforce an adjudicator's decision by reason of breach of natural justice."*

23. However, that point, which was at the heart of the judgment in ***Rhode,*** simply does not arise in the present case. There is no suggestion that the Claimant here deliberately utilised the wrong addresses, or that there was some other address known to the Claimant where the documents could have been served on the Defendants. Indeed, in the course of his submissions to me, the First Defendant properly accepted that there was no other address of which he was aware that the Claimant's solicitors could have known about, or could have used, in order to contact him.

Summary on application to set aside

24. For these reasons I consider that, in the exercise of my discretion, I must reject the application to set aside the summary judgment. In the light of that finding it is unnecessary for me to go on and consider the detailed submissions made in respect of the adjudication. However, I offer an outline of my views below.

The adjudication decision

25. Even if I am wrong, so that summary judgment should be set aside what happens then? The Claimant would then seek to enforce the Adjudicator's decision *de novo*. What answer do the Defendants have to such an application?

26. The Defendant's principal point is to complain about the service of the documents in the adjudication and the fact that they were not aware of them. Essentially, this really repeats the complaint already addressed above in respect of the service of the Court documents. There was no reason for an adjudicator to require any more onerous service requirements than were required by the CPR. The evidence is that the Adjudicator endeavoured to contact the Defendants both at the Elysium Gate address and at the Carnwath Road address. It seems to me that that was sufficient. Moreover, there is some evidence in the adjudication that the documents sent to Carnwath Road were addressed to ***'Broomhouse Drive'*** which is close to what even the First Defendant says is the correct description of the address. It seems to me, therefore, that no criticism can be made of the service of the documents in the adjudication.

27. The remaining criticisms, such as they are, of the Adjudicator in the documents are really a collection of what I can fairly describe as minor procedural gripes, dressed up as an attack on the Adjudicator's jurisdiction and all stemming one way or another from the point about the failure to serve the documents. As the Court of Appeal have made plain on a number of occasions in the last six years, the TCC has to be very suspicious about all arguments that seek to rely on arguments of natural justice: see, for example, the recent decision by Buxton LJ. in ***Carillion v Devonport*** [2005] EWCA Civ 1358. I am entirely confident that, in this case, the criticisms cannot amount to a legitimate jurisdiction point.

28. Accordingly, had it been necessary for me to do so I would have reinstated the summary judgment on the enforcement application in any event.

Summary

29. Accordingly, I find that the application to set aside the summary judgment is made much too late and, indeed, it is not sustainable in any event. If I was wrong about that and I had to consider the matter afresh I would have no hesitation in ordering summary judgment on the Claimant's application.

30. In addition, I should say, as I pointed out during argument, that the Adjudicator's decision is, of course, only temporarily binding. Thus the Defendants can, if they wish, issue their own proceedings to seek to have the money repaid by the Claimant, together with any other damages or losses that they say they have suffered as a result. Indeed, such a course of action has been open to them since the middle of last year, when they first learned of the Adjudicator's decision. Thus my decision to refuse this application can cause no permanent detriment to the Defendants if they are right and the Claimant has, in truth, no claim against them.

31. Accordingly, I dismiss the Defendants' application. The order for summary judgment dated the 11th March 2005 remains in force.

Mr Tom Lazur (instructed by Mishcon de Reya) for the Claimant
Mr Richard Giddings in person for the Defendants