



Neutral citation no. [2016] EWHC 3343 (Admlty)

Claim No. AD 2014 000040

Claim No 2014 Folio 1336

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMIRALTY COURT

BEFORE: ADMIRALTY REGISTRAR KAY QC

BETWEEN

ALLAN PEACOCK

Claimant

and

(1) DEL SEATEK INDIA PRIVATE LIMITED, A Company incorporated in the Republic of
India

(2) HYUNDAI HEAVY INDUSTRIES COMPANY LIMITED, A Company incorporated in
the Republic of South Korea

Defendants

Hearing date: 1st November 2016

Appearances: For the Claimant: Mr. Matthew Chapman instructed by Irwin Mitchell

For the Second Defendant: Mr. Emmet Coldrick instructed by Clyde & Co.

The First Defendant did not attend and was not represented.

JUDGMENT

Introduction

1. This hearing concerned an application by the First Defendant to set aside an Order giving judgment in default of an acknowledgment of service dated the 26th April 2016. The First Defendant has made an application to the court dated the 12th May 2016 for an Order that the default judgment be set aside.
2. Although the Order dated the 26th April 2016 stated that “*Judgment in default be entered against the First Claimant for an amount to be decided by the Court*” (*emphasis added*) it is obvious that the Order was intended to be made against the First Defendant and the Order of the 26th April 2016 is to be considered as amended pursuant to the slip rule. In this respect it is to be noted that the covering letter sent to the Court by the First Defendant referring to its application to set aside judgment refers to making an application to set aside “*The Order for Judgement in Default against the First Defendant dated 26.4.2016*”. It is therefore clear that the First Defendant

understood that the Order dated the 26th April 2016 was in fact made against it despite the actual wording of the Order made.

Factual background

3. The Claimant is a United Kingdom national domiciled in England who was born on the 5th January 1970. He was a commercial diver who suffered an accident on 10th November 2011 whilst working from a vessel located off-shore in the Paradip area of India. The First Defendant: is a Company incorporated and registered in India and was the Claimant's employer. The Second Defendant is a Company incorporated and registered in South Korea. The Second Defendant was the owner or occupier of the vessel from which the Claimant was working and the beneficiary of the works undertaken by the Claimant. As appears from the particulars of claim a brief resume of the circumstances of the accident show that:

- a. On or about 10th November 2011, and in the course of his said duties as a saturation diver, the Claimant was working at or about a Barge and was instructed to dive to a depth of around 20 – 30 metres so as to disconnect two chains holding two vertical piles together (one pile rested on top of the other pile).
- b. The Claimant left the surface in the dive basket. He exited the basket just below the keel of the Barge and then followed a swim line until he reached the seabed, eventually walking along the seabed holding the swim line. Visibility was poor, about 1 metre.
- c. On reaching the piles the Claimant was swimming in mid-water the swim line in the strong current. The swim line was attached to the top of the chain and not to the bottom shackle which the Claimant would have to remove. The Claimant tried to secure his umbilical to give him more room to work because the strong tide was pulling him away from his task and was causing the umbilical to move around.
- d. While the Claimant was securing his umbilical the top pile parted from the bottom pile, the Claimant's right foot was sucked in between the parted piles, the top pile then fell back on top of the bottom pile and, in doing so, crushed the Claimant's foot. The Claimant's foot was stuck for a few seconds before the piles moved again and the Claimant was able to remove

his foot. The Claimant detached his umbilical and hopped/dragged himself back to the dive basket after informing the dive supervisor of the accident/injury. The dive basket had been removed to the surface and the Claimant had to await its return before returning to the surface.

- e. The top and bottom pile parted because they were insecurely attached and/or there was too much “*slack*” in the chains holding them together and/or the swell and movement of the water caused the Barge to roll which also affected the movement of the piles.
 - f. By reason of the accident the Claimant sustained a severe crush injury to his right foot resulting in a below-knee amputation.
4. Aside from the default judgment made, liability, causation and quantum are all in issue in this matter and the Second Defendant has also contested jurisdiction.

Procedural chronology

5. The Claim Form was issued on the 4th November 2011. On the 8th January 2015 the Claimant applied for permission to serve proceedings outside the jurisdiction on (1) Seatek India Private Limited and (2) Hyundai Heavy Industries Company Limited. On the 3rd March 2015 an Order was made granting permission to serve outside the jurisdiction. On the 14th April 2015 Burton J made an order extending time for service on both Defendants to 30th August 2015. On the 12th August 2015 Andrew Smith J made an order extending time for service on both Defendants to 30 November 2015 extending time for service on both Defendants to 30 November 2015. Also on the 12th August 2016 proceedings are served on Seatek India Private Limited. On the 28th August 2015 Seatek India Private Limited provided a fully pleaded Defence by which stated, among other things, that no entity with the name Seatek India Private Limited existed. On the 30th September 2015 the Claimant made an application to amend the Claim Form and Particulars of Claim to correct the name of First Defendant from Seatek India Private Limited to Del Seatek India Private Limited. On the 6th October 2015 the Court made an order (without notice) granting permission to amend the name of the First Defendant pursuant to CPR 17.4, giving directions for service and acknowledgement of service. On the 10th November 2015 the Second Defendant acknowledged

service indicating an intention to contest jurisdiction. On the 23rd November 2015 the Second Defendant applied for an order setting aside service pursuant to COR Part 11. On the 29th February 2016 the Amended Claim Form and Particulars of Claim with the corrected name of First Defendant was served on the First Defendant in India. On the 22nd March 2016 the hearing of the Second Defendant's challenge on the issue of jurisdiction was adjourned to await the decision of by the Supreme Court in [UKSC 2015/0175]. The First Defendant did not attend that hearing.

6. On the 24th March 2016 the Claimant made its request for judgment in default against the First Defendant. On the 26th April 2016 the Court made the order for judgment in default against the First Defendant. On the 10th May 2016 the Claimant applied for the Court to list a CMC pursuant to Order of the Court. On the 12th May 2016 the First Defendant applied to have the judgment in default set aside and on the 20th May 2016 the First Defendant filed an Amended Defence in case it application to have the judgment set aside should be successful. On the 24th May 2016 and the 16th June 2016 the Court gave directions which directed that the hearing of the First Defendant's application and the hearing of the CMC should be on the 1st November 2016.

Consideration

7. The First Defendant's application should be dismissed:
 - a. This was a hearing of an application by the First Defendant which was informed of the time and date of the hearing nonetheless the First Defendant chose not to appear.
 - b. Further I do not consider that the Application or the content of the Defence filed by the First Defendant satisfies the requirement set out in CPR 13.3(1) that the First Defendant has a real prospect of successfully defending the claim:
 - i. Although the First Defendant has suggested a jurisdictional challenge no such challenge has been made in accordance with CPR Part 11.
 - ii. On the contrary the First Defendant has pleaded a Defence and it ahs thereby submitted to the jurisdiction of this Court;

- iii. The First Defendant appears to accept that, at the material time, it employed the Claimant;
 - iv. The First Defendant appears to rely on the application of Indian law to this action, but Indian law will only be applied to the claim in tort or contract to the extent that the Defendant *pleads and proves* the *material differences* between English and Indian law.
 - v. Such differences have not been properly pleaded so that the English Court will proceed on the basis that there are no material differences between English and, in this case, Indian law, see, *Bumper Development Corporation v Commissioner of Police for the Metropolis* [1991] 1 WLR 1362 (CA); *James Rhodes v OPO & Anor.* [2014] EWCA Civ 1277; [2015] UKSC 32; [2016] AC 219); and, *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665; [2016] 1 WLR 1814 (CA).
 - vi. Insofar as the First Defendant's Defence is predicated on the proposition that the Claimant bore the *entirety* of the responsibility for ensuring, in the course of his employment, a reasonably safe saturation dive, ie that he was wholly responsible for his own safety, such a case is fanciful and is an argument of this kind is most unlikely to succeed. Thus the defence put forward appears to be fanciful.
- c. For the Claimant Mr. Chapman submitted that the First Defendant also failed to comply with CPR 13.3(2) in that it failed to act "*promptly*". In this respect he refers to the failure of the First Defendant to act promptly from the commencement of the proceedings. In my view the promptness required refers to the time taken by the Defendant in seeking to set aside the judgment. In the present case the default judgment was made on the 26th April 2016. The application to set this judgment aside was made on the 12th May 2016. In my view that is sufficiently prompt for the purposes of CPR Part 13.

Conclusion

8. For the reasons given above I am of the view that the First Defendant's application should be dismissed.

Dated this 20th December 2016