[2012] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121/2011

APPLICATION NO 36/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPLICANT**
AND	**BENJAMIN LEWIN**	**2ND APPLICANT**
AND	**SHANE PAHARSINGH**	**RESPONDENT**

Nigel B Gayle instructed by the Director of State Proceedings for the 1st applicant

Emile Leiba and Miss Gillian Pottinger instructed by DunnCox for the respondent

1 May and 6 July 2012

PANTON P

[1] This is an application to discharge the order of Phillips JA made on 17 February 2012 whereby she dismissed a procedural appeal brought by the Attorney General against the refusal by Frank Williams J (Ag) (as he then was) to declare that a suit brought by the respondent had been struck out pursuant to rule 73.3(8) of the Civil Procedure Rules 2002.

[2] The rule in question is part of the transitional provisions dealing with the introduction of new civil procedural rules a decade ago. The rules came into operation on 1 January 2003. In relation to proceedings commenced prior to that date, where a trial date had not yet been fixed (as in the instant matter), the claimant was required to apply for the fixing of a case management conference. Where no such application was made by 31 December 2003, the proceedings were struck out without the need for an application by any party.

[3] In the instant case, the respondent had been granted, in 1995, permission to enter an interlocutory judgment in default of defence. By the time that the Civil Procedure Rules 2002 came into effect, the judgment had still not been entered. This was, apparently, due to the inefficiency of the Supreme Court's registry, as the respondent made several efforts for it to have been entered. In 2004, after the cut-off date specified in part 73 of the Civil Procedure Rules, the respondent made another request for the interlocutory default judgment to be entered and this was eventually done in October 2010.

[4] The Attorney General had sought a declaration that the suit had been struck out due to the failure of the respondent herein to apply for a date to be fixed for a case management conference. At the heart of the matter, considered firstly by Frank Williams J (Ag) and then by Phillips JA, are two letters from the respondent's attorneys-at-law to the Registrar of the Supreme Court. The first letter was written on 17 January 2003, and the other on 23 December 2003.

[5] The first letter reads thus:

> "We refer to our letters dated 4th February 2002 and 7th March, 2002, copies of which are enclosed for ease of reference.
>
> In order to assist with the entry of the Interlocutory Judgment in Default of Defence filed by us on behalf of the Plaintiff on 14th June, 2000 and the fixing of a date for the hearing of our Summons to Proceed to Assessment of Damages which was filed on the same date, we enclose herewith a copy of our file in relation to the captioned matter.
>
> We trust that you will find this to be of assistance."

And the second reads:

> "We refer to our letter dated January 17, 2003, requesting a Case Management Conference date. A copy of the said letter is enclosed for ease of reference. Please alert us as to the date appointed as soon as possible.
>
> Kindly acknowledge receipt on the copy letter attached."

[6] In dismissing the appeal, Phillips JA ruled that the latter letter "can be construed as a letter requesting a date to be appointed for a case management conference". The learned judge of appeal said that it was clear to her that the letters were to be "construed within their context, namely the framework of the litigation, that is what had occurred in the past, and the status of the litigation when the letters were issued". She pointed out that the first letter did not request a date for a case management conference and could not be construed as such. According to her, at the time of this letter, the respondent had filed two interlocutory judgments in default of defence and was awaiting the signature of the Registrar. In the opinion of the learned judge, this

letter was aimed at assisting with the entry of the judgment and the fixing of a date on the summons for the assessment of damages. In her view, if the Registrar had acted as she ought to have done, the judgment would have been perfected, the date for the summons would have been given and the need for consideration of the transitional provisions of the rules would not have arisen.

[7] The learned judge noted that the second letter incorrectly refers to the first letter as one requesting a case management conference date. However, she placed significance on the remaining words in that letter: "Please alert us as to the date appointed, as soon as possible." This, she felt, would have indicated to the Registrar that a date for a case management conference was being requested. The only date that could have been under contemplation at that time, according to the learned judge, was a date for a case management conference. The Registrar, she said, could not have understood the letter in any other way. This, she said, was so as the purpose of the transitional provisions was to guide the way forward in civil claims under the new regime, and not to deprive litigants of access to the courts, they having already initiated actions. In her opinion, a purposive interpretation must be utilized. That would give effect to the overriding objective in interpreting the rules.

[8] In seeking to have the order of Phillips JA discharged, Mr Nigel Gayle, representing the Attorney General, complained bitterly that there was no evidence before the learned judge of appeal of the entry of an interlocutory judgment, or the service thereof on the applicant. The only evidence that ought to have been considered by the single judge of appeal, submitted Mr Gayle, was the evidence that was before

Frank Williams J (Ag), that is, one affidavit and a supplemental affidavit from Garcia Kelly, one affidavit from Georgette Wiltshire, and two from Gillian Pottinger. That being so, Mr Gayle reasoned, there would have been no evidence of a judgment having been entered prior to the coming into operation of the new rules. Hence, Phillips JA erred in arriving at conclusions where there was no evidence to support same.

[9] In considering the complaint by Mr Gayle, the court cannot ignore the fact that the evidence reveals that several requests for the entry of judgment in default had been made of the Registrar of the Supreme Court, and there had been no response to those requests. The absence of a response by the civil registry is, unfortunately, not unprecedented. Phillips JA did not err in referring to what was requested and expected of the Registrar in the circumstances of the case.

[10] So far as the complaint as to service of the entry of the judgment is concerned, I am satisfied that Mr Emile Leiba has refuted that claim, in that he referred to a letter dated 25 August 2010 evidencing service of the default judgment. This was prior to the hearing before Frank Williams J (Ag). I cannot ignore the fact that the court records show that this letter dated 25 August 2010 signed by the respondent's attorneys-at-law and addressed to the applicant's chambers reads as follows:

> "We are sending you herewith Order on Summons for Leave to Enter Judgment made on the 6th day of March 1995 by the Master and Judgment in Default of Defence granted against you.
> We have filed a Notice of Assessment of Damages and will serve you with a sealed copy shortly. In the interim,

kindly advise us whether you are in a position to settle the Judgment granted against you."

The Order which was attached to the letter was filed on 9 March 1995 and reads:

"UPON HEARING the summons for Leave to enter Judgment dated 4th day of November 1994 coming on this day and UPON HEARING Mr. Lancelot A. Cowan, instructed by Dunn Cox Orrett and Ashenheim, attorneys-at-law for and on behalf of the Plaintiff herein AND UPON HEARING Miss S. D. Alcott, instructed by the Director of State Proceedings for and on behalf of the first defendant, IT IS HEREBY ORDERED THAT: -

1. The plaintiff will proceed to enter judgment against the first defendant in default of defence."

It seems to me that the way is therefore clear for the assessment of damages to be held, if the main point of this application is decided in favour of the respondent.

[11] Mr Gayle described as "alarming" the interpretation placed on the letters by Phillips JA. He submitted that a letter is unlike a statute, and the literal rule of interpretation applies. The purported intention of the letter writer is irrelevant, he said.

[12] I find myself in agreement with the reasoning of Phillips JA and the inferences drawn by her in construing the contents of the letters in question. There can be no doubt that had there been a response to the respondent's letters of 4 February 2002 and 7 March 2002 (referred to in the letter of 17 January 2003) and appropriate action taken by the Registrar, the judgment would have been entered and the date for the assessment of damages would have been fixed. It follows that the case would not have

been caught by the need for the respondent to apply for a date for a case management conference.

[13] I am of the view that the letter of 23 December 2003 cannot be considered in a vacuum or in isolation. The entire context has to be looked at. It incorrectly stated that the January letter had contained a request for a date for a case management conference. However, by going on to ask the Registrar to inform of the "date appointed", that has to be interpreted as the date for the conference. There is no other logical interpretation that can be attributed to those words. I definitely do not agree with the draconian approach suggested by Mr Gayle. Of course, it would have been desirable that greater accuracy in communication had been practised on behalf of the respondent. However, the clear intention expressed in the December letter was that a date was to be appointed for a case management conference, and that the respondent was to be advised when the date had been so appointed. This is what the December letter reveals:

1. The respondent thought that the January letter had contained a request for a case management conference; and
2. The respondent asked to be alerted as to the date for such a conference as soon as possible.

The Registrar could have, if she so wished, pointed out to the respondent that there had been no such request. However, rational thinking would have led her to the

understanding that such a request was being made as she was being asked to alert the respondent "as to the date appointed as soon as possible". Ignoring this letter was not an option that was open to the Registrar.

[14] In the circumstances, the application to discharge the order of Phillips JA has to be refused. This suit has been on the books for far too long. Regrettably, it cannot be said that the applicant has not contributed to the delay. It is high time that there be an end to this litigation, and it is hoped that the applicant will do all he can to assist in securing this end. I would therefore refuse the application and award costs to the respondent. The parties, it seems to me, should now proceed with haste to the assessment of damages.

[15] I wish to point out that Mr Leiba sought to argue a preliminary point that no appeal lies to the full court from a decision of a single judge in procedural appeals. I have deliberately not addressed that issue in this judgment. It is not out of disrespect to counsel's submissions but because the issue is to be considered otherwise by the court and we do not wish to further delay this matter, pending that consideration.

DUKHARAN JA

[16] I have read in draft the judgment of my brother Panton P. I agree with his reasons and conclusion and have nothing to add.

BROOKS JA

[17] I have read, in draft, the judgment of the learned President and agree with his reasoning and conclusion. I wish, however, to add a few words of my own.

[18] The learned President has set out the relevant facts of the matter which are important to his reasoning, and I need not repeat them here. He has made reference, to two letters, those of 17 January 2003 and 23 December 2003. These letters are critical to the decision in this court as they were in the court below.

[19] It is, in my view, also important to the understanding of the context of those letters, that reference be made to the fact that on 6 March 1995, the respondent, Mr Paharsingh, was granted leave by the Supreme Court to enter judgment in default of defence against the 1st applicant. The fact is that despite the respondent's efforts, the judgment in default was not entered. *Prima facie*, that meant that the claim would not have been exempt from the operation of part 73 of the Civil Procedure Rules 2002 (CPR) and in particular rule 73.3(4).

[20] Rule 73.3(4) requires an application to be made for a case management conference to be fixed. The rule states:

> "Where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed."

[21] Following on that reasoning, Mr Paharsingh's claim could not have been saved by the principle set out in the decision of ***Holiday Inn Jamaica Inc v Carl Barrington Brown*** SCCA No 83/2008 (delivered 19 December 2008). In ***Holiday Inn*** it was held that where an interlocutory judgment had been in force prior to the advent of the CPR, that judgment would not be affected by part 73 thereof.

[22] Without considering whether an entitlement to have a judgment in default entered, amounts to the existence of a judgment, it is my view that the *prima facie* situation in December 2003, made it necessary for Mr Paharsingh to apply, pursuant to rule 73.3(4), for a case management conference to be fixed. The principles set out in ***Norma McNaughty v Clifton Wright and Others*** SCCA No 20/2005 (delivered 25 May 2005), ruling that such 'old proceedings' were automatically struck out, applied squarely to the instant case.

[23] This, I find, is the context in which the letter of 23 December 2003 (eight days before the fatal final day), should be viewed. In that context, it is clear, I find, that Mr Paharsingh's attorneys-at-law were attempting to make sure that they did not fall afoul of rule 73.3(8) which deemed any 'old proceedings' for which no case management conference had been held, "struck out without the need for an application by any party". They were, I find, applying for a case management conference to be fixed, as has been explained in the judgment of the learned President. Accordingly, their application would have saved the claim from the operation of rule 73.3(8) and Phillips

JA was correct in finding that there was such an application and that the claim had not been struck out.

ORDER

PANTON P

The application is refused. Costs to the respondent to be agreed or taxed.