

[2011] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121/2008

APPLICATION NO 223/10

**BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MR JUSTICE HIBBERT JA (AG.)**

BETWEEN	ROBERT THOMAS BIDWELL	APPLICANT
AND	THE DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Barrington Frankson and Miss Kedia Delahaye instructed by Hugh Thompson of Gifford Thompson & Bright for the applicant

Mrs Caroline Hay and Loxly Ricketts for the Director of Public Prosecutions

1 & 2 February 2011

PANTON P

[1] This is an application for leave to extend time to allow for the filing of the record of appeal and the skeleton arguments in support of an appeal against an order of Donald McIntosh J made on 28 October 2008. The learned judge had ordered the registration of the following in the Supreme Court of Jamaica:

- (a) A forfeiture order issued on 5 January 2004;
- (b) An addendum to the forfeiture order issued on 30 January 2004; and
- (c) An addendum to the forfeiture order issued on 28 April 2004.

These orders were issued by the Court of Ontario, Ontario Court of Justice (Central West Region).

[2] There is no doubt that the order of McIntosh J was in conflict with an earlier order made by Pusey J on 25 August 2008 giving the applicant herein time to file his defence to a fixed date claim form filed by the Director of Public Prosecutions. Pusey J had ordered that the applicant "must file the Defence within 56 days of being served with the Fixed Date Claim Form and the Affidavit of Paula Llewellyn". Service of the fixed date claim form was effected on 15 October 2008. Consequently, by virtue of the order of Pusey J, the applicant would have had until 10 December 2008 to file his defence. However, the order of McIntosh J was made a mere 13 days after service.

[3] Mr Loxly Ricketts, who appeared along with Mrs Caroline Hay for the Director of Public Prosecutions, sought to argue that the matter was procedural and submitted that rules 26.9 (2) and (3) of the Civil Procedure Rules 2002 (CPR) were applicable to the situation. Those rules read:

"(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.”

We do not think that these rules are relevant to the situation given the fact that substantive property rights are likely to be affected by the failure to follow the order of Pusey J which, incidentally, reinforces the rules regarding the period for the filing of a defence to a claim. Rule 10.2 (1) of the CPR provides that a defendant who wishes to defend all or part of a claim must file a defence. The general rule is that the period for filing a defence is the period of 42 days after the date of the service of the claim form: rule 10.3 (1). So far as service outside the jurisdiction is concerned, the general rule is that an acknowledgment of service or defence must be filed within 56 days of the service of the claim form where the place of service is the United States or Canada: (rule 7.5 (5)). In the instant case, the applicant on whom the claim form would have been served resides in Canada. It may also be noted that a defendant may apply for an order extending time for filing a defence (rule 10.3 (9)).

[4] In the circumstances, the applicant ought to be allowed the opportunity to file his defence. We have looked at the six grounds of appeal that have been included in the bundle filed for the purpose of this application. Grounds (i) (ii) and (iii) read thus:

“ (i) The Fixed Date Claim Form was not served upon the Appellant within the prescribed time.

- (ii) The Appellant was not given sufficient time to file his Defence in breach of the Order of the Honourable Mr. Justice Pusey made on the 25th day of August, 2008.
- (iii) The learned Trial Judge ought to have granted the Appellant's Attorney-at-Law (sic) Application for an adjournment and his failure so to do operated to the prejudice of the Appellant."

Grounds (ii) and (iii) are in our view sufficient to dispose of the appeal itself.

[5] In view of the failure to take into consideration the order of Pusey J as well as the rules relating to the filing of a defence, the order of McIntosh J cannot be allowed to stand. No useful purpose would be served by having a separate hearing of the appeal itself as all the issues are here before us. That being so, and with a view to the speedy determination of this matter in a fair way, we hereby order as follows:

- (1) The hearing of the application is treated as the hearing of the appeal which is allowed and the order of Donald McIntosh J made on 28 October 2008 is set aside.
- (2) The appellant Bidwell is allowed 21 days from the date hereof to file and serve his defence to the fixed date claim.
- (3) The respondent is to file and serve a reply, if any, within 14 days of the service of the defence.

- (4) The Registrar of the Supreme Court is to fix a date for the first hearing of the claim as soon as possible after the filing of the reply.
- (5) There shall be no dealing with the properties, the subject matter of the claim until the determination of the fixed date claim.
- (6) Costs are to be costs in the claim.

MORRISON JA

I agree.

HIBBERT JA (AG)

I agree.