

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 81 OF 2007

BETWEEN	COURTENAY FRANCIS RAYMOND BARNETT	APPELLANT
AND	MILTON BANTON	1 ST RESPONDENT
AND	VERONICA BANTON	2 ND RESPONDENT

CONSOLIDATED WITH

BETWEEN	COURTENAY FRANCIS RAYMOND BARNETT	APPELLANT
AND	MARIA BROWN	1 ST RESPONDENT
AND	MELODY RYAN BROWN	2 ND RESPONDENT
AND	MILTON ANTHONY RYAN	3 RD RESPONDENT

PROCEDURAL APPEAL

IN CHAMBERS

BEFORE: THE HON. MR. JUSTICE K. HARRISON, J.A.

Written submissions by **Mrs. Arlene Harrison Henry**, for the Appellant.

Written submissions by **John Graham and Miss Annaliesa Lindsay**

instructed by **John G. Graham & Co.** for the Respondents.

October 24, 2007

HARRISON J.A.:

This is a procedural appeal pursuant to Rule 2.4 of the Court of Appeal Rules 2002.

On the 20th July 2007, leave to appeal from the judgment of Mr. Justice McIntosh was granted. The appeal is being considered by me on paper.

The relevant facts are that the Respondents had entered into agreements with the Appellant's father, now deceased, in 1983 for the sale of lots 20 and 21 of land located at Tower Hill in the parish of St. Mary. The Appellant is the sole executor of his father's estate and was substituted as a party in the suit brought by the Respondents subsequent to his father's death.

The Respondents sought an order for specific performance to have the Appellant complete the agreements for sale of the lots. They also sought a declaration that they were entitled to possession of the said lots and an injunction was sought to restrain the Appellant, his servants and/or agents from selling, leasing or otherwise parting with possession of the lots pending the outcome of the trial. In the alternative they sought damages for breach of contract against the Appellant.

A Defence and Counterclaim were filed. The Defence admitted that there was indeed the agreements for sale but aver inter alia, that the contracts had come to an end and therefore were no longer of any effect. The Appellant also alleged that the deposits were returned to the Respondents and that they were subsequently returned to his Attorneys at Law. The Counterclaim further alleged that the lots were subject to the Appellant obtaining subdivision approvals from the St. Mary Parish Council

pursuant to the provisions of the Local Improvement Act but such approval was not forthcoming. In the circumstances, the Appellant alleged that the Respondents were not entitled to an order for specific performance and were only entitled to a refund of the monies paid pursuant to the agreements for sale.

February 2007 was fixed for the trial of the action in the Supreme Court but the trial had to be adjourned as the matter could not be accommodated. The trial judge, Hibbert J., used the opportunity on this occasion to make further case management orders that:

"(1) Claimant's (sic) Attorneys to be afforded the opportunity to take copies or to be supplied with copies, at the Claimants' expense of the documents contained in the Defendant's List of Documents on or about February 28, 2007;

...

(3) The defendant is to specifically disclose certificate or certificates of title related to the lands within which Lots 20 and 21 form a part in Tower Hill, St. Mary, the subject matter of this Suit on or about February 28, 2007.

(4) Trial adjourned to October 25 and 26, 2007".

The Appellant failed and or refused to comply with the above orders and as a result the Respondents made an application seeking to have the Appellant's Statement of Case struck out and for judgment to be entered in their favour.

The Respondents' application was heard by Mr. Justice McIntosh and after hearing submissions from both parties the learned judge ordered as follows:

"(1) The Defendant has failed to comply with the orders of the Honourable Mr. Justice Hibbert made on the 6th day of February 2007.

(2) Accordingly the Defendant's statement of case be struck out.

(3) Judgement be entered for the Claimants.

(4) That there be an injunction preventing Defendant from dealing with, disposing or otherwise dealing with property registered at Volume 518 Folio 86 and or Volume 1083 Folio 396 of the Register Book of Titles without the supervision of the Court.

(5) Costs in the cause to the Claimants.

(6) Leave to appeal granted".

The matter came before me on August 30, 2007 but was not dealt with due the absence of an affidavit which was relied upon by the Appellant in the court below. That affidavit was filed in the Registry of the Court of Appeal on the 16th instant but the file was not brought to my attention until October 22, 2007.

The submissions of the Attorneys were filed within the prescribed time according to the Rules of Court and I have carefully read and considered them. Mrs. Harrison-Henry submitted that the penalty of striking out the Appellant's statement of case was disproportionate to the breach of non-compliance especially where all other orders of the Court were complied with. She also states in her submissions that the Order of Hibbert

J was complied with on July 19, 2007. This was done some 4½ months after the order was made.

The Respondents' Attorneys submitted on the other hand, that the Appellant's blatant and continued disobedience of the Order of Hibbert J., amounts to an abuse of the process of the Court. Furthermore, they have said that they have chosen to be silent in not offering an explanation why there was non-compliance with the Order and this also amounts to an abuse of the process of the Court.

The Defence being a Statement of Case (see Rule 2.4 of the Civil Procedure Rules 2002 ("the Rules")) the Court may strike it out pursuant to Rule 26.3 of the Rules where there has been failure to comply inter alia, with an order or direction given by the court.

In my judgment, a court must always give effect to the overriding objective to deal justly with the case: see rule 1.1(1). This includes the expeditious disposal and fairness to all parties. Although striking out of the defence is permissible under the Rules, in some circumstances it may be too extreme.

In **Biguzzi v Rank Leisure PLC** [1999] 1 WLR 1926, Lord Woolf, M.R. (as he then was) commenting on the "unqualified discretion to strike out a case (for) failure to comply with a rule," under rule 3.4(2)(c) of the Civil Procedure Rules 1998 (U.K.), said:

"In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

In the instant case, the Appellant has offered no explanation for his failure to comply with the order of Hibbert J., but in seeking to do justice between the parties, it is my view that the litigant should not be penalised for the non-observance of certain rules of practice. An attorney-at-law ought to know that questions of delay and the failure to explain non-compliance with the Court's order, are vital factors to bear in mind when it comes to the exercise of one's discretion. It is my view, however, that the learned judge below should have taken the matter one step further in making an "unless" order since the Rules now expressly provide for this.

In the circumstances, I agree with Counsel for the Appellant that the defence ought not to be struck out. The appeal is therefore allowed. The appellant is hereby ordered that unless he files and serves the necessary documents within 14 days of the date hereof, the judgment of the court below stands. There shall be no order as to Costs.

ORDER:

The appeal is allowed. The appellant is hereby ordered that unless he files and serves the necessary documents within 14 days of the date hereof, the judgment of the court below stands. There shall be no order as to Costs.

HARRISON J.A.

OCTOBER 24, 2007.