JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 140 OF 2007

CLAIM NO. C.L. 1995/J 029A

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	EDRIS JARRETT	1ST APPELLANT
AND	JOSEPH JARRETT	2ND APPELLANT
AND	CARMEN JARRETT	RESPONDENT

CONSOLIDATED WITH

CLAIM NO. C.L. 1995/J028

BETWEEN	JOSEPH JARRETT	CLAIMANT
AND	CARMEN JARRETT	DEFENDANT

Joseph Jarrett instructed by Joseph Jarrett & Co. for Appellants.

Miss Nesta Clare Smith instructed by Ernest Smith & Co. for Respondent

June 18, 2008 and May 8, 2009

PANTON, P:

I have read the draft judgment of Harrison, J.A. I agree with his reasons and conclusions. There is nothing further that I wish to add.

HARRISON, J.A.:

1. This is an appeal by the defendants Edris Jarrett and Joseph Jarrett (the appellants) against an order made by Donald McIntosh J dated December 12, 2007 which stated:

(a) The Pre-trial Review to be on the 14th day of February, 2008;

(b) The Taxation Appeal not having been heard is to be considered pending the outcome of the trial.

(c) The order of the Honourable Mr. Justice D. McIntosh made on the 7th day of March, 2006 is hereby revoked.

(d) Costs to be costs in the case.

(e) Leave to appeal granted to the Defendants.

2. For the purpose of this appeal I need only to set out the chronology of events. They are as follows:

(a) The claimant Carmen Jarrett (the respondent) filed a Writ of Summons and Statement of Claim in the Supreme Court in 1994 in relation to a land dispute between the parties. The matter was discontinued by the respondent against the 1st appellant on June 21, 2005. This discontinuation resulted in a hotly contested claim for costs between the 1st appellant and the respondent.

(b) On July 28, 2005 the 1st appellant lodged her Bill of Costs arising from the discontinuance, and this amounted to $310,693.85.

(c) On September 26, 2005 a default tax certificate was lodged on behalf of the 1st appellant after the

respondent failed to file points of dispute in relation to the Bill of Costs within the fixed period of 28 days.

(d) On October 14, 2005 the respondent filed the points of dispute.

(e) After an exchange of correspondence between the Registrar and the Attorneys-at-law for the parties, the Registrar issued a Default Tax Certificate on the 28th of November 2005 in the amount of $310,693.85. The respondent was served with a copy of this certificate on December 7, 2005.

(f) On January 18, 2006 the respondent applied to set aside the Default Tax Certificate. This application came before McIntosh J., on March 7, 2006 and he made the following order:

> "(a) The disputed taxation be heard by the Registrar on Thursday the 16th of March, 2006 At 2.30 p.m. Failing which the Default Tax Certificate to stand.
>
> (b) That the amount of the taxation be paid on or before the 16th day of October, 2007 the date set for the Pre-Trial Review.
>
> (c) If the aforesaid sum is not paid the Claimant's trial date is to be vacated and the Claimant will be deemed to have abandoned her claim".

(g) Shortly after the March 7 order was made, the 1st appellant filed a supplemental Bill of Costs which amounted to $438,843.85. A reply to the points of dispute was filed by the 1st appellant on March 14, 2006. The taxation took place before the Registrar on March 16 and 21, 2006 and costs were taxed in the sum of for $186,259.25.

(h) On March 22, 2006 the attorneys for the respondent wrote a letter to the Registrar concerning the taxed costs. That letter stated inter alia:

"We write in reference to the hearing of the Taxation in respect of Edris Jarrett which was held on the 16th & 21st days of March, 2006.

We are in receipt of the Taxed Bill of Costs from Mrs. Jarrett's Attorneys-at-Law.

We note however that the Writer hereof inadvertently omitted to ask that the sums awarded be apportioned 50:50 to reflect the costs for the 1st Defendant only. For example, the first item in the Bill of Costs is in respect of "1 7/2/1995 receiving instructions and perusing supporting documents 3 hours" the sum allowed is $18,000.00 this sum should however in fairness be reduced to $9,000.00 to accurately reflect the 1st Defendant's costs only.

If allowed to stand the Claimant would in effect be paying the costs of both Defendants.

Since the Final Costs Certificate has not yet been signed we respectfully ask that a further date be fixed for us to finalize the costs.

We urge you to consider our request favourably as the 1st Defendant would not be prejudiced in any way and the over-riding objective of the Civil Procedure Rules, 2002 to deal with cases justly would be achieved.

Yours faithfully,
ERNEST A. SMITH & CO.

(i) On March 30, 2006 the taxation hearing resumed.

(j) A further supplemental Bill of Costs was filed by the 1st appellant on April 6, 2006. Taxation continued, and on July 21, 2006 yet a further supplemental Bill of Costs amounting to $2,088,095.00 was filed by the 1st appellant.

(k) Affidavits of Mr. Nelton Forsythe, Attorney at Law, were filed on behalf of the 1st appellant. Mr. Forsythe was cross-examined upon these affidavits on November 14, 2006 and November 29, 2006 was fixed for the Registrar to give her findings on taxation. These were given on December 13, 2006. Costs were taxed in the amount of $435,225.00 payable to the 1st appellant.

(l) A Costs Appeal Notice was filed on behalf of the respondent on December 21, 2006. On February 22, 2007 a Notice of Application was also filed on behalf of the Appellants seeking leave to appeal against the final tax certificate and for extension of time to be granted within which to file the appeal.

(m) On October 4, 2007, a Notice of Application was filed on behalf of the respondent. She sought an order that Joseph Jarrett the 2nd appellant, reimburse the respondent's costs which she was ordered to pay to the 1st appellant. On that said date, a Notice of Application was filed by the respondent seeking an order for the grant of relief from complying with Orders 2 and 3 made by McIntosh J., on the 7th March 2006.

(n) The Pre-trial Review hearing came up before Rattray, J. but the court file could not be located. The hearing was adjourned to February 14, 2008.The learned judge also ordered that the 4th of October applications (supra) were to be heard on the 4th February 2008.

(o) On December 12, 2007 the Costs appeal came up before McIntosh J., and he made the order which is now the subject of appeal.

(p) The respondent filed an application for stay of execution of the taxed costs in the Supreme Court but there is no record of that application being heard.

3. It seems clear to me that orders (b) and (c) of the 7th March 2006 para 2 (f) (supra) are sanctions. The taxed costs were fixed for payment to be made on or before

the 16th October, 2007 the date set for the Pre-Trial Review. It was further ordered that if that sum was not paid, the Claimant's trial date would be vacated and the claim deemed to have been abandoned.

4. Notice of Appeal dated December 19, 2007 was filed in the Registry of the Court of Appeal. Subsequent to the filing of this Notice, an amended Notice of Appeal was filed. The grounds of appeal are as follows:

> "1. That learned Judge erred in revoking the Order made on the 7th day of March 2006. The date for its compliance had passed and the Respondent was in material breach of the learned Judge's own order for the payment of the Appellant's taxed costs by the 16th of October 2007.
>
> 2. That there was no application before the learned Judge for a revocation of the Order made on the 7th of March 2006.
>
> 3. That the Respondent's application for a stay of execution filed on the 11th of December 2007 for consideration on the 12th of December 2007 was in breach of the Civil Procedure Rules.
>
> 4. That the Respondent having failed to pay the Appellant's taxed costs of $435,225.00 by the 16th of October, 2007 is deemed to have abandoned her claim and the Judge erred in setting down the matter for Pre-Trial Review on the 14th day of February 2008 in respect of the 2nd Defendant.
>
> 5. That the Respondent's Appeal Notice (Costs) of the 21st of December 2006 against the taxed costs of $435, 225.00, awarded to the Appellant when the Respondent discontinued the claim against her after the matter was before the court below for ten years, was not an automatic stay of execution of the Order of the 7th of March 2006 and therefore the

Respondent was obliged to pay the taxed costs by the 16th day of October 2007 and having failed to do so is deemed to have abandoned her claim.

6. That the learned Judge erred in ordering the taxation appeal pending the outcome of the trial. The Appellant was entitled to have the matter of her costs expedited without it being dependent on the outcome of the trial against the 2nd Defendant.

7. The learned Judge having informed the parties that the Court's file was missing erred in proceeding to hear the matter and revoking his order of the 7th March 2006 without the benefit of the contents of the missing file, including the bundles / affidavits filed on behalf of the Appellant".

This Court is being asked to:

(a) Set aside the order of the 12th of December, 2007.

(b) For an order that the Respondent having failed to pay the taxed costs of $435,225.00 by the 16th of October 2007 is deemed to have abandoned her claim and the trial date be vacated.

(c) Costs of the appeal to the Appellant to be taxed or agreed.

5. When this appeal came on for hearing the attorneys agreed that they would forego oral submissions and rely solely on their written submissions.

6. Mr. Jarrett for the 1st appellant, submitted that the Court should set aside the order of December12, 2007 that was made by McIntosh J. He referred to and relied on the cases of **Assicurazioni General Spa v Arab Insurance Group** [2003] 1 WLR 577, **Designers Guild Ltd. v Russell William (Textiles) Ltd.(trading as Washington D.C)** [2000] 1 WLR 2416, **Tanfern Ltd. v Cameron-MacDonald and**

Another [2000] 1 WLR 1311 and **G v G (Minors: Custody Appeal)** [1985] 1 WLR 647. In the latter case Lord Fraser said at page 652:

> "... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible".

7. Mr. Jarrett also submitted that McIntosh J. had erred in revoking his Order of the 7th of March 2006. He argued that as a general rule a successful litigant should not be deprived of the fruits of his/her litigation pending an appeal, unless there was some good reason for this course. See: **Leicester Circuits Ltd v. Coates Brothers plc.** (2002) EWCA Civ. 474.

8. Miss Smith for the respondent submitted that the learned judge had borne in mind the overriding objective of the Civil Procedure Rules 2002 (the CPR) when he made the order of December 12, 2007. Miss Smith referred to Part 11 Rule 11.12(4) of the C.P.R which states:

> "The court may exercise any power which it might exercise at a case management conference."

She also referred to Part 26 Rule 26.1 (2) of the CPR which states inter alia, as follows:

> "Except where these Rules provide otherwise, the court may
> ...
>
> (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the

court even if the application for extension is made after the time for compliance has passed;

(d) adjourn or bring forward a hearing to a specific date;

(e) stay the whole or part of any proceedings generally or until a specified date or event;

f) decide the order in which issues are to be tried;

(v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

9. Miss Smith also submitted that the 1st appellant was not prejudiced when the learned judge had revoked his order of March 7, 2006 and that in all the circumstances he had properly exercised his discretion.

10. The crucial issue in this appeal is whether the learned judge was empowered to make the order of December 12, 2007. In order to determine this issue it is important to consider the following: (a) whether, and if so, in what circumstances, the court at first instance has jurisdiction to set aside its own order; (b) what is the proper test to be applied when there is failure to comply with a sanction imposed by the court; (c) whether or not the learned judge had properly exercised his discretion in setting aside the order and; (d) what are the powers of the Court of Appeal in reviewing the exercise of that discretion?

11. There is hardly any doubt that a court can, in certain circumstances, vary its order by virtue of its inherent jurisdiction. The learned judge gave no reasons for the

order he made on December 12, 2007 so this court is at large on the facts: see **Flannery et al v Halifax Estate Agencies Ltd.** [2000] 1 WLR 377.

12. I turn now to some additional background facts. Several letters were written to the Registrar of the Supreme Court in relation to the costs issue. They indicated that the respondent was quite active in seeking to obtain the Registrar's notes and reasons in relation to the contested taxation that had taken place before her. The letters are set out below:

> February 1, 2007
> The Registrar
> Supreme Court
> King Street
> Kingston
>
> Dear Madam,
> .....
>
> We act on behalf of the Claimant Carmen Jarrett.
>
> The costs of the Defendant Edris Jarrett were taxed before Mrs. Audré Lindo in her capacity as Registrar on diverse days in 2006.
>
> We have since filed an Appeal Notice (Costs) on December 21, 2006 against the decision made on December 13, 2006.
>
> We are requesting the Registrar's notes of evidence and reasons for the hearing of the appeal.
>
> Your prompt attention is anticipated.
>
> Yours faithfully,
> ERNEST A. SMITH & Co.
>
> PER
> NESTA-CLAIRE SMITH (MISS)

June 13, 2007
The Registrar
Supreme Court
King Street
Kingston

Dear Madam,
.....

We refer to our letter dated February 1, 2007, a copy of which is enclosed for ease of reference.

We would be most obliged if we received Mrs. Audre' Lindo's notes of evidence and reasons as soon as possible. An Order was made by the Honourable Mr. Justice McIntosh that the taxed costs must be paid by October 16, 2007.

Do let us hear from you.

Yours faithfully,
ERNEST SMITH & CO.

August 17, 2007
The Registrar
Supreme Court
King Street
Kingston

Dear Madam,

.....

We refer to our letter dated June 13, 2007 which was received at your office on June 14, 2007. (A copy of same is enclosed herewith).

We are still awaiting Mrs. Andre' (sic) Lindo's notes of evidence and reasons which are required for the Appeal Notice (Costs) filed from December 21, 2006. The date by which the costs must be paid is October 16, 2007.

We would be most obliged if:

(a) we are given copy of the aforesaid notes evidence and reasons;
(b) you fixed a date for the hearing of the Appeal Notice (Costs) before the 16th October, 2007.

Your prompt response would be appreciated.

Yours faithfully,
ERNEST SMITH & CO.

October 3, 2007
The Registrar
Supreme Court
King Street
Kingston

Dear Madam,
.....

We refer to our letters dated February 1, 2007 and June 13, 2007 (copies of same are enclosed).

We again implore you to forward Mrs. Lindo's notes of evidence. They are needed urgently for the hearing of the Appeal against costs.

Yours faithfully,
ERNEST A. SMITH & CO.

PER
NESTA-CLAIRE SMITH (MISS)

13. It is quite clear from the documentation set out at paragraph 12, that the respondent was not sitting by idly but was quite active in seeking to have the costs appeal heard. The letters from the respondent's Attorneys-at-Law which commenced on February 1, 2007 ended on October 3, 2007. They had set out the need for obtaining the Registrar's notes of evidence and her reasons for arriving at the final taxed costs. The letter of June 13, 2007 did refer to the order of March 7, 2006 and for the taxed

costs to be paid by October 16, 2007. The letter of August 17, 2007 also made reference to the March 7 Order and for the need to fix a date for hearing of the appeal before October 16, 2007. The final letter was written to the Registrar on the 3rd October. These letters seemed to have fallen on deaf ears because the records do not disclose any response by the Registrar.

14. It is my view that there is merit in the submissions of Miss Smith. Her submissions at paragraph 12 of the written submissions are worthwhile repeating in this judgment. She submitted:

> "12. The Learned Judge by revoking his order dated the 7th March, 2006 did not prejudice the 1st Appellant. The only prejudice to be suffered by the 1st Appellant was the time within which the appeal against costs would be heard. The issue between the 2nd Appellant and the Respondent was to be determined at trial within approximately four (4) months. The Pre-Trial Review along with the Application for Relief from Sanction and for the 2nd Defendant Joseph Jarrett to pay the taxed costs was already set for hearing within two (2) months (February 14, 2008). Since these matters were contested it was unlikely that the one hour fixed for hearing would be sufficient time for the appeal against costs to be heard. There was a strong likelihood that it would have been adjourned and/or part heard to a date after the scheduled trial dates. The payment of the costs was a condition precedent to the trial proceeding. The Order dated December 12, 2007 removed this condition precedent allowing the trial to proceed. The Learned Judge's Order safeguarded the trial dates thereby ensuring that the matter was dealt with expeditiously and fairly (See Rule 1.1(d) CPR).

15. In my judgment, the judge's approach to the case was entirely appropriate and reflected the spirit of the CPR. In **O'Hara & Anor v Rye** [1999] EWCA Civ. 779

delivered 12 February 1999 Lord Justice Henry stated inter alia with regards to the English CPR:

> "...the philosophy reflected in them represents good practice. Thus the over-riding objective of these rules is to enable the court to deal with cases justly. The court should further that over-riding objective by active case management. That includes encouraging the parties to co-operate with each other and the court in the conduct of the proceedings..."

McIntosh J. was empowered under rule 11.12(4) of the CPR to exercise any power which he might have exercised at a case management conference. The principle is also established that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless the Court is clearly satisfied that the judge was wrong. See **Evans v Bartley** [1937] 2 All ER p.654. That is not the position here. In my judgment, the learned judge's decision in the instant case was well within the bounds of his discretion and he was plainly right. I would therefore dismiss this appeal with costs to the respondent.

DUKHARAN, J.A.

I agree.

PANTON, P.

ORDER:

The Appeal is dismissed.

Costs to the respondent to be taxed if not agreed.