

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 31/85

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN SLIDIE BASIL JOSEPH WHITTER PLAINTIFF/APPELLANT
AND PAUL DeLISSER DEFENDANT/RESPONDENT

D. M. Muirhead, Q.C., and Enos Grant for appellant
Hugh Small, Q.C., and Miss Linda Mair for respondent

19th, 20th, 21st May, 16th, 17th June,
7th July, 1986

CAREY, J.A.:

By Sec. 11(1)(a) of the Judicature (Appellate Jurisdiction) Act no appeal shall lie from an order of a Judge giving unconditional leave to defend an action. The question for this Court is whether the following order of Downer, J comes within this restriction against the hearing of this appeal:

"IT IS HEREBY ORDERED:-

1. The Defendant granted leave to defend on the following conditions:
 - (i) The Plaintiff has leave to Amend his Statement of Claim and to file and deliver same within eight (8) days of the date hereof;
 - (ii) The Defendant to file and deliver his Defence within fourteen (14) days of the date of the Amended Statement of Claim on his Attorney-at-law;
 - (iv) Following the close of the pleadings, both parties within 21 days thereof file Affidavits of Documents relating to all matters of fact raised

"in their respective pleadings and that each party has the right to inspect the documents disclosed by the other party within 30 days of the service of the Affidavits of documents.

2. Liberty to Apply".

Before considering the question, I propose to rehearse a brief history of the matter. The appellant, who is the plaintiff, by a writ dated 26th April, 1985 claimed against the respondent, the following relief:

"(a) A declaration that a loan transaction entered into by himself and the Defendant in or about July 1983 is void and/or illegal and/or unenforceable having regard to the provisions of the Money-Lending Act;

(b) Further and in the alternative, a declaration that a Mortgage dated 19th July 1983 and issued by him in favour of the Defendant pursuant to the said loan transaction is void and/or illegal and/or unenforceable having regard to the provisions of the Money-Lending Act;

(c) An Injunction restraining the Defendant by himself, his servant and/or agent from acting under the said Mortgage, in particular purporting to exercise the Power of Sale contained in the said Mortgage and/or from carrying out the public auction of 6 lots charged under the said Mortgage advertised to be held on the 30th April 1985 until the final determination of this matter;

(d) For such further and/or other relief as to this Honourable Court may seem just".

Appearance was entered by the respondent on 2nd May 1985 but no defence having been filed, the appellant applied to sign final judgment, invoking the provisions of sec. 79 Civil Procedure Code, the well-known Order 14 procedure. At the hearing on 4th July 1985, both parties were represented by learned counsel, and in the event, the learned judge made the order as set out above.

It should be noted that this point as to jurisdiction was not taken by the respondent, but by the court itself, and regrettably, after the appellant had

completed his submissions on his grounds of Appeal. He, of course, sought to challenge the order of Downer, J giving leave to defend.

The power to grant leave to defend is given by Sec. 83(1) of the Civil Procedure Code, which provides as follows:

"Leave to defend may be given unconditionally, or subject to such terms as to giving security, or time or mode of trial or otherwise, as the Judge may think fit".

The conditions which a judge may impose relate to (i) the giving of security - this condition calls for no explanation and speaks for itself - or (ii) time or mode of trial, which would cover an order for a speedy trial, or as was the case in England years ago when civil actions were tried by judge and jury, trial by a judge sitting alone, and (iii) the category of - 'or otherwise'. As to this last generic phrase, the usual condition imposed is one requiring payment into court. But I do not suggest that other conditions ejusdem generis, could not be ordered.

A number of cases were cited to us by Mr. Grant, but none of them are really concerned with determining what conditions are contemplated by sec. 83 Civil Procedure Code (Order 14 R6). Various forms of orders made when conditional leave is granted, appear in Appendix K of the 1952 edition of the Annual Practice and are, in my view, a useful guide.

I can now examine the 'conditions', for thus did the learned judge characterize the terms he imposed. With respect to the first condition, it must be a misuse of language to refer to an order giving a plaintiff liberty to amend his statement of claim, as a condition imposed on the defendant. It really is beyond argument. So far as the second term is concerned, that represents the order granting

leave to defend and further fixes a time in which the defendant is required to file his defence. Indeed, if the judge had omitted to limit the time for filing a defence, sec. 200 of the Civil Procedure Code would apply. It states:

"Where leave has been given to a defendant to defend under Title 13, he shall file his defence, and deliver a copy thereof, within such time as shall be limited by the order giving him leave to defend; or if no time is thereby limited, then within eight days after the order".

In prescribing a time for filing defence, the judge was doing no more than he was empowered to do under that provision: he plainly was not acting under sec. 83(1) Civil Procedure Code. Indeed, the time fixed by the judge was in excess of the time applicable, had he not fixed time.

I do not suppose it was being argued that the 'condition iv', was a condition being imposed on the defendant, and on his failure to comply therewith, would result in the plaintiff being at liberty to sign final judgment. Indeed, to be fair to the learned trial judge, he regarded condition (ii) as being a true condition, non-compliance with which, would enable the plaintiff to sign final judgment for he said, in granting conditional leave to defend:

"So I rule; That the defendant file and deliver his defence within fourteen (14) days of the service of the amended Statement of Claim on his Attorney-at-law. It follows that failure to comply with this condition will result in the plaintiff being entitled to enter final judgment in this action".

In my judgment, in referring to that order as conditional, he fell into error, and I cannot accept as valid the argument of Mr. Grant that this court was bound by the statement of the learned judge that he had granted conditional leave when the term imposed by him was not one which he had any power to impose under sec. 83 Civil Procedure Code. The

terms which the judge imposed were such as he was entitled to, and could properly make under sec. 83A of the Civil Procedure Code, which provides as follows:

"Where leave, whether conditional or unconditional, is given to defend or leave is given to enter final judgment subject to a suspension of execution pending the trial of a counterclaim, the Court or a Judge shall give directions as to the further conduct of the action and sections 272A to 272F of this law shall, with the omission of so much of subsection (1) of section 272F as requires parties to serve a notice in writing specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application for judgment were a summons for directions under that Title".

In my opinion, 'all the conditions', the phrase used by Mr. Grant, could only have been made by virtue of that provision, and no other: they were directions. The matter is too plain for words.

For these reasons, I concluded that the appeal should be struck out.

ROWE, P.:

I agree.

CAMPBELL, J.A.:

I agree and have nothing to add.