[2013] JMSC Civ 128

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV02875

BETWEEN	**ANWAR WRIGHT**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**

Marvalyn Taylor-Wright instructed by Marvalyn Taylor-Wright & Company for the Claimant

Carole Barnaby instructed by the Director of State Proceedings for the Defendant

Heard: November 7, 2011, September 25, 2012 and September 20, 2013

An application to set aside decision to grant leave to enter Default Judgment - An application to set aside decision refusing extension of time in which to file Defence - Reasonable prospect of success - as soon as reasonable practicable - Overriding Objective in the exercise of Discretion

Campbell J

Background

[1] On the 3rd June 2009, the claimant filed a Claim Form and Particulars of Claim for detinue and unlawful interference with his bus. He alleged that on the 2nd June 2009, a Corporal Bailey attached to the Darling Street Police Station, unlawfully, maliciously

and without reasonable and probable cause, through oppression seized and detained his bus for a period of eight days, as a result of which he suffered loss and damages .

[2] On the 4th June 2009, the Claim Form was served on the Attorney Generals Chambers, pursuant to the provisions of the Crown Proceedings Act. An Acknowledgment of Service was duly served upon the Claimant, which disclosed an intention to defend the matter.

[3] On the 26th September 2009, the Claimant filed a Notice of Application seeking an Order that leave be granted to enter Default Judgment against the defendant for failing to file a Defence. The grounds on which the Order was sought was as follows:

a The time for the defendant to file the Defence expired on the 16th day of July 2009.

b The Court has jurisdiction to grant leave pursuant to Rule 12.5 of the Civil Procedure Rules (CPR) 2002. The claimant's affidavit in support of the application asserted that the time frame of 42 days allowed by the rules within which to serve the document on the clamant has expired.

[4] On the 15th February 2010, the defendant filed a Notice of Application, seeking the following Orders:

i That time for the Service of this Notice of Application for Court Orders be abridged

ii That leave be granted to the defendant to file her Defence out of Time

The Grounds on which the application was made is as follows:

i The Court pursuant to Civil Procedure Rules 26.1.2 (b) may extend the time for compliance with any rule even if the application for extension is made after the time for compliance has passed and may direct, pursuant to CPR 11.11 (3) (b) that he has sufficient notice of an application which has not been served at least seven days before the date of the hearing.

ii The instructions which were necessary to file a Defence in the claim were not received within the period limited by the Civil Procedure Rules for filing a Defence.

iii The instruction for the Defence were only received after the Claimant had applied for leave to enter Judgment.

[5] The defendant's notice was supported by an affidavit by Carole Barnaby dated 15th February 2010 (1st Affidavit), in which she stated she was an attorney-at-law, on the record for the defendant. She said that after being assigned the file on the 9th June 2009. She wrote to the Office of the Commissioner of Police seeking instructions from the 12th June 2009. She indicated that the claimant previously had filed another claim (2008HCV 06023) against the defendant.

On the 17th June 2009, she said she was advised by the Assistant Commissioner of Police that the matter had been already dealt with and the file forwarded on the 27th March and April 17th 2009. She responded, in a letter dated 29th July 2009, to the Commissioner's office, that the events constituting the claim were different from the matter on which his letter was based and requested instructions in the present claim before the 18th July 2009, being the last date he could file a Defence without permission.

On the 6th October 2009, the Director of State Proceedings was served with the Claimant's Notice of Application seeking to enter Default Judgment. Ms. Barnaby states that prior to getting the notice for Default Judgment she made numerous calls to the Office of the Commissioner. She said that instructions were received after the 42 days provided by the rules had expired.

First Application – Claimant's Application to enter Judgment in Default

[6] On the 12th November 2010, Mr. Justice Sykes heard both applications. In his written judgment delivered on the 26th November 2010, he identified the issues in paragraph 1 of that judgment as follows:

"There are two applications before the court. One is an application by the Attorney General to extend time within which to file a Defence. The other is an application by the Claimant for permission to enter judgment in default of Defence against the Attorney General. The submissions being made in both applications overlapped to such an extent that both applications were heard together."

The learned judge ordered that:

(1) The application to extend time to file Defence is dismissed.

(2) The application to enter judgment is granted.

(3) The matter is to proceed to Assessment of Damages.

(4) Costs of both application to the Claimant.

Application to set aside Sykes J Orders

[7] On the 21st December 2010, the defendant filed a Notice of Application for the following orders:

i That the Default Judgment entered in consequence of Mr. Justice Sykes judgment delivered on the 26th November 2010 be set aside.

ii That the defendant/applicant be granted leave to file a Defence.

iii That the Assessment of Damages hearing be stayed pending the resolution of the application.

The grounds on which the Orders were sought were as follows:

(i) The defendant has a real prospect of successfully defending the claim, a matter which enables the court, pursuant to Civil Procedure Rules 13.3. (1) to set aside a Default Judgment entered under Part 12.

(ii) The defendant has applied to the Court as soon as was reasonable practicable after finding out that the Default Judgment had been entered.

(iii) The defendant has a good explanation for failing to file a Defence within the forty two days limited by the Civil Procedure Rules as instructions were not received from the agents and/servants of the Crown within the period limited by the Civil Procedure Rules.

New Relevant Material

[8] In support of the application, Ms. Carole Barnaby, attorney-at-law for the defendant, filed an affidavit dated 21st December, 2010 (2nd Affidavit), where at paragraph 8 she states:

> *"That the matters set out in paragraph 7, (vii) to (xi) herein were not included in the affidavit sworn by me and filed on the 15th February 2010 wherein a draft Defence is exhibited due to inadvertence."*

[9] Among the material included in paragraph 7 (vii) to (xi), was that, the police officer who effected the seizure said:

> *"At the time of seizure the driver was told to attend at the station the following day so that the summons would be issued and the bus returned."*

[10] That no one showed up at the station to receive the summons. That during the course of the following week he received a call from the Attorney General's office. He advised the caller of the circumstances of the seizure, and of the instructions he gave the driver concerning the summons, which instructions were not followed. During the said call, he was advised by the officer of the Attorney General's office that someone would be coming to collect the bus. Following the telephone conversation, someone did turn up at the station, a summons was prepared and issued to him and the bus released to him.

[11] On the 24th January 2011, the claimant filed an affidavit in response in which he stated *inter alia*, that the application:

> *"Seeks to relitigate issues which have already been litigated in this court, whether the defendant has a real prospect of successfully defending the claim or a*

good explanation for failing to file a Defence within time and that these are the same areas which form the substratum of the defendants new application."

[12] Ms Barnaby submitted that, there is no special provision provided by the CPR for the setting aside of Default Judgments entered against the Crown. She conceded that, the issues were the same that were dealt with by Sykes J. Counsel submitted that Sykes J was of the view that the application to file out of time, could be regarded as an application to set aside. She could not agree with such a view.

[13] She submitted that an applicant is at liberty, to apply to set aside Interlocutory Judgment, to the same judge, or another judge, in the same court with concurrent jurisdiction, provided that in making the application to set aside, the applicant brings new evidence for the court to consider, in the application to set aside. She relied on two judgments, which were delivered before the advent of the CPR, **Trevor McMillan v Network Security & Arthur McNeish** (SCCA No. 111/2002 delivered 29th July 2003), **Richard Khouri** and **Seaford v Quarry & C (Ja.) Limited.** SC No. CL 2000/Q001 (unreported) delivered June 20, 2003.

[14] She further submitted, that In **Trevor McMillan**, the Court of Appeal, stated that the new evidence to be provided, even if omitted by inadvertence, the applicant will be permitted to rely on that evidence. Rule 13.3 is the relevant rule. The paramount consideration is whether there is a real prospect of success. The claimant is obliged pursuant to Section 33 of the Jamaica Constabulary Force Act, to plead and prove that what was done was either maliciously or without reasonable and probable cause. Nothing was pleaded to say that Special Corporal Bailey acted contrary to Section 33.

Discussion

[15] The authorities support the submission by learned Counsel for the Crown, that a second and subsequent application may be made to the same or another judge of the Supreme Court to set aside an Interlocutory Judgment entered by default. The now repealed Civil Procedure Code at Section 258, provided for the setting aside of Interlocutory Judgment entered by default. The governing principle then was enunciated in **Evans v Bartlam** [1937] A.C., per Lord Atkins at 480:

> *"That principle obviously is that unless and until the courts have pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."*

[16] The post CPR principles are encapsulated in the overriding objective of the new regulatory framework, to deal with cases justly. An important feature of achieving this objective is ensuring that cases are dealt with expeditiously and fairly. In **Selford Quarry v CF Jamaica Ltd**., Mangatal J (acting) after referring to the post CPR decision of **Bizuzzi v Rank Leisure Plc.** [1999] 4 ALL ER, 934, said at paragraph 12, *inter alia:*

> *"In that case the Court emphasized that the whole purpose of making the CPR, a self –contained code was to send a message which now generally applies. Earlier authorities are no longer of any relevance once the CPR applies. That case also emphasized that under the CPR, time limits were now ever more important than they were previously. However, the Courts have wider and more varied powers to control the litigation."*

[17] The learned author of Stuart Sime, a **Practical Approach to Civil Procedure Ninth Edition,** deals with the setting aside under two heads. Firstly, setting aside as of right and secondly, discretion to set aside. After dealing with the first of these situations, the learned author at, paragraph 11.6.2 says:

> *"In other cases, the court will set aside or vary a Default Judgment only if the defendant has a real prospect of successfully defending the claim 'or it appears there is some other good reason why ... the defendant should be allowed to defend the claim,' taking into account any delay in applying."*
> *(CPR r 13.3)*

(18) I don't understand, Counsel for the claimant, to be contending that there is no right to set aside an Interlocutory Judgment obtained by default. The contention of Counsel, Mrs. Taylor-Wright, as contained in her written submissions is that, the court has already heard and determined these issues against the defendant in a fully

contested hearing before Sykes J., and those issues ought not to be relitigated. She further submitted that the fundamental principle is that it is in the public interest to bring finality to litigation and that it is unfair for a person to be vexed twice with litigation on the same issues.

[19] Counsel, for the Crown, did not deny that the issues were the same. She submitted that if there is an Interlocutory Judgment, an applicant is at liberty, to apply to set it aside before the same judge, or another judge, in the same court with concurrent jurisdiction, provided that in making the subsequent application to set aside, the applicant brings new evidence which was not primarily before the court for its consideration.

(20) In **Trevor McMillan v Network Security & Arthur McNeish & Richard Khouri** (supra), the Director of State Proceedings had filed a summons to set aside the judgment in default that had been entered. The case had been dismissed on a preliminary objection at trial. Counsel for the defendant had successfully sought judgment against the defendants, for the reason that they: "had not entered an appearance." A summons to set aside that Judgment was heard on the 7th January 2002 and dismissed. Another summons was brought before Sykes J (acting) on the 3rd June 2002, when it was dismissed on the ground that a second application was the wrong procedure and that an appeal against the earlier summons should have been pursued. The Director of State Proceedings appealed. One of the grounds of appeal was:

> *"That the learned trial judge erred in law in holding that a second application to set aside an Interlocutory Judgment was a wrong procedure, and that an appeal of the first decision should have been pursued."*

[21] The Court of Appeal held that a second and subsequent application may be made to the same or another judge of the Supreme Court to set aside such a judgment as long as the applicant can put forward new relevant material for consideration. The Court of Appeal relied on its earlier decision in **Gordon et al v Vickers et al** [1990] 27 JLR 60.

[22] Facts may be regarded as new material although through inadvertence or lack of knowledge such facts were not placed before the court on the first occasion provided they are relevant (See also **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies et al** (1971) 1 WLR 550).

[23] Mangatal J in **Selford Quarrie**, had an application for an interim payment to be made by the first defendant. Counsel for the first defendant applied for an adjournment because the first defendant had, a pending application to set aside Interlocutory Judgment. The learned judge observed at paragraph 16:

> *"It seems clear that a defendant, in the interest of justice, can make more than one application to set aside a Default Judgment, provided the application is based on new grounds, or is not an abuse of the court process. This follows from the fact that the default is not a judgment on the merits."*

She referred to the Judgment of Court of Appeal in **Granville Gordon & Adelaide Gordon v Williams Vickers & Lucille Vickers 27** JLR 60, and the admonitions of Rowe P:

> *"This does not mean that the Court is powerless to curb an abuse of its process, nor does it mean that a defendant against whom a Default Judgment has been regularly entered can make repeated applications to set aside without adducing new relevant facts."*

[24] Is the principle of *res judicata* relevant to a procedure of setting aside a Default Judgment, to prevent the defendant from raising a second time a cause of action or issue which has already been litigated? Mrs. Taylor-Wright relied on the case of **NW Water Ltd v Binnie and Partners** 1990 2 All ER 547. The Court found that the issues were determined in an earlier action. The court refused the matter to be raised between parties arising out of identical facts and dependent on the same evidence, it would be an abuse of process to allow the issue to be relitigated. There has been no determination on the merits before Sykes J. The prescription is that there must be new relevant material, to allow the applicant to approach the court to set aside the Default

Judgment. There can therefore be no determination of the same facts and identical evidence.

[25] It was submitted that there is an underlying public interest, that there should be finality in litigation. The public also have an interest to ensure the public funds are not expended because of procedural slips which result in no prejudice. The public interest must be that matters be dealt with justly.

[26] The Judicial Committee of the Privy Council in an appeal from the Court of Appeal in Jamaica, **Administrator General v Stephens** 1992 WIR 238 at page 243 .founded their decision upon the principle, namely that there must be an end to litigation. Their Lordships held:

> *"There comes a time when it is oppressive to allow a party to litigation to reopen a matter that has been judicially determined against him in an interlocutory stage of the proceedings."*

Their Lordships commented on the fact that: the case had been proceeding for ten years. The appellant's conduct of the case could only be construed that the appellant had accepted a previous court order, and had allowed a Default Judgment to be entered against them. Their Lordships found that as public officer it would to an abuse of the process of the court to allow the appellant to put in a Defence totally inconsistent with his previous stance. There is no such inconsistency displayed by the defendant in this case, who has adopted no other stance to Sykes J order.

[27] Were there any "new relevant facts" in the 2nd Affidavit that were not included in the 1st Affidavit, before my brother Sykes J. Ms Barnaby has pointed this court to paragraph 7(vii) to (xi), of the 2nd Affidavit, which she says was not before Sykes J. Counsel for the claimant says that: "even if the matters were new why were they not placed before the Court on the previous occasion."

[28] Paragraph 7(vii) to (xi), which was not included in the 1st Affidavit, goes to what is an essential area of an allegation of detinue. In detinue, there must be an unconditional demand and refusal. Detinue is possession of a chattel adverse to the

rights of the owner. The core of the action is wrongful detainer (and not the wrongful taking) of specific personal property by the defendant, regardless of how the defendant came into possession. To ground the tort, the claimant, has to establish that:

(a) He has an immediate right to possession,

(b) the chattel in question is in the possession of the defendant (an unconditional demand was made,

(c) the defendant refused to hand over the chattel without lawful excuse.

Sykes J did not have this relevant material before him. According to the material presented in paragraph 7 (vii) to (xi), as soon as the demand was made, the bus was released.

[29] Counsel for the Crown, in paragraph 8, of the 2nd Affidavit states that the omission of the new material from the 1st Affidavit was a result of her inadvertence. In **Bizuzzi v Rank Leisure PLC., CA** - (CCRTI 1999/0700/2) – July 1999, Lord Woolf said:

> *"The advantages of the Civil Procedure Rules over the previous Rules are that the courts powers are much broader than they were. 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."*

(30) The Court of Appeal in **Keith O'Connor v Paul Kaufman, Percival Picott and Eugenee Adolphus Picot**, CA 33/ 2002,(delivered on the 7th April 2006) in examining the procedure for setting aside Default Judgment, pursuant to CPR13.3 (prior to its amendment) McCalla JA as she then was, in delivering the unanimous judgment of the court, said:

> *"The requirements of the abovementioned section are cumulative and in the circumstances outlined above, have not been satisfied. The CPR confers wide powers that enable the court to adopt a flexible approach depending on the circumstances of a particular case.*

It appears that the 1st Affidavit was drafted primarily to support, the defendant's application for an extension of time to file Defence."

Real Prospect of Success

[31] Does the defendant have a real prospect of successfully defending the claims as against a mere fanciful prospect? The test is the same as to be applied in an application for summary judgment, **Swain v Hillman and Another** (2001) 1 All ER 91; **ED and Man Liquid Products Ltd. v Patel** (2003) EWCA Civ.472, **The Times,** April 18, 2003 In dealing with the question of real prospect of success. Crown Counsel identified two causes of action, (1) Trespass (2) Detinue. She argued that the Claimant is obliged to plead and prove the requirements of Section 33 of the Jamaica Constabulary Force Act, that the Act was done either maliciously or without reasonable and probable cause. It was contended that the claimant had not satisfied that requirement in his pleadings.

[32] Paragraph 7 of the 2nd Affidavit, outlines the breach of the Road Traffic Act that precipitated Special Corporal Bailey's actions. The Defence is able to say that, there has been no unlawful interference or injury with the claimant's vehicle. According to Crown Counsel, the defendant can prove through the police officer that the interference was lawful pursuant to S14 3 of the Road Traffic Act.

[33] In respect of the allegation of detinue, Crown Counsel, was of the view that she had a real prospect of succeeding due to the failure of the claimant to prove that an unconditional demand was made. The claimant asserts that he sent the driver to the police station on a number of occasions. There is nothing to indicate that the driver went. If in fact, he went to the station, to whom did he make the demand? Was there a response? On the other hand, Special Corporal Bailey has said that no one showed up to collect the summons. The lack of specificity in the claimant's pleadings strengthens the defendant's arm.

[34] The police officer, has admitted that he told the claimant, that he does not give tickets, "me only tek way bus." If the law gives him the right to do so, that is take away buses, then such an admission may not take the claimant's case any further.

As Soon as Reasonably Practicable

[35] In **Merlene Murray-Brown v Dunstan Harper & Winsome Harper**, a judgment of the Court of Appeal, (in Chambers), (unreported) delivered on the 1st February 2010, Philips, JA referred to **Rahman v Rahman** (1999) LTL 26/11/99, in considering the nature of the discretion to be exercised by the court, in these applications and said:

> *"It concluded that the elements the judge had to consider were the nature of the Defence, the period of the delay (i.e. why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the Default Judgment was set aside, and the overriding objective"*

[36] The delay was not inordinate, in respect of the time the action was filed after the delivery of Sykes J's judgment. The application was made three weeks after Default Judgment. Counsel for the Crown said there was no time limit within which to apply to set aside Justice Sykes' Orders. They have filed their application within three weeks, which time cannot be considered inordinate or unreasonable.

[37] The court has also to look at the period for the delay in the initial application to extend time within which to file a Defence. Counsel was assigned the file on 9th June, 2009 and indicated by the 15th June 2009, that the Attorney General, intended to defend the matter. On the 12th June, she sought, by letter instructions from the Office of the Commissioner of Police (COP). She properly advised the COP, that she had to file a Defence on or before the 18th July 2009. The COP's office confused the matter with another matter involving the claimant. On the 29th June 2009, she wrote again giving specific details to enable the information being received. Counsel made numerous calls to get instructions without success. The Attorney General was served with the application on the 6th October 2009. No application was made for an extension of time within which to file the Defence before 15th February 2010. A period of seven (7) months had elapsed from 18th July 2009.

[38] Counsel said the reason for the delay, was due in part to the representative capacity in which the Attorney General's functions. The comments of Sykes J as to the

development and use of technology to facilitate communication is apposite. The fact that there was a prior case with the same name parties, is not a usual thing, and led in some measure to the delay in the response from the Commissioner's Office.

[39] In **Peter Haddad v Donald Silcera** SCCA No. 31/200, the learned Justice of Appeal noted at page 12:

> *"As has been already stated, the absence of a good reason for delay is not sufficient in itself to justify the court in refusing to exercise its discretion to grant an extension of time. But some reason must be proffered. The guiding principle is which can be extracted .... that the court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor."*

[40] I find that I have before me, new relevant material that Sykes J did not have before him in the prior application and I find that the new material, was not presented before Sykes J, due to inadvertence on the part of Counsel. I accept that the defendant has a real prospect of successfully defending the claim. This application cannot in the circumstances, be considered an abuse of the process on the court.

The reason proffered and what appears on the face of the application is sufficient to facilitate the exercise of the court's discretion to grant the application as sought by the defendant.

[41] The defendant's application to set aside the Judgment of Sykes J is granted. The claimant's application to enter Judgment in Default is refused. The defendant is to enter Defence, within 14 days hereof, or the Order of Sykes J will stand.