



[2013] JMSC CIV. 86

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION**

SUIT NO. 2009 HCV 00646

BETWEEN	CHARMAINE BOWEN	CLAIMANT
AND	ISLAND VICTORIA BANK LIMITED	1ST DEFENDANT
AND	UNION BANK JAMAICA LIMITED	2ND DEFENDANT
AND	RBC ROYAL BANK (JAMAICA) LIMITED (FORMERLY RBTT BANK JAMAICA LIMITED	3RD DEFENDANT
AND	FINANCIAL SECTOR ADJUSTMENT COMPANY LIMITED	4TH DEFENDANT
AND	JAMAICA REDEVELOPMENT FOUNDATION, INC.	5TH DEFENDANT
AND	DENNIS JOSLIN JAMAICA, INC	6TH DEFENDANT
AND	ALDITH ELLIS	DEFENDANT TO THE COUNTERCLAIM

Mr. Charles Piper, Attorney-at-Law for the 5th and 6th Defendants

Mr. Panton, Attorney-at-Law for the 2nd and 3rd Defendants

Mr. McDermott, Attorney-at-Law for the 1st and 4th Defendant

Heard on the 14th February and 21st March, 2013

PUSEY J.

[1] The Claimant filed an action against the Defendants in May 2004 seeking the following orders:-

1. A declaration that all sums borrowed from the 1st Defendant or loaned to the Claimant by the 1st Defendant have been duly paid;
2. A declaration that the Claimant is not indebted to the Defendant or any of them, their heirs and successors;

3. A statement of account from the 1st Defendant to the Claimant showing any sum that is due and owing by the Claimant to the 1st Defendant arising out of the relationship as customer and banker; and
4. A declaration or an order that the Claimant having settled its indebtedness with the 1st Defendant that the 1st Defendant returns to the Claimant all the securities held by the 1st Defendant therefor or in the alternative.

An order that the defendants return the securities they are in possession of including some specified properties.

- [2] The Claimant had a loan facility with the 1st Defendant. The 1st Defendant went through changes consequent on the banking crisis of the 1990's which resulted in the loan being handled by the 2nd and 3rd Defendants and then passed through the 4th, 5th and 6th Defendants.
- Miss Bowen sets out in her Particulars of Claim that she disputes the continued existence of any loan and asserts that she was overcharged interest by the banks.
- [3] For the purposes of this application the last paragraphs of her May 2004 Particulars of Claim is particularly significant. Miss Bowen set out from paragraph 39 of the particulars of Claim stated.
- [4] The Claimant subsequently retained Chartered Accountant Mr. Dalma P. James to conduct a forensic audit of her statements of accounts and contract documentation and this account when it was supplied to her identified several discrepancies resulting in the clear conclusion that the Claimant has overpaid the 1st Defendant bank and the Claimant accordingly claims the refund of the amount overpaid by her at the same rate of interest charged by the Defendants and using the same method of computation of costs.

[5] The Claimant will rely on the **Report of Mr. Dalma P. James Chartered Accountant** which is exhibited in her Affidavit... [emphasis added]

[6] The matter was first set for trial in June 2008. I have not seen the court record for that day, but Mr. Piper indicated that it was adjourned at that time because the Claimant had a death in her family. This was not denied by the Claimant. Subsequently, the Claimant changed attorneys and at least one trial date set for October 2009 was adjourned so that the Claimant could instruct new attorneys.

[7] The Matter was sent back to Case Management Conference and went before P Williams J on 31st October 2011. Williams J adjourned the trial to 24th September 2012 and ordered that :

- a. The Claimant, 1st and 4th Defendants and 5th and 6th Defendants do an accounting of the relevant accounts on or before 30th March 2012; and
- b. The Claimant, 1st and 4th Defendants and 5th and 6th Defendants are at liberty to file further witness statements relevant to the accounting.

[8] Williams J also allowed the 5th and 6th Defendants to have their evidence given by Jason Rudd in place of Janet Farrow.

The Defendants contend that the application to allow time to do the accounting was done at the instance of Lord Gifford who then appeared for Miss Bowen. On 28th March 2012 the Claimant still being represented by Lord Gifford applied for an extension of time to comply with the order of Williams J. In the supporting affidavit sworn to by Lord Anthony Gifford it was disclosed that the Claimant had contracted a Mr. Dawkins Brown who had advised that he needed until 18th July, 2012 to complete the required report. An order was made by K. Anderson J. which appears to extend the time of Williams J's order to 18th July 2012.

- [9] The 5th and 6th Defendants have now applied to have the Claimants statement of case struck out by virtue of CPR 26.3 (1)a which allow a party's statement of case to be struck out for non-compliance with an order or direction of the court.
- [10] He cited the authority of Bruce v Bruce wherein a 2001 judgment Marsh J. in this court indicated that the disobedience of a peremptory order of the court was an abuse of the process. This case is significant as it prefigures the "new" rules of the Civil Procedure Code of 2002. It is my view that the scope of the C.P.R. including its overriding objective strengthens that dictum of this court.
- [11] Mr. Charles Piper argued that the Claimants actions are particularly frustrating. She had requested the order and sought additional time to comply with it from Anderson J. Additionally, it is clear that the evidence sought is necessary for the substantiation of Miss Bowen's suit. She has averred that the interest was wrongly deducted and that she has "overpayed" on the account. It is therefore crucial that she provide the accounting evidence to support this. Her failure to do so amounts to a disobedience of the court's order compounded by the absence of an indispensable element of the Claimant's case.
- [12] Mr. Panton for the 2nd and 3rd Defendants indicated that he had opposed the applications for adjournment and sought costs. And that his clients had not been required to submit accounts. He importantly pointed out that an order would not be appropriate based on the history of the case.
- [13] Mr. McDermott for the 1st and 4th Defendants supported the application even though he has not yet complied with the orders and was applying to be in compliance with the order. He however indicated that as the Claimant sought declarations, that her indebtedness was extinguished, it was necessary for her to prove this by evidence. In other words, he aimed to benefit from the application even though he had not complied.

- [14] Miss Bowen is at this time without an attorney. She points out that this puts her at a serious disadvantage against the might of experienced counsel and the resources of the Defendants. With that in mind the court attempted to ensure that she be given sufficient time to explain her situation. She indicated that she intended to rely on the report of Dalma James and that this report was to be put in a format that would allow it to be used in court. She points out that she had always intended to rely on Dalma James' report as she set out in the pleadings. She also stated that Lord Gifford had applied for a further extension of the order of Williams J. She has since the hearing, filed a copy of the Notice of Application filed by Lord Gifford in July 2012 seeking a further extension because the accountant retained, failed to honour his retainer.
- [15] Mr. Piper had pointed out that the reliance at this stage on Dalma James cannot be used to thwart the order of the court as this report was previously filed and existed before the order of Williams J made at the request of Lord Gifford. In response to that, I note that the Notice of Application speaks to a new report of Dalma James which was to be completed before 31st July, 2012.
- [16] To this date, that report is not before the court and the claimant now seeks additional time for another report from Mr. James. Despite my understanding of the difficulties that the Claimant faces in arguing her case when she has no current representation, it is my view that she has been granted more than ample time and opportunity to obtain the necessary legal representation. She has complained that she has been deprived of the representation of Lord Gifford due to his illness. However, the Claimant has had at least four different attorneys-at-law representing her in this matter. The attorneys who represented her at the last trial date of this matter in September 2012 removed their name from the record by order of this court in October 2012.
- [17] It is also clear that she had sufficient opportunity to obtain the accounting evidence or report in compliance with the order of Williams J. Even when one

considers the last Notice of Application filed by Lord Gifford, that extension if granted would have been only to the end of July 2012. Today, some eight months later, there is not even a draft report for this court to peruse.

[18] In all the circumstances of this case it is my view that the Claimant's Statement of case should be struck out and Judgment entered against her in favour of all the Defendants' Judgment in terms of the order made today.

[19] The costs of the 2nd, 3rd, 5th and 6th Defendants should be paid by the Claimant. The 1st and 4th Defendants having not complied with the court order cannot benefit in costs from this action. It is my hope that the Defendants will consider carefully whether they will enforce any order as to costs.