[2015] JMSC Civ. 240

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013HCV06636

BETWEEN	**HENRY GORDON**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Hannah Harris Barrington for claimant instructed by the Jamaican Forum for Human Rights.

Tamara Dickens for the Defendant instructed by the Director of State Proceedings.

Civil Procedure - Application to enter default judgment - Application to Strike out Claim- Application for extension of time to file Defence - Whether Amendment to the statements of case affects the prescribed time for filing Acknowledgment and Defence - CPR Rule 20.3 - Striking out of Statement of Case-CPR Rule 26.3(1)(c) - Wrongful conviction - Whether judge is crown servant - Immunity of judicial officers - The Crown Proceedings Act.

HEARD ON THE: 29th April and 28th October 2015 delivered 3rd December 2015

In Chambers

Bertram Linton, J (Ag.)

Background

[1] This case has a uniquely checkered past and as such it requires some amount of recap.

Mr. Henry Gordon, the claimant, was convicted in the circuit court for Clarendon of manslaughter. He says in his claim form (filed and served on the 3rd December, 2013 (2013HCV06636) that he claims damages as he was wrongly convicted because the trial judge misdirected the jury at his trial. He bases this contention on the fact that the

Court of Appeal in quashing his conviction, gave as its reason, that the directions to the jury at the trial were defective in a material particular.

[2] On December 17th 2013, another claim was filed and served (2013HCV06910) with the same two parties as claimant and defendant which recited the same complaint but with minor changes in the recital as to what remedy was being claimed.

[3] The defendant's Acknowledgement of Service was filed on the 13th of January, 2014 in response to the first claim received; it acknowledges receipt of the claim on the December 3rd, 2013 and among other things expresses an intention to defend the claim. This acknowledgment is expressed (without contention) to have been served on the claimant on the 14th January, 2014. The Defendant did not file a defence to this claim and defence counsel asserts that the duplication of the claims was what accounted for this. Thereafter the defendant sought clarification as to which claim was being proceeded with, no information on this was forthcoming and the defendants understandably were confused as to the intentions of the claimant. It was not until February 28th, 2014 that a notice of discontinuance was filed in the matter of 2013HCV06910 that notice was served on the defendant on the 7th March 2014.

[4] On February 27th, 2014, the claimant filed his notice of application to enter judgment in default of defence in 2013HCV6636. The defence would have been due sometime in late February 2014, but up to the 7th March, 2014 both claims were still subsisting. On June 27th 2014 later amended on June 30th 2014, the defendant filed Notice of application requesting that the claim be struck out as disclosing no cause of action against the defendant or that the defendant be allowed to file a defence out of time. The claim was also amended and filed on July 23, 2014 and served on the defendant on the 5th of August 2014.This amendment seems to be attempting to address the issues raised in the defendant's amended application.

[5] The original claim said among other things;

"That the claimant was wrongfully convicted of the offence of manslaughter in the Circuit Court held in May Pen…the learned trial judge… misdirected the proceedings…this error by the learned trial judge have [sic] caused Mr. Henry Gordon to be incarcerated."

It now recites as of 23rd July 2014;

> "*The Claimant further states that he was convicted due to the trial judge's incorrect direction to the jury. The Claimant served several years in prison; whilst he was innocent. He was degraded for no good purpose and now wishes to be compensated for the damage he has suffered; which is in breach of Section 13(3)(o) and 19.-(1) of the Charter of Fundamental rights and freedoms,…".*

[6] This is now a new claim and totally new set of issues have been raised. In fact the applications were set to be heard on July 2, 2014, but because of insufficient time being allotted, the hearing was set for December18th, 2014 and further for April 29th, 2015.The claimant has filed six affidavits, all sworn to by the attorney, the last of them on April 21st, 2015 there is no proof of service of this last document on the defendant and as such it was not allowed into evidence. The claimant's skeleton argument was also noted and the claimant was also ordered to file a response to the authorities raised by the defendant. The claimant now wishes judgment to be entered in default of the filing of a defence to his amended claim form of July 23rd 2014 and served in August 2014. The defendant has also filed its affidavits in support of its application and the amendment .All submissions have been duly noted and will be referred to as are relevant to the court's decision on the matter herein.

The issues

[7] A. Is the application before the court filed on February 27th, 2014 applicable to the Amended Claim form filed on 23rd July 2014 and served on 5th August 2014?

B. Should judgment be entered on this claim in default of a defence being filed?

C. Should the Claim be struck out on the bases identified by the defendant?

D. If the claim is not struck out, should permission be granted for the defendant to file its defence out of time to the relevant claim?

The Claimant's Application

[8] In direct response to the initial submission of the claimant that they had a right to default judgment once the defendant had failed to appear or to file a defence in the matter, the following is noted.

[9] The right of the claimant to make this application and the power of the court to entertain it is not expressly stated in the Civil Procedure Rules (CPR) Part 59 which deals with proceedings by and against the crown. However it has long been recognized and accepted that the Crown Proceedings Act section 29 (2) is to be given full effect.
Section 29 (2)

> *"Provision shall be made by rules of court and Resident Magistrates Court rules with respect to the following matters-*
> *(c) …for providing that in the case of proceedings against the crown, the plaintiff shall not enter judgment against the crown in default of appearance or pleading without the leave of the court to be obtained on application of which notice has been given to the crown."*

[10] In a judgment delivered September 18, 2006 **Rutair Ltd. V Civil Aviation Authority [2005] HCV 1748** in our court, Campbell, J said in his ruling on the issue, that although the CPR is silent on the point, regard had to be given to the express provision in the Crown Proceedings Act as it applied to default judgments. I also adopt the analysis of McDonald-Bishop (Ag) (as she then was) in **Marcia Jarrett v South East Regional Health Authority, Robert Wan and the Attorney General [2006] HCV 00816** where she expressed that; the purpose and rationale for such a rule remains the same today as it was under the former rules. So, the fact that there is an omission to make such provision in the CPR cannot override the mandatory provisions of the statute which stand in effect until repealed.

Rule 20.3 of The CPR is titled and recites

Consequential amendments

> *20.3 (1) A defendant served with an amended particulars of claim or a claimant served with an amended counterclaim may amend the defence once without permission within 28 days of service of the amended particulars of claim or counterclaim as the case may be.*

Issue A

Is application relevant to current statement of case

[11] When the application for permission to enter default judgment was made in February 27, 2014, the relevant claim was the one filed on December 3rd 2013 (2013HCV06636). It is noted the defendant had received two almost identical claims on the same issue. It is understandable then that the defendant's attorney would be at a loss as to which matter was to be addressed and this may have caused or contributed in no small way to the defendants not filing a defence as prescribed certainly up to March 7, 2014 when the defendant received the notice of discontinuance in case # 2013HCV6910.

[12] I find that this is a reasonable starting point for the defendant to have determined that the way was clear to file a defence in the matter, certainly in the defendant's mind this is when a clear indication came as to which claim the parties were now to give their full attention. The application to enter default judgment would then have been premature as even though strictly speaking the period allowed by the rules had indeed passed, the defendant would have been at a disadvantage based on the confusion created by the claimant.

[13] From the submissions of both parties and the affidavits filed, it would appear that this confusion triggered some discussion as to an extension of time being granted for the defence, the claimant's attorney was adamant that no extension was agreed to by her and in this light it would appear that the defendant would be then obliged to approach the court.

[14] In any event CPR Rule 20.3 would then become applicable since the defendant would then be entitled to a further 28 days from the receipt of the amended claim to file a defence to the amended claim.

[15] Having proceeded to take the defendant to task for not filing a defence in time to the claim filed on December 3rd 2014, and with a request for judgment in default pending, the claimant then proceeds to amend his claim in a substantial way, changing the whole basis of the claim, that is to ask for redress in response to breaches of constitutional rights. In the court's view this could not be allowed since if the court were to accede to the claimant's request it would be giving judgment to a claim which had not been before it at the time of the application and the issues raised were never put before the defendant for a defence to be filed addressing the new and substantial issues raised.

[16] This is borne out by the fact that in her document titled "Claimant's Skeleton Argument", filed on 21st April 2015 for hearing in this application before the court, Ms Harris-Barrington argues that;

"The substantial issue is not pursuant to what the trial judge did or did not do. The case for the Plaintiff revolves around the indignity he suffered, the conviction whilst being innocent and the time he spent in prison. The Constitution of Jamaica gives redress to citizens who allege that their fundamental rights have been breached…

That the matter proceeded for three consecutive days 19, 20 and 21 July 2011, and upon the conclusion of the judges, they were of the view that the conviction should not

stand as the learned trial judge… misdirected the court proceedings. This error by the learned trial judge have (sic) caused Mr. Henry Gordon to be incarcerated."

[17] This is in sharp contrast to the claim to which no defence was filed and which would have formed the factual substratum for the original application by the claimant to enter default judgment. It also does not take into account that the statement of case was substantially amended and as such time began to run for the defendants giving another 28 days after the amended claim was served.

In resolving '**Issue A'** I find then that the application to enter default judgment in default of the filing of a defence could not properly be said to be in respect of the current claim form that is before the court for determination.

'Issue B'

Should judgment in default be entered for the claimant?

[18] There is no question then that the claimant have amended the statement of case then on several occasions, was premature in his application to enter default judgment as the time permitted by the rules had not expired for the defendant to file its defence in the case.

The defendant's application

Issue C

[19] On the amended application to strike out the claim the defendant says that no cause of action known to law was pleaded and that there were no reasonable grounds for bringing the action since the judge is not to be regarded as a crown servant; but even if he was so regarded, there was immunity which attached in the exercise of his judicial functions. On the first point she cites (in response to the claim that was before the court at the time) that wrongful conviction as a result of misdirection to the jury was the basis of the claim. It is notable that the case Ms. Harris –Barrington cites in support of her claim was one for false imprisonment and the persons who received compensation in that matter were deemed to have been falsely imprisoned by police officers who it is well accepted were crown servants.

[20] In the main case cited by Ms. Hannah Harris Barrington, **Mark Sangster and Randall Dixon v The Queen [2002] UKPC the Privy Council** instructed that the case be remitted to the Court of Appeal in Jamaica for the question of whether a new trial should be ordered. The UK Privy Council proceeded on the basis that a material video tape of the robbery for which the accused had been charged had not been disclosed by the police and **"if it had been disclosed to the defence and had been led at trial, it might reasonably have affected the decision of the trial jury to convict. That being so, the convictions of the appellants must be regarded as unsafe, with the result that there has been a miscarriage of justice." For these reasons at the conclusion of the hearing their Lordships indicated that they intended humbly to advise Her Majesty that the appeals should be allowed and the convictions quashed. (At Para 20)**

[21] Later it was noted that the men were awarded various sums as compensation consequent upon the decision not to order a new trial and a finding that they had been falsely identified by police officers as being involved in the robbery when there was exculpatory evidence in the form of the video tape which showed other persons entirely conducting the robbery.

This case bears absolutely no resemblance to the issues raised in the matter before us whether on the original claim or any of the amended claims. In addition I find that wrongful conviction was never cited as a basis for the award to these parties, and as such the claimant has not sufficiently shown that this cause of action whether by authority in case law or by statute has been regarded as a basis for a claim in law, certainly not in Jamaica. There is therefore no reasonable ground for the bringing of the claim.

[22] I am further bolstered in this view by the fact that the Crown Proceedings Act seeks at Section 3 (5) to protect the actors in the judicial process who are crown servants. This blanket protection is not offered in any other area.

I adopt the reasoning in the book, "Constitutional and Administrative law, by John Alder, 9th edition, where the learned author describes the situation as follows:

> *"Although judges are in theory crown servants, from the seventeenth century it was established that the king cannot act as judge himself (see Prohibition del Roy 1607). There is now a strong separation between the courts and the executive which has been endorsed by the judges. As Lord Steyn put it in R (Anderson) v Secretary of State (2002) our constitution has never embraced a rigid doctrine of separation of powers. The relationship between the legislative and the executive are close. On the other hand the separation of powers between the judiciary and the legislative branches of government is a strong principle in our system of government (at page 39)"*

[23] The Crown Proceedings Act makes it possible to sue government departments in tort, imposing vicarious liability on the crown for torts committed by its servants and agents as if the crown were a private person of full age and capacity. Even if we assume that the holders of judicial office are crown servants or agents for this purpose, the act clearly states that the Crown was not vicariously liable where the individual servant or agent was not personally liable in tort. Since judges are protected by the rule of absolute immunity, this would have prevented vicarious liability arising in respect of the judiciary. Moreover to put the matter beyond any possible argument the act states that the Crown is not liable for the conduct of any person while discharging or purporting to discharge any responsibilities which he has in connection with the execution of the judicial process. The plain intention expressed in the Act, taken with the rule of absolute immunity at common law, excludes any possibility of the Crown being liable for the wrongful acts of judges and others acting in a judicial capacity.

[24] So for example in **Welsh v Chief Constable of Merseyside Police [1993] 1 ALL E R 692,** the Crown Prosecution Service was sued because a mistake had led to the claimant being arrested and held in custody unnecessarily. The court found that what had occurred was an administrative mistake and as such a failure to inform the court of vital and relevant facts, so they could not call the immunity to their aid. As

opposed to the cases of **Anderson v Gorrie [1895] 1Q B 668, Sirros v Moore & others [1974] 3 ALL E R776, and Deighan v Ireland, Attorney General, Minister of Justice & others, [1995] 1 R re56** where the plaintiff failed because "the acts complained of were done by the judge acting in his capacity as a judge in good faith though mistakenly" per Buckley L J . According to Lord Denning Master of the Rolls, in the Deighan case, "The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear"

Issue D

[25] Based on the foregoing reason it is not necessary to give the defendant an extension of time to file a defence.

In is therefore ordered as follows and in keeping with the application by the defendant that;

a) The claim is struck out and judgment entered for the defendant.
b) Costs are awarded to the defendant to be agreed or taxed.