[2016]JMSC Civ. 201

IN THE SUPREME COURT OF JUDICATURE OFJAMAICA

CLAIM NO. 2010 HCV 02014

BETWEEN	**MICHAEL JOHNSON**	**CLAIMANT**
AND	**FREDERICA CROOKS**	**1ST D EFENDANT**
AND	**MICHELLE CROOKS**	**2ND DEFENDANT**
AND	**HAROLD CROOKS**	**3RD DEFENDANT**

Dr. Delroy Beckford for the Applicant/Defendants (paying parties).
Mr. Mikhail Williams for the Respondent/Claimants (receiving party).

HEARD: October 20, 2016 and November 15, 2016

APLICATION TO SET ASIDE DEFAULT COST- CERTIFICATE – WHETHER APPLICATION TO SET ASIDE CAN BE MADE TO A JUDGE AS WELL AS REGISTRAR – CPR 65.20, 65.22

CORAM: WINT-BLAIR, J. (Ag.)

[1] This is a decision on two applications heard together the first is an application filed on July 8, 2016 in which the applicants seek the following orders:

1. "That the Default Costs Certificate dated the 27th day of June, 2016 and granted in favour of the Claimant/Respondent be set aside.
2. That the taxation proceedings commenced by way of the Claimant's/Respondent's Bill of Costs filed on the 11th day of May, 2016 be stayed pending final determination of the claim herein.

3. Alternatively, that leave be granted to the Defendants/Applicants to file and serve within seven days of the date hereof a [sic] Points of Dispute in terms of the draft Points of Dispute exhibited to the Affidavit of Frederica Crooks in Support of Notice of Application for Court Orders dated the 7th day of July, 2016.

4. That execution of the Default Costs Certificate dated the 27th day of June, 2016 and granted in favour of the Claimant/Respondent be stayed pending the outcome of the Defendants/Applicants Notice of Application for Court Orders dated 7th day of July, 2016.

5. Costs to the Defendants/Applicants to be taxed if not agreed.

6. Such further and /or other relief as this Honourable Court may deem just."

[2] The second is an application filed on the 17th of August, 2016 in which the applicants seek the following orders:

"1. That the Defendants be granted relief from sanctions for not serving the Witness Statements of Frederica Crooks, Oliver Baylis and Kern Christian on or before the 31stday of May 2016 pursuant to the Order of the Honourable Mr. Justice Stamp dated the 13th day of April 2016..

2. That the said Witness Statements of Frederica Crooks, Oliver Baylis and Kern Christian that were served on the Claimant's Attorneys-at-Law on the 15th day of August 2016 to stand as served in compliance with the Order of the Honourable Mr. Justice Stamp dated the 13th day of April 2016.

3. Such further and/or other relief as this Honourable Court may deem just."

[3] This is a procedural matter. To this end, only the facts necessary to the conclusion will be referred to. In addition, based on my conclusion, it was not necessary to deal with several issues raised by counsel although I have given them due regard and consideration.

[4] On the May 11, 2016, the claimant filed his bill of costs. Included at the end of the bill of costs was a notice for the parties to file Points of Dispute within 28 days and stating the consequences of not so doing, namely the possibility of a default Cost Certificate being issued. No points of dispute were filed. On June 27, 2016 a default costs certificate was issued by the Registrar. Rules 64 and 65 govern the matter of costs.

[5] The applicants will be referred to as the paying parties and the Respondent the receiving party. The question arose for determination, which was whether the paying Parties could make this application directly to a Judge. This application presumed that it can be so made.This gave rise to the central issue.

Can the paying parties apply to a Judge of the Court to set aside a default costs certificate?

[6] If paying parties do not agree with a Bill of costs, the rules make provisions as to the route available to them.

Civil Procedure Rule 65.20

(1) The paying party and any other party to the taxation proceedings may dispute any item in the bill of costs by filing points of dispute and serving a copy on:

(a) the receiving party;

(b) every other party to the taxation proceedings.

(2) Points of dispute must:

(a) identify each item in the bill of costs which is disputed;

. *(b) state the reasons for the objection and*

(c) state the amount (if any) which the party serving the points of dispute considers should be allowed on taxation in respect of that item

(3) The period for filing and serving points of dispute is 28 days after the date of service of the copy bill in accordance with paragraph (1).

[7] I adopt the words of King, J as set out below:

> "The rules provide that points of dispute are the sole means by which the paying party may respond to a bill of costs. There is no provision in the Civil Procedure Rules or the Legal Profession Act for a paying party to counter with party a Notice of Application for Court Orders. The failure of the paying parties to file points of dispute has resulted in the receiving party having an opportunity to apply for a default cost certificate with an order to pay costs. If the paying parties had filed its points of dispute (even if they did so outside of the prescribed time limit) the receiving party would not have been able to successfully apply for a default cost certificate: Civil Procedure Rule 65.20(5) and (6): per King, J in **Clough Long and Co. v Adolphy Samuels** et al [2014]JMSC Civ. 27. "

[8] Civil Procedure Rules 65.20(5) and(6) provide that:

(5) (*a) the receiving party may file a request for a default costs certificate if*

(b) the period set out in paragraph (3) for serving points of dispute has expired; and

(c) no points of dispute have been served on the receiving party.

(6) If any party (including the paying party) serves points of dispute before the issue of a default costs certificate the registrar may not issue the default costs certificate.

Submissions

[9] Dr. Beckford submitted in sum that:

i. Rule 65.22 does not establish any exclusive jurisdiction on the part of the Registrar to set aside a default costs certificate. It creates no jurisdiction in a named person, therefore the court in the exercise of its inherent jurisdiction is not pre-empted from exercising jurisdiction

ii. Rule 65.19 is the general rule that costs must not be taxed until the conclusion of the proceedings unless ordered by the Court. The proceedings are ongoing.

iii. The paying parties rely on the grounds that the receiving party was aware that at all times the costs claimed were being disputed as unreasonable, that there was no agreement with the costs and that the attorneys were claiming costs which were not arrived at by way of an order of the court or by mutual consent.

iv. The authorities say the court can set aside a default costs certificate for good reason.

[10] Mr. Williams submitted in sum that:

i. On the first application, he had no objection.

ii. In respect of the first application according to Rule 26.3(4), the Court may not order payment of costs for relief unless exceptional circumstances are shown. Costs must be entered against the applicant on the application.

iii. Rule 65.22 gives the Registrar specific jurisdiction. This Rule raised two points:

a. The first is the jurisdiction of the court as no previous application had been made directly to the Registrar. The application was not properly before the court. The application had not been made to the proper officer of the court.Rules 65.22 and 65.27(1) set out the procedure. What counsel for the applicants should have done is to first apply to the Registrar, then if dissatisfied, appeal to a judge of the Supreme Court. In addition, no points of dispute had been filed in response.

b. Rule 65.18(2) provides that at the commencement of taxation proceedings bill of costs must be filed and served not more than 3 months after the date of the order of Stamp, J. made on April 13, 2016, for the receiving party to receive payment which was May 31. If not, should be referred to taxation before the Registrar.

The Law

[11] As considered above, when outlining the procedure for disputing a bill of costs, the law does not recognize any other means of dispute, whether by oral disagreement, letter to the Registrar or even by a Notice of Application for Court Orders. The Rules state that these issues are to be raised in points of dispute. The paying parties filed no such points of dispute within time and filed no application to this court for an extension of time within which to file so as to comply with Rule 65.20.

[12] In support of the submission that this court has jurisdiction to determine the application, Dr. Beckford relied upon the case of **Harold Brady v General Legal Council** [2012] JMCA App 40 which states at paragraphs 1 and 2:

> *"…Mr. Brady failed to file his points of dispute in respect of the bill of costs within the prescribed time and, as a result, the registrar of this court, on 19th November 2012, properly issued a default costs certificate in the sum mentioned above.*
> *Mr. Brady now seeks to set aside the default costs certificate*

and asks that the points of dispute document, which was filed on 23 November 2012, be permitted to stand."

[13] Mr. Brady appealed and Brooks, J.A. sitting as the single judge held that as a single judge he had the inherent jurisdiction to determine the matter. He said at paragraph 10:

> *"I have recently had the opportunity to consider the powers of a single judge of this court with respect to applications to set aside default costs certficates. It was my finding then, and I am still of opinion, that a single judge of this court may consider and grant an application to set aside a default costs certificate. It is a power that this court has in order to control its own process (see Rodney Ramazan and Another v Owners of Motor Vessesl (CFS Pamplona) [2012] JMCA Civ App 37). I therefore cannot agree with the Council's attorneys-at-law on the issue of jurisdiction."*

[14] The learned Judge of Appeal went on to indicate how he would exercise his jurisdiction in determining the matter as set out below at paragraph 12 and following:

> *"[12] The question that remains is whether Mr. Brady has satisfied the requirements to have the default costs certificate in this case, set aside. The authorities seem to suggest that the certificate may be set aside for "good reason". It would seem that in considering whether good reason exists, the court should consider, at least:*
>
> *(1) the circumstances leading to the default;*
>
> *(2) whether the application to set aside was made promptly;*
>
> *(3) whether there was a clearly articulated dispute about the costs sought;*
>
> *(4) whether there was a realistic prospect of successfully disputing the bill of costs;*
>
> *There is an overlap between these considerations and those in respect of*

applications for relief from sanctions. Rule 2.20(4) of the CAR requires a consideration of the principles of relief from sanctions applies in circumstances such as these. The rule states:

> *"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."*

In my view, an application to set aside a default costs certificate easily qualifies as an application for relief."

[15] In the case of **Rodney Ramazan & Ocean Faith N.V. et al** [2012] JMCA App 37.Brooks, J.A. He held as follows:

> *"Rule 65.22 does not stipulate any restriction on the paying party seeking to set aside the default costs certificate. The paragraph is broad in its application. Paragraph 65.22(2) stipulates a mandate for the registrar but, in my view, does not otherwise prevent the registrar from setting aside a certificate. It does not say that the registrar must set aside in a certain case, "but not otherwise". I am fortified in this view by the fact that by rule 65.20 (4) the registrar may permit a paying party who does not file points of dispute in time, to participate in the taxation proceedings. Such proceedings could only be a taxation hearing that follows from points of dispute being in place. I accept, however, that the rule could have been made clearer. I also note that a request has previously been made for the rules committee to address the matter (see Charela Inn Ltd v United Church Corporation and Others 2004 HCV 02594 (delivered 8 July 2011)).*
>
> *I therefore find that the registrar has the discretion to set aside a default costs certificate, even if the receiving party was not found to be not entitled to it, as stipulated in rule 65.22(2).* ***The court, or a single judge thereof, may also exercise that discretion."*** (emphasis mine)

[16] This dictum was based on a decision of Brooks, J(as he then was) on an interpretation of Rule 65.22 in **Charela Inn v United Church Corporation**

in which Brooks, J (as he then was) also said regarding Rule 65.22:

> *"I shall now consider whether the default costs certificate may be set aside in accordance with rule 65.22. That rule states:*
>
> *(1) The paying party may apply to set aside the default costs certificate.*
>
> *(2)* ***The registrar must set aside a default costs certificate if the receiving party was not entitled to it****." (Emphasis supplied)*

I divert briefly to state that I find, that if the registrar is permitted to set aside the default costs certificate, the court or a judge would also be empowered to take that step. Support for this finding is to be found at rule 2.5 (1) of the CPR, which provides:

> *"Except where any enactment, rule or practice direction provides otherwise the functions of the court may be exercised in accordance with these Rules and any direction made by the Chief Justice by –*
>
> 1. *(a) a single judge of the court;*
> 2. *(b) a master; or*
> 3. *(c) a registrar."*

Even if I am wrong in that interpretation of that rule, I find that the court's power to set aside the default costs certificate would fall within the court's inherent power to control its process. I therefore find that I have the authority to set aside the default costs certificate, or, at least direct the registrar so to do, if the application ought to succeed.

[17] The Rules have been amended since **Charela Inn** was decided. In 2011, Rule 65.22 was amended to bring it in line with the UK Civil Procedure Rules of 2004. It now adds paragraph 3, which states that an application can be set aside for good reason and paragraph 4 which states that any application made must be supported by affidavit and propsed points of dispute. The amendment has not specified whether the application may be brought before a judge.

[18] The procedure for setting aside a default costs certificate in the UK is commenced by an application to the court. The word court in their Rules includes a costs Judge which is not a position known to this jurisdiction. Rule 65.22 does not state the level of court to which an application should be made. However, it does no use the word “Judge” which is defined in the Civil Procedure Rules to exclude Registrar unless required by context. However, in the instant case, there is not cause to read the word Judge into the Rule which has been specifically omitted. The designation of court as the Supreme Court confers jurisdiction upon the Registrar to hear the application. It is easy to understand why based on **Charela Inn** it would appear that a Judge should also hear the application, as the definition of court includes Judge of the Supreme Court. But, it does not end there. I will follow both paths to their logical conclusion.

[19] As I understand the law, the procedure for setting aside a default costs certificate is as set out in the Rules. Pursuant to Rule 65.22 an application is first made to the Registrar as set out in Rule 65.21 to obtain a default costs certificate. This is done by filing an affidavit proving service of the bill of costs and that no points of dispute have been received by the receiving party. A draft default costs certificate should accompany these documents for signature by the Registrar.

[20] Once issued by the Registrar, in order to have this default costs certificate set aside, the paying party may apply to the Registrar so to do. If the receiving party was not entitled to it the Registrar will set it aside. If the Registrar does not set it aside, then the paying party may appeal to a Judge of the Supreme Court pursuant to Rule 65.27. This appeal is against a decision of a Registrar. The procedure on appeal is set out in Rule 65.28

[21] In the instant matter as required by Rule 65.18(6), the bill of costs served on the paying party had attached a notice of the need to serve points in

dispute under Rule 65.20 and the consequences of not doing so. No points of dispute were filed in response. Neither did the paying parties file an application to the court for an order extending time with which to comply with Rule 65.20(3). The receiving party filed a request for a default costs certificate pursuant to Rule 65.20(5)(b). The receiving party was therefore entitled to it in all the circumstances.

[22] If the application to set aside a default costs certificate is made directly to a judge then it would yield an anomalous result. For it would mean that an aggrieved paying party could apply **either** to a judge or to the Registrar. If the paying party remained aggrieved by the decision of the Judge or of the Registrar then, a further appeal would lie in the instance of an appeal from a decision of the Registrar to a Judge of the Supreme Court, and from a Judge, in the normal case, to the Court of Appeal. This is not a normal case.

[23] Further, if the application to set aside is not made to the Registrar but to a Judge, if the receiving party was not entitled to it, the Judge would have to set aside and then remit the matter to the Registrar for taxation. Any appeal from this process would then return to a Judge for a hearing.

[24] On this interpretation, there would be no certainty as to the process. Parties would be able to choose their path with no distinction as to how appeals would be decided and by what level of court until an application to set aside was made. This would be a rather curious application of the Rules. Particularly as Rule 65.27 provides that appeals from taxation are specifically to a Judge of the Supreme Court.There could be no appeal from a Judge to another Judge of equal jurisdiction. The appeal from the order of a Judge could only lie to the Court of Appeal, which is not provided for in the Rules in respect of Rule 65.27.

> *65.27 (1) An appeal against a decision of a registrar on taxation is to a judge of the court.*

(2) The Chief Justice may from time to time nominate a judge of the court to hear appeals against taxation.

[25] Further Sections 13 and 43 of the Judicature (Supreme Court) Act also provide that any appeal from any order of the Registrar may be made to a Judge. Section 43 provides that a Judge may order the matters that shall be enquired into by the Registrar and the proviso thereto, that appeals from a decision of the Registrar shall be to the Court.

[26] Taxation matters are listed for hearing before the Registrar. It seems to accord with logic that the Rules Committee provided in Rule 65.22 for applications such as the one at bar to remain before the Registrar for consideration.

[27] The Interpretation Act provides:

> *"rules of court", when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court;*
>
> The Rules being procedural are susceptible of application in a way which leads to greater certainty in the practice and procedure of matters in the civil jurisdiction of the court. Based on the reasoning above, I would wish to posit another view with the greatest of respect to the dicta of the learned Judge of Appeal.

[28] Though the rule under discussion is procedural, I rely upon the approach to statutory interpretation to buttress the foregoing analysis. The speech of Lord Reid in the House of Lords is cited in aid of the approach to be taken in construing the words of a statute. He states as step one, a mix of the literal and golden rules in which a judge must ask himself what is the natural and ordinary meaning of the word or phrase in question and apply it to the facts of the case unless the result is something which cannot

reasonably be supposed to have been intended by the legislature;but the rule is one which leaves a lot to the choice of the particular judge.[1]

In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase." **Pinner v Everett** [1969] 3 All E.R. 257 at 258-9.]

[29] For step two, Lord Reid in **Maunsell v Olins** [1975] AC 373 at 382 said:

> *"Then [in case of doubt] rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one "rule" points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular rule".*

[30] It is here we see that in all the relevant circumstances it would appear that Rule 65.22 allows for the division of labour within the Supreme Court, thus the context is important. The application of the role may be viewed through the lens of that which best accords with practical reality.

[31] Finally, Lord Reid's third step is:

"It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond

[1] Cross on Statutory Interpretation,2nd edn p.37

that you must not go." Per Lord Reid, **Jones v Director of Public Prosecutions** [1962] AC 635 at 662

[32] Professor Cross sets out a brief statement of the rules of English statutory interpretation below:

> *"1. The Judge must give effect to the grammatical and ordinary or where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.*
>
> *2. If the Judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.*
>
> *3. The Judge may read in words which he considers to be necessarily implied by the words which are already in the statute and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.*
>
> *4. In applying the above rules the judge may resort to aids to construction."*[2]

[33] Applying the words of Professor Cross and the dicta of Lord Reid to the instant case, I hold the view that the application to apply to set aside a default costs certificate pursuant to Rule 65.22(1) is to be made to the Registrar and not to a single Judge of the Supreme Court. This is the

[2] ibid

preferable interpretation as it renders the application of the rule more certain, more reasonable and more easily applied.

[34] This would mean that in the instant case, the application is not properly before this court.

[35] In respect of the application for relief from sanctions by notice of application for court orders filed on August 17, 2016, the orders are made by consent.

Orders are:

1. By consent, the Defendants/Applicants (paying parties) are granted relief from sanctions for not serving the Witness Statements of Frederica Crooks, Oliver Baylis and Kern Christian on or before the 31st day of May 2016 pursuant to the Order of the Honourable Mr. Justice Stamp dated the 13th day of April 2016.
2. By consent that the said Witness Statements of Frederica Crooks, Oliver Baylis and Kern Christian that were served on the Claimant's Attorneys-at-Law on the 15th day of August 2016 stand as if served in compliance with the Order of the Honourable Mr. Justice Stamp dated the 13th day of April 2016.
3. The application to set aside the Default Costs Certificate is refused.
4. The court as constituted has no jurisdiction to set aside the default costs certificate. The matter is hereby to be remitted to the Registrar for hearing.
5. Costs in the application to the Respondent/Claimant receiving party to be taxed if not agreed.
6. Leave to appeal granted.