[2015] JMCC COMM 25

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2012CD00059

BETWEEN	**ANDRE TYRELL**	**CLAIMANT**
AND	**CORDEL BURRELL**	**FIRST DEFENDANT**
AND	**DOWNSOUND RECORDS LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Analisa Chapman and Kerrie-Ann Dryden for the claimant

Emile Leiba and Kristopher Brown instructed by DunnCox for the first and second defendants

November 6 and December 2, 2015

CIVIL PROCEDURE – APPLICATION TO SET ASIDE JUDGMENT – WHETHER PERMISSION TO FILE WITNESS STATEMENTS IN SUPPORT OF DEFENCE SHOULD BE GRANTED – WHETHER DEFENDANTS SHOULD BE PERMITTED TO PARTICIPATE IN ASSESSMENT OF DAMAGES

SYKES J

Application

[1] On September 3, 2015 Lindo J (Ag) assessed damages and made an award against both defendants. The award was a very hefty one for copyright infringement and is indeed a landmark award for breach of copyright in Jamaica. The award has many components but to give some idea of the magnitude of the award the following is extracted: general damages were JA$3.7m; additional statutory damages were JA$9.5m; there is a United States of America component of US$15,000.00 and there is interest at 14.99% on the general damages awarded for breach of economic copyright and breach of moral rights.

[2] Mr André Tyrell moved swiftly to enforcement. By September 21, 2015 he secured a provisional charging order from Sykes J. A writ of seizure and sale was also issued from the Supreme Court. The swiftness of the enforcement was matched by the alacrity and enthusiasm of the bailiff. The bailiff, in short order, took possession of vehicles belonging to the second defendant and they were headed to auction block.

[3] In these circumstances both defendants arrived on the door steps of the law firm of DunnCox seeking urgent legal advice. The practical manifestation of the advice is this application to set aside the judgment of her Ladyship and that the defendants be permitted to defend the claim by filing a defence, witness statements and to call such witnesses at the assessment of damages. There was also an oral application to set aside or vary the order of Sinclair Haynes J who entered judgment against both defendants as far back as October 22, 2012.

[4] The defendants are also seeking a stay of execution of the judgment pending the outcome of this application. In the event that their primary relief is not granted the defendants have asked the judgment be set aside and they be permitted to file a defence limited to quantum. The defendants also asked that the provisional charging order be set aside.

The affidavits in support of application

[5] Mr Cordell Burrell and Mr Joseph Bogdanovich filed affidavits in support of the application. Mr Burrell identifies himself as a music producer and senior staff producer of Downsound Records Limited ('DRL'). He accepts that he received the claim form, particulars of claim and other supporting documents on August 22, 2012. On receipt of these documents he contacted Miss Chapman, the lawyer for Mr Tyrell and sought to explain to her that the song he produced which was alleged to be a reproduction, adaptation or derivative work of Mr Tyrell's work had not generated any substantial income or international chart success. He proposed to settle the matter.

[6] The affidavit seeks to say that the assessment of damages was fundamentally flawed because it ignored the recognised methods of assessing damages and that this flaw resulted in the greatly inflated damages that were awarded.

[7] In his affidavit Mr Bogdanovich identifies himself as the managing director of DRL. He states that while in the state of Florida in the United States of America he received a call from Mr Burrell indicating that both Mr Burrell and DRL were sued by Mr Tyrell for breach of copyright. He said that he was assured by Mr Tyrell that everything was 'under control' and the claim had no merit. He was also told by Mr Burrell that Mr Tyrell's lawyer was contacted. This led Mr Bogdanovich to believe that all was well and so he did not follow up on this claim. Since the assessment he contacted Mr Lloyd Stanbury who examined the award and concluded that basis of the calculation of the award was erroneous.

[8] These affidavits explain so well why default judgment was entered. The defendants did not respond with any sense of urgency to the claim. While it is true that default judgments may be set aside these affidavits have not provided any basis for the exercise of any such discretion.

[9] There is a third affidavit from Mr Kristopher Brown who says that he sought the advice of persons versed in the music industry and the current opinion is that the award is inconsistent with how damages are awarded in the industry.

The submissions

[10] Mr Emile Leiba insisted that the learned judge applied the incorrect legal principles for assessing damages in this area of law. He was of the view that all the persons consulted by him made it clear that damages are not assessed in the manner indicated by her Ladyship and in these circumstances justice demanded that the defendants be allowed to set the matter aright. Learned counsel stated that they only wish to participate on the issue of quantum of damages and not on the issue of liability.

[11] Mr Leiba laboured to convince this court that there were various procedural rules which would permit this court to grant the defendants the opportunity to participate in an assessment of damages. There was reference to rules 26.1 (v), 26.9, 39.6 (1) and 42.13 of the Civil Procedures Rules ('CPR').

[12] Rule 26.1 (v) empowers the court to take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective. Rule 26.9 empowers the court to correct any failure to comply with a rule, practice director or court order. Rule 39.6 (1) permits the court set aside the judgment or order made when a party is not present at a trial. Rule 42.13 permits a judgment debtor to apply to the court for a stay of execution or other relief on the ground stated there.

[13] This court is able to say that rule 39.6 (1) cannot possibly assist Mr Leiba because that refers to a regularly managed case that goes all the way to trial and a party is absent. It may cover cases where a default judgment is entered and damages are to be assessed since the assessment of damages is a trial. However this is not a regularly managed case where the usual steps were taken in case management leading up to trial. It may be thought that since this is a

default judgment case and since the assessment was a trial that the court is permitted to set aside the assessment itself. For the reasons about to be given this possibility cannot avail Mr Leiba. The CPR clearly defines the rights of defendants where default judgments are entered against them.

[14] Mrs Dryden's response is unassailable. She submitted that once liability is established and the default judgment was properly entered without any defence on quantum being put in then the rights of the defendants are necessarily limited in the way stated in **Winston Johnson v Norbert Lawrence** [2012] JMCA Civ 12. Therefore there is no basis for this court to permit the defendants to defend on quantum. The CPR, she said, has covered the ground. The rules are specific and where there are specific rules then no resort can be had to general rules. This court agrees with Mrs Dryden's submissions.

The resolution

[15] The court means no disrespect to Mr Leiba for not recording his submissions in detail. The reason for this omission is that the decision of the Court of Appeal of Jamaica in **Winston Johnson v Norbert Lawrence** [2012] JMCA Civ 12 is conclusive and no argument to the contrary can be contemplated.

[16] In that case the defendant sought to set aside or vary a default judgment entered against him. The variation sought was to have the judgment entered as one of judgment on admissions. The judgment entered was one in default of defence. The judge who heard the application refused to set aside or vary the default judgment. The judge also refused relief from sanctions but granted permission to the defendant to challenge the assessment of damages by cross examination of the claimant and his witnesses. The learned judge also ordered that the claimant serve upon the defendant witness statements.

[17] The reason for seeking to have the judgment entered as one on admissions was to secure the benefit of rule 16.3 (6). Under rule 16.3 (6) a 'defendant is entitled to cross examine any witness called on behalf of the claimant and to make

submissions to the court but is not entitled to call any evidence unless the defendant has filed a defence setting out the fact the defendant seeks to prove.'

[18] The learned judge took the view that there was a conflict between rule 16 and rule 12.13 and in light of such conflict he was entitled to use the overriding objective to do justice between the parties.

[19] On appeal, the point taken was that there was no conflict between the two rules. The claimant sought to uphold the judge's decision on the refusal to set aside or vary the default judgment but took issue with the learned judge on rights of a defendant to participate in the assessment of damages where a judgment in default of defence was entered.

[20] It is interesting to note the submissions of counsel for the defendant in the Court of Appeal. They are, with immaterial variations, the submissions spring from the same root as those being urged by Mr Leiba. Mr Leiba has urged the difficulties for the defendants unless they are permitted to cross examine and adduce evidence. Miss Dummett submitted to the learned Justices of Appeal that:

(1) the learned judge was correct to permit cross examination of the claimant;

(2) although a default judgment was conclusive on liability damages still had to be proved and that all questions going to quantification was open to challenge by the defendant;

(3) in the particular case, the claimant was making a claim for loss of earnings which had not been pleaded;

(4) unless the defendant was permitted to challenge the claimant, the court would be making an award to which the claimant was not entitled;

(5) the defendant would be deprived of the opportunity to say he did not cause any particular loss and the court would be left with the claimant's assertions;

[21] Mr Reitzin who appeared for the claimant made the devastating and conclusive point that English cases were irrelevant regarding rule 12.3 of the Jamaican CPR. Learned counsel submitted that that rule was the consequence of a policy decision to deal with delays in the administration of justice. The English CPR has no such rule or even one remotely similar. Mr Reitzin took the view that rule 12.3 was indeed, a Jamaican tailor-made solution for a chronic Jamaican problem of delay. Rule 12.12 states that 'unless a defendant applies for and obtains an order for the judgment to be set aside the only matter on which a defendant against whom a default judgment has been entered may be heard are (a) costs; (b) time of payment of any judgment debt; (c) enforcement of the judgment; and (d) an application under rule 12.10 (2).' Mr Reitzin made the further telling submission that when a default judgment was entered the defendant had very limited rights and under rule 12.13 a defendant has no right to cross-examine any witness called on behalf of the claimant or make any submissions to the court.

[22] Harris JA examined rules 10.2, 12.10, 12.13 and 16.2 of the CPR. Her Ladyship stated the issues for resolution as follows:

(i) what is the extent to which a defendant is allowed to participate in an assessment of damages hearing in circumstances were a default judgment has been obtained against him?

(ii) what is the procedure to be adopted in relation to the assessment of damages after a default judgment?

[23] Harris JA stated at paragraphs 14 - 18:

> *[14] In ascertaining the rights of a defendant at an assessment of damages, following entry of a default judgment, one must have regard to rule 12.13. This rule is unequivocal in its wording as to the extent to which a court will entertain a defendant at the hearing of an assessment of damages. It permits a defendant to be heard only*

on the areas of costs, the time of payment of any judgment debt and enforcement of the judgment.

...

[15] ...It follows from this that cross-examination of a witness and making submissions to the court are not among the entitlements accruing to the defendant under a default judgment.

...

[16] It was also Miss Dummett's submission that rule 12.13 ought to be read in conjunction with rule 16.2. There is no doubt that rule 16.2(4) stipulates that the registry must fix dates for the assessment hearing, standard disclosure and inspection, the exchange of witness statements and the filing of the listing questionnaire. However, this provision must be viewed in the light of the scheme of the rule within which it falls. It must be borne in mind that rule 16.2 in its entirety, deals with the assessment of damages after default judgment. The rule makes provision for the procedure to be adopted in two situations, namely: where the claimant has stated that he is in a position to prove damages and where the claimant has stated that he is not in a position to prove damages. In my view, rule 16.2(2) quite clearly addresses the situation where the claimant is in a position to prove damages. In that instance, the registry must fix a date for the assessment and give notice of this to the claimant. Rule 16.2(3) speaks clearly to the situation where the claimant is not in a position to prove damages. The use of the words "must then fix" in my view suggests that rule 16.2(4) is a natural progression from rule 16.2(3) only. That this is obviously the case is underscored by the fact that rule 16.2(2) has its own regime in relation to the fixing of a date for the assessment of damages. It is my view that to construe rule 16.2(4) as applying

to both rule 16.2(2) and rule 16.2(3) would make nonsense of rule 16.2(2). Mr Reitzin's submissions that rule 16.2(2) is to be read separately from rule 16.2(3) and rule 16.2(4) and that the latter two provisions should be read together have great force. In Jamalco, Cooke JA in addressing these provisions stated:

" In the application for default judgment it was stated that –'The claimant is in a position to prove the damages.' Accordingly, the next step was that – 'The registry must then fix the date … for the hearing of the assessment.' (Rule 16.2). It follows that since the claimant (appellant) was in a position to prove the amount of damages rule 16.2(4) is not relevant."

It follows from this that the appellant, in this case, having stated that it was in a position to prove damages, rule 16.2 (3) and (4) would not apply. The learned judge therefore erred in applying the rule to the circumstances of this case.

[17] It is now necessary to address the question as to what would be the result in circumstances where the claimant has stated that he is not in a position to prove damages. Surely, in those circumstances, rule 16.2(3) and (4) applies. What is the effect of these provisions on the participatory rights of the defendant? Do these provisions allow for cross-examination and the making of submissions by the defendant? The answer, in my view, is a resounding "no". To so interpret the rules would be to ignore the very plain words of rule 12.13. The rule is plain and unambiguous and must be given its ordinary meaning. In Vinos v Marks & Spencer [2001] 3 All ER 784 Peter Gibson LJ in dealing with the question of the construction of the rules of the English CPR which are substantially similar to our rules, said at paragraph 26:

> *"The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code."*
>
> *[18] It is a cardinal principle of construction that general provisions do not derogate from specific provisions. The provisions of Part 16 are general provisions relating to the assessment of damages and must be read subject to the very specific provisions of Part 12 dealing with default judgments. Further, as Mr Reitzin has pointed out in his comparison of these provisions and the provisions relating to judgment on admission (rule 16.3), there is noticeably absent from rule 16.2(4) any express words giving the defendant the right to cross-examine, whereas in rule 16.3, such an entitlement is expressly conferred.*

[24] Her Ladyship, from all of the above concluded, at paragraph 18, that:

> *A defendant against whom a default judgment has been entered therefore has no right in relation to cross examination, the making of submissions or the calling of witnesses even where the claimant has stated that he is not in a position to prove damages.*

[25] The Court of Appeal therefore adopted the analysis of Mr Reitzin as correct and from this court's perspective there is no argument that can now be made against the very restrictive rights of a defendant when a default judgment is entered. Therefore even if an assessment of damages is to follow, the defendant cannot participate except in the manner specified by the CPR. This means that the defendants application to set aside the assessment portion of the judgment is futile because even if this were done he cannot adduce any evidence or make any submissions other than on costs, time to pay and an application under rule 12.10 (2). Therefore no useful purpose would be served by agreeing with Mr

Leiba. He could not submit to the assessment judge that he or she was utilising wrong principles in making the assessment.

[26] There is an additional point. The defendants were served by email with documents as an alternative method of service. Mr Leiba sought to say that there is no specific order on the court file giving the stamp of approval of service by other means. He accepted that the rules do permit service by other means but submitted that it required a specific order approving the service by other means, which in this case, was by email.

[27] It is the view of this court that Lindo J (Ag) must have been satisfied that email service was proper in the circumstances because as a matter of law, the claimant would have had to establish that the defendants were properly served with the relevant documents. It is inescapable that her Ladyship would have been told that the service was by email. Since her Ladyship proceeded with the assessment then the inevitable conclusion is that Lindo J must have been satisfied with the email service. There is therefore no basis for this court to interfere with the default judgment in the possible bases of either non-service or no specific order approving ex post facto service by email.

Disposition

[28] The application is dismissed with costs to the claimant to be agreed or taxed. Leave to appeal granted.