



[2016] JMSC CIV. 29

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008HCV04148

BETWEEN	ERROL BACCHAS	CLAIMANT
AND	WESTMORELAND PARISH COUNCIL	1ST DEFENDANT
AND	CHARLES BEHARIE	2ND DEFENDANT
AND	OPAL BEHARIE	3RD DEFENDANT

Application for Leave to Appeal an Order for Costs – application to Extend Time to appeal – Whether Judge has Power to Set Aside an Order made by another Judge of Equal Jurisdiction- Whether Appeal has a Real Prospect of Success - Whether costs at Case Management must always be costs in the claim.

Charles Piper QC, M. Locke instructed by Charles Piper & Associates for Claimant

Canute Brown instructed by Brown, Godfrey & Morgan for Defendants.

Heard: 3rd, 8th and 12th February, 2016

Cor: BATTS, J.

This judgment was delivered orally on the 12th February, 2016.

[1] By Notice of Application filed on the 29th September 2015 the Defendants seek:

- a) Leave to enlarge time to appeal against an Order made on the 21st April 2015 that the Defendants pay

costs to the Claimant on applications at a Case Management Conference and that half the costs on Case Management Conference be costs in the claim.

- b) That Leave to Appeal the Order of the Judge awarding costs against the Defendant in an Interlocutory proceeding in which the discretion to award costs is prescribed by Law.
- c) An Order that proceedings to recover costs awarded to the Claimant to be taxed or agreed be stayed pending the determination of this Application.

[2] In the course of submissions I invited the Defendant's counsel to amend his application, and thereby seek to appeal the entire order made on the 21st April, 2015. This invitation was accepted. Mr. Piper QC requested time to consider the implications and this was granted. At the resumed hearing on the 8th February, 2016 I heard submissions on the proposed expanded Notice of Application. I indicated to the parties that I would rule in this judgment on the application to amend, and if granted on the amended application.

[3] The route taken by this litigation before arriving at this juncture may best be described as tortuous. It is however necessary to recount it if my decision on this application is to be understood.

- a) This claim was filed on the 1st September 2008 along with Particulars of Claim. The 2nd and 3rd Defendants were not then parties to the claim. The Claimant was then represented by B E Frankson & Co.
- b) On the 12th November, 2008 an ex parte order for an injunction was granted in the Claimant's favour.
- c) On the 21st day of April 2009 that injunction was discharged at an inter partes hearing. The court at that time gave permission to file a Defence on or before the 22nd May, 2009

and fixed a date for Case Management as well as a trial date.

- d) The claim was discontinued against Gene Gooden and the National Works Agency on the 23rd March 2009 but continued against the 1st Defendant (Westmoreland Parish Council).
- e) By Notice of Application filed on the 15th July 2009 the Claimant applied for a Judgment against the Defendant for failing to file its Defence.
- f) The First Defendant, who was then the only Defendant, filed a Defence on the 28th October, 2009.
- g) By Notice of Application dated 12th October, 2009 the Defendant applied for an extension of time to file Defence.
- h) By Order made on the 10th October 2009 the Application for Judgment was refused and further Case Management Orders made. These included a trial date of 23rd March, 2010.
- i) On the 23rd March 2010 the matter was adjourned to the 22nd June 2010.
- j) On the 22nd June 2010 a trial date of the 9th December 2010 was fixed. Other orders as respects experts reports were also made.
- k) On the 9th December 2010 the trial was adjourned to the 14th June, 2011 because an expert report was not ready.

- l) On the 14th June 2011 the trial was adjourned for a date to be fixed by the Registrar because lead Counsel was in the Court of Appeal.
- m) Curiously, a referral to mediation by consent of the parties was made on the 17th June 2011.
- n) The matter was listed for trial on the 12th December 2011 but was adjourned due to the pending mediation
- o) By report dated the 8th January 2014 the mediator stated the parties met but were unable to arrive at a settlement
- p) A Case Management Conference was fixed for the 31st July 2014 but the parties were directed to attend before the Registrar to agree on a date.
- q) On the 17th July 2014 the Claimant filed an Amended Claim and Particulars of Claim which added Charles and Opal Beharie as Defendants (now the 2nd and 3rd Defendants).
- r) An Amended Claim and Particulars of Claim to the same effect were also filed on the 24th July 2014.
- s) By Notice of Change of Attorneys filed on the 23rd October 2014 Messrs. Charles E Piper & Co. became attorneys for the Claimant.
- t) On the 27th October 2014 the court made the following orders:
 - i. CMC adjourned to the 21st April 2015 at 2:00 p.m.

- ii. Claimant is permitted to file and serve Further Amended Claim Form and Particulars of Claim by November 21st 2014.
- iii. The 2nd and 3rd Defendants are to file and serve acknowledgments of service in relation to the Amended Claim Form and Particulars of Claim (which were acknowledged as having been received in Chambers).
- iv. The Defendants are to file and serve Defence by the 12th December 2014 at 3:00 p.m.
- v. The Claimant to file Reply if necessary by the 9th January 2015 at 3:00 p.m.
- vi. All Applications and Affidavits in support (where necessary) are to be filed and served by March 13 2015 at 3:00 p.m.
- vii. Written Submissions together with bundles in relation to all applications are to be filed and served by March 31 2015 at 4:00 p.m.
- viii. Costs to be costs in the Claim
- ix. Claimants attorney at law to prepare, file and serve Order.

u) At the Case Management Conference of the 27th April 2015 there were two applications before me:

- i. Notice of Application filed on the 26th February 2015 by the Claimant seeking Judgment against the 2nd and 3rd Defendants for failing to

file their acknowledgement of Service or Defence in accordance with the Order of the court and time having expired so to do.

- ii. Notice of Application filed on the 13th March 2015 seeking an Order that the amendments to the Claimant's Statement of Case filed on the 18th July 2014 and Further Amended on the 17th November 2014 be disallowed or that the amendment adding the 2nd and 3rd Defendants be disallowed. It was also sought in the application to have the Statement of Case struck out as disclosing no reasonable ground for bringing a claim against the 2nd and 3rd Defendants. Finally, the Defendants applied for relief from sanctions and for permission to file a Defence.

v) The orders I made on the 27th April 2015, and which are the focus of the applications today, were as follows:

- (1) Relief from Sanction granted to the Second and Third Defendants.
- (2) The Claimant's Notice of Application for Court Orders is withdrawn
- (3) Costs of the Defendant's application filed on the 13th March 2015 and the Claimant's application filed on the 26th February, 2015 to the Claimant to be taxed or agreed and paid.

- (4) Time extended for the filing of acknowledgement of service on behalf of the 2nd and 3rd Defendants to 24th April, 2013.
- (5) Time extended for the filing of Amended Defence for First Defendant and Defence for the 2nd and 3rd Defendants to the 22nd May 2015.
- (6) Unless a Defence is filed on behalf of the 2nd and 3rd Defendants in accordance with Para 5 above Judgment shall be entered against the 2nd and 3rd Defendants.
- (7) – (19): Case Management Conference Orders for Disclosure, Witness Statements, Expert Report, Pre-Trial Review and a trial date was fixed for the 5th to 9th December, 2016.
- (20) Half Costs of the Case Management Conference were ordered to be costs in the Claim.

[4] By Affidavit filed on the 30th September 2015, in support of the Defendants 'application for permission to appeal and an extension of time in which to do so, we are told that on the 13th August 2015 the Claimant filed a Notice of Taxation of costs. That Notice of Taxation is on the court's file and is in the amount of \$655,561,65. Mr. Morgan in his affidavit does not give the quantum of costs claimed as the reason for seeking permission to appeal. He does say that counsel formed the view that the Judge's refusal of the Defendant's application was erroneous but that an appeal would only further delay the matter, and further that it was felt that the Order for Costs could be struck down. He said also,

“18. The failure to comply with the rules insofar as the time within which to apply for leave was not intentional and is due entirely to the Defendant’s attorney at law taking too long a time deciding how to proceed.

19. No submissions were invited on the issue of costs at the time the award was made. The learned judge did not therefore consider whether it was reasonable for the Defendants to have pursued the issue of disallowance of the amendments or the conduct of the Claimant in the pursuance (sic) of his claim.”

[5] Such then is the history of the matter. I have carefully considered the respective submissions. I have also reviewed my notes such as they are, of the hearing on the 21st April 2015. Having done so, I am satisfied that the application to extend time to appeal, and the application to amend the application to appeal must all be refused.

[6] There is I believe very good reason for the limited time available to appeal interlocutory Orders as is being considered in relation to costs. If reasons are required or if what transpired at the hearing requires some clarification the earlier such records can be prepared the better. I, for example, have no great recollection of what transpired other than that which my note provokes. Mr. Morgan has said I gave no opportunity for submissions before making the costs Orders. I do not know. My notes do not reflect that I did; but my notes on such issues whilst Case Management Orders are being considered, would probably not have so stated in any event. I therefore start with the presumption that the time limits for appealing interlocutory Orders ought to be respected. In this case the Defendant has waited several months before seeking leave to appeal.

[7] I do however recognise that if an appeal has real prospects of success then every opportunity to right a wrong should be granted. Particularly where, in relation to an appeal against costs, the fixed trial date is unlikely to be adversely affected.

[8] In this case however, I am satisfied that any appeal will in all probability be fruitless. This is because the court on the 27th October 2014 granted permission

for a Further Amended Claim and Particulars of Claim. It was not then contended that the intended Amendment ought to be particularised. Be it noted that an amended Claim adding the 2nd and 3rd Defendants had earlier been filed since in or about the 24th July 2014, See affidavit in proof of service filed on the 24th July 2014.

- [9] It is true that the Civil Procedure Rules 2002, Rules 19.4 and 20.6, deal separately with the addition of parties and amendments to Statement of Case after a period of limitation has expired. However, the Defendants failed, since July 2014 and did not do so when the opportunity arose on the 27 October 2014, to challenge the jurisdiction to add parties or to amend. Permission to further amend on the 27th October 2014 was granted for a claim which by that date all parties recognised as including the 2nd and 3rd Defendants as parties. That is the only way that the Order to file an acknowledgement and Defence by the 2nd and 3rd Defendants could make sense. There was, let me be clear, no appeal against the Order of the 27 October 2014. Indeed my brief note of Mr. Brown's submission on the 21st April 2015 before me had him say at one stage,

“Challenge to Amended Claim although permission granted to Further Amend Claim. No challenge to Further Amended which was without permission see Order of Justice Dunbar-Green Acting.”

- [10] Mr. Brown in his submissions relied on ***Busch v Stevens*** [1962] 1 All 412. In that case, on appeal from a decision of the Master in Chambers, a first instance judge in Chambers (Lawton J), struck out an Amended Statement of Claim because the Defendant had been denied a relevant Limitation Defence. This is good law and good sense. The decision is rather curious however because the Master had refused to set aside the decision of a judge in chambers (which had not been appealed). The Master, quite correctly in my view, took the position that the decision of the judge ought to be appealed, and he (the Master) had no jurisdiction to set it aside. Lawton J, (as he then was) on an appeal from the

Masters decision allowed the appeal on two grounds. Firstly, because he formed the view the judge's decision was *per incuriam*. But secondly, because it was an abuse of process for a party to take advantage of an Order which did not specify the amendment to be made, and thereby amend in a way to deprive a party of a limitation Defence. I respectfully disagree with Lawton J as to the power of a court of equal jurisdiction to set aside an order made on the basis that it was *per incuriam*. Chaos would reign if litigants felt at liberty to apply to set aside earlier decisions made and which were not appealed. Certainly an application may at times be entertained by the judge who made the Order particularly before it has been perfected and we are well aware of the slip rule. However, Lawton J's entertainment of an appeal from a fellow judge's Order is not an event within my own experience.

[11] Having said that however there is force in Justice Lawton's other ground for intervention. That is the matter of abuse of process. Had that been the situation here I would have had little hesitation in granting permission to appeal. In this case however, the amendment was made in 2014. The Defendants took no objection. At the hearing in October 2014 they obtained permission from the court to file acknowledgements and Defences for the 2nd and 3rd Defendants. Their addition as parties could not credibly be regarded as an abuse of process they having acceded to the joinder.

[12] Any conduct to be examined has to be the Defendants' who were in breach of the Order from which there has been no appeal. They failed to file acknowledgements or Defence. I decided in my discretion to accept the failure by Counsel, as a good explanation, and hence to grant relief.

[13] As regards the Orders for costs, it appears to me that costs are in the discretion of the court. Rule 27.8 says that the "general rule" is that costs at a Case Management will be costs in the claim. However, Rules 64.3, 64.4, 64.6(1), 64.6(2), (3) (4) and (5) all confer on the court a discretion to depart from that

general rule. That discretion must however be judicially exercised that is it must be fair.

[14] The costs Orders made had regard to the fact that much of the time at the hearing on the 27 April 2015 was consumed with the Defendant's unsuccessful application to strike out the amended claim and Particulars of Claim and to have themselves removed as Defendants. I had regard to the fact that the Claimant withdrew his application for judgment once I determined to grant to the 2nd and 3rd Defendants relief from sanction. A relief that would not have been necessary had they filed an acknowledgement and defence as ordered. I bear in mind that the Acknowledgement and the Defence could have themselves made it a point of contest about the limitation bar and perhaps also challenge joinder; a defence "without prejudice" to an application challenging the amendment so to speak. The Defendant did not do so and breached the Order of the 27th October 2014.

[15] In the result, therefore I refuse this application for an extension of time and for permission to appeal my Orders in relation to costs as well as for permission to amend the application so as to appeal my Order generally. Costs to the Claimant to be taxed or agreed.

[16] Permission is granted to appeal the refusal of extension of time to appeal if required.

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David Batts
Puisne Judge