[2022] JMSC Civ 222

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV00911

BETWEEN	**ROBERT DALE BRODBER**	**CLAIMANT**
AND	**E.W. ABRAHAM & SON LTD**	**1ST DEFENDANT**
AND	**MAXELL ORMSBY**	**2ND DEFENDANT**

IN CHAMBERS

Mrs. Caroline P. Hay KC & Mr. Neco G. Pagon instructed by Caroline P. Hay for the Claimant

Mr. Green instructed by Messrs. Chen Green & Co. for the 1st and 2nd Defendants

Heard: October 26, 2022 and December 19th, 2022

Civil Procedure – Application for determination of liability after defence struck out and judgment entered – Effect of striking out – Procedure after defence struck out and judgment entered - Relevant considerations

HUTCHINSON SHELLY, J

[1] There are two applications before the court, both of which were filed by the defendant. The first in time was filed on the 20th of July 2022 and the orders sought as well as the grounds are set out in extenso:

> *Application for direction to be given for the trial of an issue of liability and for the Court to exercise general powers to rectify matters where there has been a procedural error under R16.4(2) (c) and R 26.9*

The Defendants, E.W. ABRAHAMS & SONS LIMITED, a company registered under the Companies Act for Jamaica and MAXELL ORMSBY, a security supervisor, pursuant to Rules 16.4(2)(c), 13.3 and 26.9 of the Civil Procedure Rules (2002) seeks the following orders, that:

1. *The critical issue for determination on the issue of liability relates to the legal issue of ownership of the 2002 Toyota motor vehicle retrieved from the Claimant's garage.*

2. *That the letters issued to the Claimant dated January 23, 2015 and February 20, 2015, taken together invites no other conclusion but that it was the 1st Defendant's intention that the sale of the motorcar was intended to be used during and under the course of the Claimant's employment with the 1st Defendant.*

3. *The proposed purchase arrangement between the 1st Defendant and the Claimant was nothing more than a bailment for the purpose of reducing the 1st Defendant's expenses and was never intended to transfer ownership of the Toyota motor car before the Claimant had paid the full purchase price.*

4. *The 2nd Defendant be granted further and other relief which the Court considers just and appropriate.*

5. *Such consequential orders as this Honourable Court deems just.*

The grounds on which the Applicant is seeking the orders are as follows:

a) *The Clamant is not entitled to an award for anything it asks for notwithstanding the unless order of this Honourable Court, as the Claimant still has an extant duty to prove the amount of the loss if any. The assessment judge still must take into account issues such as remoteness, causation and mitigating factors in arriving at any appropriate award.*

b) *The 1st Defendant has filed a detailed Defence to the Claim which gives rise to critical legal issues which have not been resolved in advance of the assessment for damages.*

c) *The Defendants will rely on section 54 of the Sale of Goods Act which provides specifically that where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.*

d) *The Defendants will rely on section 29(1) of the Sale of Goods Act that specifically provides that on the issue as to whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties.*

The Defendants will rely on section 39(1) of the Sale of Goods Act which reads,

"Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the rights. property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law-

i. a lien on the goods or right to retain them for the price while he is in possession of them;"

ii. a right of resale as limited by this Act."

The second application was filed on the 25th of October 2022 and is outlined as follows;

The Applicants, the Defendants herein, whose address for service is in care of his Attorney at-Law, 6 Haining Road, Kingston 5, in the parish of Saint Andrew, seeks the following orders:

1. *That the Applicants be granted relief from a sanction likely to be imposed.*
2. *Costs to be cost in the claim.*
3. *Any other orders that the court deems just.*

[2] To make the best use of judicial time, both applications were heard on the 26th of October 2022. In coming to a determination of the issues raised, I found it useful to outline a chronology of the relevant events;

- The matter was commenced by a Claim Form and Particulars of Claim which were filed on the 2nd of March 2016 in which the Claimant sought the following orders;

    1. *damages for breach of contract by the wrongful withholding of sums due him by the 1st defendant upon the cessation of the claimant's employment with the first defendant as of May 29, 2015.*
    2. *damages for breach of contract for the sale of a 2002 Toyota sprinter motor car.*

3. *damages and aggravated damages for trespass and detention and also damages and vindicatory damages for breach of his fundamental rights to privacy of the dwelling property.*
4. *Claimant has also asked for an award of interests.*

- The Claim was subsequently amended and the Amended Claim Form and Particulars were filed on the 9th of January 2017. On the 29th of April 2016, a defence was filed on behalf of the 1st and 2nd defendants.

- The matter had a number of dates and on the 20th of March 2017, the Claimant filed an application for summary judgment. On the 21st of September 2017, the matter proceeded to a case management conference and a number of orders were made by the Judge. Orders were made for the filing of witness statements, standard disclosure, inspection, the agreed statement of facts and issues, a listing questionnaire and a pre-trial memorandum.

- The Claimant's application and amended application for summary judgment were scheduled for hearing in March 2018. This Application was opposed by the defendant. The matter was heard on the 16th of March 2018 and on the 23rd of March 2018 the application was refused, leave to appeal was also granted to the Claimant. The appeal was heard on the 4th of March and 24th of May 2019 and it was dismissed.

- On the 20th of February 2020, the claimant filed an application seeking an order that the defence of the first and second defendant be struck out for non-compliance with the case management orders made on the 21st of September 2017. An order was also sought for judgment to be entered in favour of the claimant against both defendants. This application was made on the basis that the defendant had failed to comply with the case management orders and had not applied for relief from sanction. The

application was heard on the 24th of February 2020 and Fraser J, as he then was, made the following orders:

1. *Time abridged for the hearing of this application;*
2. *The defence of the first and second defendants were (sic) struck out for non-compliance with the case management orders;*
3. *Judgment entered for the Claimant against the first and second Defendants; and*
4. *Cost of the application awarded to the Claimants.*

- On the 3rd of March 2020, the Defendants filed the outstanding documents. On the 4th of March 2020, they filed an application for relief from sanctions and affidavit in support. That application was heard on the 15th of June 2020 and on the 6th of July 2020, the court refused the application and awarded costs to the Claimant. The Defendant was also granted leave to appeal which was not pursued.

- On the 21st of January 2022, the Claimant filed an application for court orders in which orders were sought for an assessment of damages hearing. On the 26th of January 2022, a notice of case management conference for assessment of damages was issued by the Court's registry. The case management conference was scheduled for the 14th of March 2022.

- On the 14th of March 2022, a number of case management orders were made and a further CMC date scheduled for the 21st of July 2022 ostensibly to address any applications arising. On the 20th of July 2022, a day before the case management conference, the defendant filed the first application referred to above. The matter was scheduled for the 26th of October 2022 and the Claimant was granted permission to file an affidavit in response. Orders were also made for the parties to file submissions and

the Defendant was directed to file a Judges Bundle. Deadlines were also set for compliance with these orders. It is not in issue that the Defendants did not comply.

- On the 27th of July 2022, the Defendants filed a notice of intention to be heard i.e. a Form 8A, in which they indicated their intention to participate in the assessment hearing. They also asked that they be allowed to cross-examine witnesses, make submissions and call evidence set out in three prospective witness statements.

- On the 5th of September 2022, the Claimant filed his affidavit in response to the application of the 20th of July 2022. On the 25th of October 2022, one day before the hearing of the application on the 26th of October 2022, the defendants filed their application for relief from sanction in respect of their failure to comply with the filing dates stated on the 21st of July 2022.

Application for direction to be given for the trial of an issue of liability and for the Court to exercise general powers to rectify maters where there has been a procedural error under R16.4(2) (c) and R 26.9

Applicant's Submissions

[3] In written submissions which were later amplified, Counsel for the Defendants took issue with the Claimant proceeding to assessment in this matter 'in circumstances where to do so would be '*fundamentally flawed, unjust, wrong, an unlawful procedural error and not provided for under the CPR*.' He argued that before an assessment as to quantum could be conducted, there had to be some determination of whether the order made by the Court on the 24th of February 2020 was sufficiently defined '*to exclude the issues of liability of the defendant arising under a contract for the sale and transfer of the car'*. Mr. Green also asserted that

there were still questions surrounding whether the property in the car had passed to the Claimant.

[4] He made reference to *Rule 12.1(1)* and *(2) of the CPR* which speak to the circumstances in which a default judgment is entered and posited that the mere imposition of a sanction does not by itself give rise to a default judgment. Mr. Green argued that the provisions of *Rule 12.1* would not apply as a defence had in fact been filed. He made reference to *Part 16* where the procedure which governs the scheduling of a matter for assessment of damages is laid out. Mr. Green acknowledged that *Part 16* outlines the three circumstances in which an assessment of damages would arise and contended that the procedure adopted by the Claimant to have the matter proceed to an assessment hearing is not available to him as *'the learned judge gave no direction for assessment after direction for trial*.' A statement which I found seems to make reference to *Rule 16.4(1***)** which provides:

> ***Assessment of damages after direction for trial of issue of quantum***
>
> ***16.4 (1) This rule applies where the court makes a direction for the trial of an issue of quantum.***
>
> *(2) The direction may be given at –*
>
> *(a) a case management conference;*
>
> *(b) the hearing of an application for summary judgment; or*
>
> *(c) the trial of the claim or of an issue, including the issue of liability.*
>
> *(3) On making such a direction the court must exercise the powers of a case management conference and in particular may give directions about –*
>
> *(a) disclosure under Part 28;*
>
> *(b) service of witness statements under Part 29; and*
>
> *(c) service of expert reports under Part 32.*
>
> *(4) The court must also fix –*

(a) a date by which the claimant is to file the listing questionnaire at the registry; and

(b) a period within which the assessment of damages is to commence

(emphasis added)

[5] Mr. Green submitted that the Judge gave no consideration to this direction and this failure gives rise to what he described as a critical issue, i.e., whether the Court ought to exercise its discretion to rectify matters pursuant to the powers at **Rule 26.9**. Having made this submission, Counsel then made reference to the Court of Appeal decision of ***Thompson (Douglas) v Jennings (Peter) [2021] JMCA Civ 6*** in which the Court analyzed the circumstances in which an order may be made for rectification and opined that a Court would only do so where it '*would not substantially affect the rights of the parties*.' Mr. Green then expressed the view that to proceed to assessment in light of the procedural errors cannot be cured by **26.9**.

[6] He insisted that the circumstances in the case at bar are entirely different from a default judgment as in this scenario, judgment had been *'arrived at as a consequence of a sanction*' and the matter of liability had not been resolved prior to the assessment. He insisted that in these circumstances the party seeking damages must establish liability. Counsel then made reference to a number of decisions to include ***Al-Tec Inc Limited and James Hogan and Others [2019] JMCA Civ 9*** and ***Natasha Richards and Phillips Richards v Errol Brown and the Attorney General [2016] JMFC Full 05*** in which the respective Courts made it clear that the Defendant against whom a default judgment has been entered is not shut out from the process, but is in fact entitled to participate in the assessment of damages hearing.

[7] Mr. Green asked the Court to give careful consideration to the affidavit of Mr. Michael Abrahams which he said raised triable issues which needed to be resolved. He concluded his submissions by reiterating that there was no direction for trial of an issue of quantum and accordingly, the procedure is flawed and the

Defendant's rights would be severely impaired if the matter proceeds without a resolution of the issue of liability.

Respondent's Submissions

[8] In her submissions in respect of both applications, Mrs. Hay K.C. raised strenuous objections to either being granted. She made reference to a history of dilatory conduct on the part of the Applicant and asked the Court to note that this pattern was also seen in the timing of the applications. She emphasized that there was a history of delinquency in complying with timelines and it was on this basis that the order had been obtained for their defence to be struck out.

[9] King's Counsel made reference to the affidavit of Mr. Brodber in which he asserted that this application amounted to an attempt to re-litigate the matter and noted that the affidavit of Mr. Abrahams was the same affidavit previously filed in response to his application for summary judgment. King's Counsel argued that in those circumstances, it could lend no support to the application in this regard. She asked the Court to find that the complaint made in respect of the ruling of Fraser J was one in which two courses had been open to the Applicant, the first being an application for relief from sanctions which had been pursued and denied and the second, an appeal from both decisions which was never pursued.

[10] King's Counsel submitted that while the Judgment had not been perfected, it had not been overturned and Counsel had been instructed to agree the terms of same in order for it to be finalized. She argued that it would not be correct to say that proceeding to assessment deprived the Applicants' of a voice as Part 16 and the authorities cited by Counsel clearly reveal that the Defendant would be able to present evidence and file submissions on the issue of quantum.

Analysis and Discussion

[11] In my review of this application, I carefully analyzed the affidavits filed by both sides as well as the submissions and authorities cited. In respect of the affidavit of Mr.

Abraham, I found that it was *ipsissima verba* of the 2017 affidavit which specifically addressed the application for summary judgment and as such, outside of assertions to the effect that there were triable issues, provided no actual support for this application.

[12] From their submissions on the matter, it is clear that there is no dispute between the Parties that the Court is empowered to make orders striking out a party's statement of case, whether of its own volition or on an application brought by either side. This power can be exercised in a myriad of circumstances and in the instant case, it is clear that in making this order, the Learned Judge had been acting pursuant to **Rule 26.3(1)** which provides;

> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
>
> *(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings*

[13] The Court having made a decision to strike out the defence and enter judgment, the Defendants would have been put on notice of *Rule 26.7(2)* which provides;

> *26.7 (1) ……...*
>
> *(2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.*

[14] On the refusal of the application for relief from sanctions, there was no bar to the matter proceeding to assessment of damages or a case management conference in that regard even in the absence of words to that effect from the Court which had entered judgment.

[15] In the well regarded text, *A Practical Approach to Civil Procedure by Stuart Sime, 14th Edition*[1], the procedure following an entry of judgment was addressed as follows:

> *When the Court enters a default judgment of the second type for damages or interest to be decided, or for the value of goods to be decided by the court, it will give any directions, it considers appropriate. Further, if it thinks appropriate it will also allocate the case to a case management track. Alternatively, the Court may list the matter for a disposal hearing or will stay the action while the parties try to settle the case using ADR or other means.*
>
> *The orders being considered here are described as 'relevant order's by PD 26, Para 12. In addition to being one of the possibilities on obtaining a default judgment, they may also be made on entry of judgment on admission, on the striking out of a statement of case; on a summary judgment application……*

[16] Although the Learned Judge had not made these orders, it is clear that on the striking out of the claim, the usual procedure would have been to schedule a case management conference or assessment hearing where quantum would be determined and there was no requirement to schedule a trial to determine liability as this was no longer required upon the entry of judgment. While Mr. Green has argued that Fraser J should have made a direction for the trial of an issue and failed to do so, it is evident that these words must be construed in the context within which they fall and the only trial to which *Rule 16.4(1***)** alludes is a trial as to quantum.

[17] Additionally, it is my opinion, that the absence of directions from Fraser J did not constitute a procedural flaw as contended by Counsel as *16.4(2)* makes it clear that the directions may be given at a case management conference, the hearing of an application for summary judgment or the trial of the claim or of an issue, including the issue of liability. The latter category would not be applicable as the entry of judgment for the Claimant meant that there was no longer a claim or issue to be tried. It was then open to the Court to schedule a case management hearing

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[1] Paras 12.23 and 12.24

to give the required directions. It bears emphasis, that the effect of the order striking out the defence (statement of case) and entry of judgment for the Claimant meant that the Applicant's defence and entitlement to a trial on the merits no longer existed and liability had been determined in favour of the Claimant. As such, the sole issue which remains to be tried is the quantum of damages to be awarded.

[18] It should also be noted that the extract from the text makes it clear that such directions can be given on entry of judgment even after a striking out of defence. The fact that this was not done by the Court on the 24th of February 2020, would not have rendered the judgment or process void or invalid as **Rule 42.8** makes it clear that the judgment takes effect from the time it is entered and there had been no order from another Court setting it aside.

[19] To describe the situation as being flawed and prejudicial to the Defendant would be a misdescription as they would still be entitled to raise questions as to the quantum of damages to be awarded to the Claimant under his contract of employment as well as to make submissions on what loss, if any, he had suffered as a result of the trespass and re-possession of the motor vehicle. The decisions of ***Al-Tec Inc Ltd*** and ***Natasha Richards,*** although specifically addressing circumstances in which a default judgment had been granted, make it clear that there would be no bar to the defendants participating. It is my view that *Rules 16.2 (2)(c)* and *16.2(5)* of the CPR would apply and they allow the defendant not only to file witness statements but also to cross examine the Claimant's witnesses and make submissions. These provisions clearly act as safeguards against any prejudice that the Applicant fears may occur.

[20] In light of the foregoing conclusions, I am satisfied that there is no merit in the complaint which underpins this application as the rights of the defendant to challenge on the measure of damages still remain, and can be actively pursued as a result of the Form 8A which was filed. It should also be noted that any order to re-open the trial of the issue of liability by a Court of concurrent jurisdiction, would be tantamount to acting in an appellate jurisdiction.

Application for relief from sanctions

[21] In respect of this application, the evidence on which the Applicant has sought to rely is contained in an affidavit sworn to by Mr. Green, who is Counsel with conduct of the matter. When enquiries were made by the Court if there was any other evidence, Counsel indicated that his was the sole affidavit filed and I have outlined the relevant paragraphs which state as follows;

> *2. That the order of the court dated July 20, 2022 has not been complied with as it became apparent that during the course of this writer's research to do the submissions there was far more material that was needed to be reviewed, than was originally contemplated.*
>
> *3. The failure to comply was not intentional and in any event the "material discovered shows that the procedural defects are of such "that the Claimant cannot proceed with an assessment without rectification of the defects.*
>
> *4. Further the defects are of the kind that the court has a duty under CPR 26.9(3), to ensure that„ in the interest of justice, it is to make an order to "put matters right" and in so doing an order to proceed to assessment would "not put matters right" as there is no provision under the CPR to proceed 'With an assessment in the manner that the Claimant is seeking to do.*
>
> *5. That the delay in compliance in the circumstances is not inordinately long' and the Claimant has. not been subject to considerable if any convenience*
>
> *6. The Defendants have now complied with all the orders.*

Applicant's Submissions

[22] In his oral submissions, Mr. Green asserted that the main point on which the Applicant relies is that the delay is not inordinate, not deliberate and there has now been full compliance. On the issue of a good explanation, he submitted that the time allowed was inadequate for the research for this application to be properly conducted. He acknowledged however that he had been present for the hearing and had thought it would have been sufficient time. He asked the Court to find that the primary consideration is the interest of the administration of justice as only a day or two was lost in addressing this matter.

[23] In respect of the submissions and authorities which were filed a day before this hearing, he submitted that the matter could still have proceeded as King's Counsel was aware of the application as she was present on the last occasion in June 2022 and would have been alerted to the contents of the notice of application.

Respondents Submissions

[24] In submissions opposing this application, King's Counsel outlined that the Claimant had alerted the Applicants to the fact that there had been no compliance with the orders made by Jarrett J (Ag). Counsel stated that this was done through correspondence, which was exhibited. King's Counsel submitted that it was subsequent to this communication that they were served with the submissions, authorities and most recent application.

[25] Mrs. Hay K.C. took issue with the late timing of this application and described it as being a deliberate pattern on the part of the defendants. King's Counsel submitted that both applications should be refused as they were grounded in a history of non-compliance. She submitted that the explanation provided in the affidavit in support does not provide a good explanation and contended that the application is patently manipulative of the Court's process and should not be permitted. She made reference to and relied on affidavits filed by the Claimant and asked the Court to refuse the application.

Analysis and Discussion

[26] In light of my earlier findings that '*the application for direction of a trial of quantum*' is without merit, the consideration of this application at this stage may seem purely academic. I have decided nonetheless to review same. The requirements to obtain a grant of relief from sanctions is outlined at **Rule 26.8** et seq. of the CPR which states;

> *26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party

[27] On a review of the orders made by the Court on the 21st of July 2022, it is clear that the Applicant failed to comply with the order that their submissions and authorities should be filed by the 23rd of September 2022. They also failed to file the Judge's Bundle and serve the index by the 21st of October 2022. These orders were not complied with until the 25th of October 2022, which was one day before their application was to be heard. In light of the tight time-lines which had been set by the Court it was imperative that Counsel act with alacrity. Unfortunately, this was not the case and the application for relief was filed a full month after the submissions should have been filed and one day before the hearing date. The Respondent was also negatively impacted as he was served on the eve of the hearing. In these circumstances, I did not find that the application was made promptly.

[28] While the application was supported by an affidavit in which an explanation was provided, it was sworn to by Counsel who argued the matter which raised some concerns for the Court given the provisions of Canon V of the Legal Profession (Canons of Professional Ethics) Rules. Rule (p) which state:

> *"While appearing on behalf of his client, an Attorney shall avoid testifying on behalf of his client, except as to merely formal matters, or when essential to the ends of justice,* ***and if his testimony is material to the cause, he shall, wherever possible, leave the conduct of the case to another Attorney"***

[29] In light of the indication that this was the only affidavit filed on the part of the defendant, I made the decision to give fair consideration to same bearing in mind the overriding objectives. The affidavit outlined that the delay was not intentional and was wholly attributable to the insufficient time given by the Court for the filing of same. By my calculation, the Applicant would have had two (2) months to file his submissions and almost three (3) months to file the core bundle. A situation Counsel accepts he did not object to at the time but now seeks to assert impeded his ability to comply.

[30] It is my considered view that the contents of this affidavit do not provide a good explanation for the delay, neither do they prove that the delay was not intentional. On a review of the history of this matter, it is clear that the tardiness which had been displayed by the Applicant in this instance was in keeping with an established pattern of mon-compliance and this is seen not only in relation to these orders but the orders made on the 14th of March 2022 and the 21st of September 2017 as well.

[31] Given the Applicant's failure to satisfy the requirements of *26.8(1)* and *(2**)***, it is insufficient for them to assert that it is in keeping with the interests of justice to grant relief as it is settled law that an Applicant must meet the hurdles outlined at the earlier provisions before the Court considers *26.8(3).*

[32] In the circumstances, this application is doomed to fail as well. As such, it is my ruling that:

1. The Applications filed on the 20th of July 2022 and 25th of October 2022 are refused;
2. Costs are awarded to the Claimant to be taxed if not agreed;
3. Claimant's Attorneys to prepare, file and serve Formal Order herein.