



[2016] JMSC Civ.103

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2012 HCV 06591**

<b>BETWEEN</b>	<b>LORI MORGAN</b>	<b>CLAIMANT/ RESPONDENT</b>
<b>AND</b>	<b>PRIME SPORTS JAMAICA LIMITED (Coral Cliff Entertainment)</b>	<b>DEFENDANT/ APPLICANT</b>

Phillip Bernard instructed by H. Charles Johnson & Co for the Claimant/Respondent.

David Johnson and Kalima Bobb-Semple instructed by Monique R. Cohen for the Defendant /Applicant.

**IN CHAMBERS**

**Heard: November 12, 2015 and June 24, 2016.**

**Unless Order – Claimant in Breach of Order – Whether Judge has Jurisdiction to vary Unless Order – No Application made for Leave to Appeal to Judge varying Unless Order - Whether Leave to Appeal ought to be granted**

**RATTRAY, J.**

[1] The claim in this action was brought by the Claimant Lori Morgan on the 28<sup>th</sup> November, 2012, to recover damages for negligence against the Defendant Prime Sports Jamaica Limited. It is alleged by the Claimant that she sustained injuries while carrying out her duties at work at the Defendant's premises at Gloucester Avenue, Montego Bay in the Parish of St. James on the 2<sup>nd</sup> April, 2010.

**[2]** A Defence was filed on the 14<sup>th</sup> February, 2013 denying liability, which pointed the finger of blame at the Claimant herself, alleging that any injuries suffered were caused by Ms. Morgan's own negligence. The Claimant filed a Reply to Defence on the 5<sup>th</sup> March, 2013, and this matter went to mandated mediation on the 25<sup>th</sup> July, 2013. The parties however were unable to arrive at any settlement.

**[3]** A Case Management Conference was set for hearing on the 25<sup>th</sup> April, 2014. Although Counsel for the Defendant and its representative were present, both the Claimant and her Attorney-at-law failed to attend. The Case Management Conference was therefore adjourned by Simmons J. to the 18<sup>th</sup> November, 2014. On that date, Case Management Orders were made by King J. including the scheduling of a Pre-Trial Review hearing on the 4<sup>th</sup> June, 2015. A perusal of the Court file does not reflect that any Formal Order was filed, nor does the Minute of Order signed by the Judge indicate which, if any of the parties were present.

**[4]** In the Affidavit of Ms. Bobb-Semple, the Attorney for the Defendant stated that on the 18<sup>th</sup> November, 2014, she, along with the representative of the Defendant was present at the adjourned Case Management Conference and that the Claimant once again failed to appear. However, on this occasion her legal representative, Mr. H. Charles Johnson was in attendance at the Case Management Conference. No affidavit has been filed challenging the recollection of Counsel for the Defendant, as to who was present on the 18<sup>th</sup> November 2014.

**[5]** At the hearing of the Pre-Trial Review on the 4<sup>th</sup> June, 2015, again the Claimant made no appearance at Court, nor was she represented on this occasion. The learned Judge conducting the Pre-Trial Review hearing, Hibbert J. extended the time for compliance by the Defendant with the Orders made at the Case Management Conference and adjourned the hearing of the Pre-Trial Review to the 7<sup>th</sup> October, 2015. He further ordered that unless the Claimant attended the adjourned Pre-Trial Review **and** complied with the Case Management Conference Orders on or before the 31<sup>st</sup> July, 2015, "the statement of case of Claimant shall stand struck out".

**[6]** By the time the adjourned Pre-Trial Review came up for hearing on the 7<sup>th</sup> October, 2015, the Claimant had not fulfilled all the terms of the Order of Hibbert J. Through her Attorney-at-Law, the Claimant had filed the documents ordered by King J. within the time extended by the Court, that is, by the 31<sup>st</sup> July, 2015. However, the Claimant for the fourth time failed to attend Court, this time on the 7<sup>th</sup> October, 2015 in direct contravention of the Order by Hibbert J.

**[7]** When the Pre Trial Review came up for hearing on the 7<sup>th</sup> October, 2015, the learned Judge, Sinclair-Haynes J., after hearing submissions from Counsel for both for parties made the following Orders as reflected in the Minute of Order:-

*"1. Order of Hibbert J dated 5<sup>th</sup> June, 2015 varied as follows:*

- a) Unless Claimant's representative attends adjourned pre-trial review the matter stands struck out.*
  - b) Trial dates of 13<sup>th</sup> & 14<sup>th</sup> October, 2015 vacated.*
  - c) Trial now fixed for 20<sup>th</sup> & 21<sup>st</sup> July, 2016 at 10 am for 2 days.*
- 2. Pre-Trial review adjourned to the 11<sup>th</sup> May, 2016 at 11 am for ½ hour.*
  - 3. Costs to be costs in the claim.*
  - 4. Claimant's Attorney to prepare, file and serve orders herein."*

No perfected Formal Order has been obtained.

**[8]** There was no application for leave to appeal made to the learned Judge. However, by way of Notice of Application for Court Orders filed on the 16<sup>th</sup> October, 2015, the Defendant/Applicant applied for permission to Appeal the said Order of Sinclair Haynes J., as she then was. This is the application presently before this Court.

**[9]** In her Affidavit filed in support of the application, Counsel, Ms. Bobb-Semple deponed to and contended the following:-

- (i) No application was made by the Claimant to set aside the Unless Order of Hibbert J.*
- (ii) The Claimant repeatedly failed to attend Case Management Conferences and Pre-Trial Review Hearings, even after the Unless Order was made by Hibbert J.*

- (iii) Having been in breach of the said Unless Order, no Application to Set Aside the said Order nor for Relief from Sanctions was ever filed.*
- (iv) Despite the absence of an Application for Relief from Sanctions supported by affidavit evidence, Sinclair Haynes J. on her own initiative varied the Pre-Trial Review Orders made by Hibbert J.*
- (v) The variation of those Orders was made after the Claimant's case had been automatically struck out as a result of the Claimant's failure to attend the Pre Trial Review hearing, as had been ordered by Hibbert J.*

**[10]** Counsel Mr. David Johnson on behalf of the Defendant / Applicant submitted that in order for his client to obtain leave to appeal, the Court must be satisfied firstly, that the Order in respect of which leave to appeal is sought is an interlocutory order and secondly, that the Applicant has a real chance of success. He further submitted that both requirements had been satisfied in the present case.

**[11]** Mr. Johnson referred to the several dates set for the Case Management Conferences and Pre-Trial Review hearings, where either the Claimant or her Attorney-at-Law were absent and where Orders made were not complied with. He further relied on the Order of Hibbert J. made on the 4<sup>th</sup> June, 2015, which declared that unless the Claimant attended the adjourned Pre-Trial Review and complied with the Orders made by the 31<sup>st</sup> July, 2015, her Statement of Case was to stand struck out. The effect of this Order he argued was that a sanction was imposed by Hibbert J. He further argued that as no application was ever made to set aside that Order, which attached a sanction on the Claimant's failure to attend the Pre-Trial Review, that Order remained in place.

**[12]** Counsel for the Applicant went on to contend that relief from the Order of Mr. Justice Hibbert could only be granted where a written application had been filed, supported by affidavit evidence pursuant to Rules 26.8(1),(2) and (3) of the Civil Procedure Rules. These rules indicate that any such application for relief from sanctions must be made promptly [Rule 26.8(1)(a)] and supported by evidence on affidavit [Rule 26.8(1)(b)]. Further, that the Court may grant such relief only if satisfied that the failure to comply was not intentional [Rule 26.8(2)(a)], that there was a good explanation for the failure [Rule 26.8(2)(b)] and that the defaulting party had generally complied with the Orders made [Rule 26.8(2)(c)]. Other considerations which the Court must bear in mind

in deciding whether to grant such relief include the interest of the administration of justice [Rule 26.8(3)(a)], the question of who was at fault for the failure to comply with the Court Order [Rule 26.8(3)(b)], whether compliance can be effected within a reasonable time [Rule 26.8(3)(c)], whether the trial date can still be met if relief is granted [Rule 26.8(3)(d)] and the effect that granting or refusing relief would have on each party [Rule 26.8(3)(e)].

**[13]** The Applicant's Counsel pointed out that no such application for relief from the sanction imposed by Hibbert J., nor any application whatsoever was filed on behalf of the defaulting Claimant. He therefore submitted that the Learned Judge had no power to vary the Order of Hibbert J., as on her failure to attend Court on the 7<sup>th</sup> October, 2015, the Claimant's Statement of Case had been automatically struck out.

**[14]** Counsel Mr. David Johnson also made reference to the Affidavit of Mr. H. Charles Johnson, the Attorney-at-Law on record for the Claimant. He asserted that that affidavit was of no assistance to the Court, as it raised only arguments and in no way detracted from the submissions advanced on behalf of the Defendant/Applicant. He further asserted that the submissions made on his client's behalf in fact revealed an appeal with a real chance of success and asked this Court to make an Order that leave to appeal be granted.

**[15]** The Counsel who appeared on behalf of the Claimant/Respondent in this application, Mr. Phillip Bernard, firstly submitted that the Order of Sinclair Haynes J. was not an interlocutory order, but was in fact a final Order. He did not elaborate on nor put forward any reasons for this submission. He referred to and relied on the Affidavit of his instructing Attorney at Law, Mr H. Charles Johnson, filed in response to the Defendant's Application for leave to appeal. In that affidavit, Mr. H. Charles Johnson explained that as a result of the injuries suffered by his client, which led to the filing of the present Court proceedings, she had been residing overseas where she was able to obtain employment, in order to finance her medical treatment. He pointed out that he was not served with the Unless Order made on the 5<sup>th</sup> June, 2015 by Hibbert J. until the 27<sup>th</sup> July, 2015 and his client was unable to obtain leave from her job and make the

necessary travel arrangements to attend Court on the 7<sup>th</sup> October 2015. He indicated however, that he attended Court on her behalf as her Attorney at Law and with her authority.

**[16]** In this affidavit, he went on to explain that based on his submissions to Sinclair Haynes J. on the 7<sup>th</sup> October 2015, the learned Judge in making her Order, applied the overriding objective of the Court to deal with cases justly, ensuring that matters are handled expeditiously and fairly and that parties are not prejudiced by their financial position. He maintained that Sinclair Haynes J. did not disregard the Order of the Court, but instead varied it, thereby permitting the Claimant to attend the adjourned Pre-Trial Review hearing on the 11<sup>th</sup> May 2016, to prevent the Claim being struck out.

**[17]** His affidavit also highlighted provisions of the Civil Procedure Rules (“CPR”) which he contended empowered the Judge to make the Order varying the Unless Order of Hibbert J. Those provisions he argued authorised 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 26.1(v)]. Further, he relied on the overriding power of the Court to make Orders, which also included a power to vary or revoke that Order, [Rule 26.1(7)].

**[18]** The Claimant’s Counsel Mr. Bernard, in relying on the Affidavit of Mr. H. Charles Johnson, submitted that the Application for Leave to Appeal was an abuse of the Court’s process, as the learned Judge was well within her discretion to make the Order and to exercise the power that she did. As such he urged the Court to dismiss the Application for Leave to Appeal.

**[19]** It is not for this Court to decide whether or not the decision of Sinclair Haynes J, in varying the Unless Order of Hibbert J. was or was not correct. That is the purview of the Court of Appeal. I am however satisfied that this Court can rule on the question of whether the Order of Sinclair Haynes J. was an interlocutory or a final Order. This is one of the pivotal factors that must be considered in determining whether or not leave to appeal ought to or can be granted. If the Order is a final one, no leave to appeal is

required. If the Order is an interlocutory one, an application for leave to appeal must be made to this Court before any such approach can be made to the Court of Appeal.

**[20]** The word “Interlocutory” is defined in Black’s Law Dictionary, Revised Fourth Edition at page 952 as “Provisional; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy.” Further, the term “Interlocutory Order” at page 1247 of the said Dictionary is defined as “An order which decides not the cause, but only settles some intervening matter relating to it.” I am of the view that the Order of Sinclair Haynes J. made on the 7<sup>th</sup> October, 2015 was in fact an Interlocutory Order and I so find.

**[21]** The essential issues raised in this Application which the Applicant seeks leave to present to the Court of Appeal can be distilled as follows:

- i) What is the effect of non-compliance with an Unless Order of the Court, to which is attached a specific sanction?
- ii) Does the Court have the power to vary an Unless Order in respect of which a party has been in breach, without a written application being filed supported by affidavit evidence, as contemplated by Rule 26.8 of the Civil Procedure Rules?

I am satisfied that the material placed before this Court have raised sufficient issues of concern that leave to appeal ought to be granted and I so order.