[2016] JMCC COMM 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014CD00021

BETWEEN	**NATIONAL HOUSING TRUST**	**CLAIMANT**
AND	**RON FOREMAN & ASSOCIATES LIMITED**	**FIRST DEFENDANT**
AND	**LAWRENCE RONALD FOREMAN**	**SECOND DEFENDANT**

IN CHAMBERS

Ransford Braham QC and Jeffrey Foreman instructed by Brahamlegal for the claimant

Seymour Stewart and Michelle Thompson instructed by H S Rose and Co for both defendants

March 9 and April 1, 2016

CIVIL PROCEDURE – APPLICATION TO SET ASIDE MADE IN ABSENCE OF DEFENDANTS – WHETHER ORDER SHOULD BE SET ASIDE UNDER RULE 11.8 OR UNDER RULE 39.5, 39.6

SYKES J

The beginning

[1] On April 22, 2015, Sykes J made an order permitting the National Housing Trust ('NHT') to enforce an arbitration award as if it were a judgment of the Supreme Court. This is permissible under the Arbitration Act. The award in question was handed down by Mr Stephen Shelton QC on September 16, 2013.

[2] The background to the arbitration can be stated quite briefly. The arbitration arose out of a dispute between the NHT and Ron Foreman & Associates Ltd ('the company') and Mr Lawrence Ronald Foreman, collectively known as the Foremans. The NHT lent the sum JA$104,342,498.48 to the Foremans. The money was lent to the Foremans to build 160 housing units on land owned by the Foremans. The units were to be delivered to the NHT. Problems developed between the parties and eventually, the Foremans initiated arbitration proceedings. This they did under the arbitration provisions of the loan agreement.

[3] While the arbitration was going the Foremans filed a claim in the Supreme Court, **Ron Foreman & Associates Ltd and Lawrence Ronald Foreman v National Housing Trust** Claim No 2013HCV04210 ('the first claim'). After the award was handed down the Foremans sought to challenge the award in **Ron Foreman & Associates Ltd and Lawrence Ronald Foreman v National Housing Trust** Claim No 2013HCV06263 ('the second claim'). Both claims were consolidated. They have not been disposed of.

The middle

[4] After two years of delay in both claims, the NHT decided that it would apply to enforce the award, as they were entitled to do, and hence the order of Sykes J on April 22, 2015. This is the present claim before the court.

[5] The Foremans have applied to set aside that order. Five grounds were filed. On objection of Mr Ransford Braham QC four of the five were not pursued because those grounds could not be dealt with on this application by the Foremans but were more

appropriate for the consolidated claim to which reference has already been made. Mr Seymour Stewart accepted the validity of the objection. Nothing more need be said about those four grounds.

[6] The sole ground left was that order of Sykes J should be set aside on the ground that the order was irregularly obtained and should be set aside because the company was served at shop 3 which was not the business address of the company. Mr Stewart also submitted that in respect of service on Mr Foreman the registered post was sent to the wrong address, that is to say it was not sent to the address in the order of Edwards J. Mr Stewart referred to rule 11.18 (3). Rule 11.18 states:

> *(1) A party who was not present when an order was made may apply to set aside that order.*
>
> *(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.*
>
> *(3) The application to set aside the order must be supported by evidence on affidavit showing –*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other order might have been made*

[7] Learned Queen's Counsel took the view that the governing rules of this application are rules 39.5 and 39.6. Rule 39.5 provides:

> *Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules –*
>
> *(a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or*
>
> *(b) if one or more, but not all the parties appear the judge may proceed in the absence of the parties who do not appear.*

[8] Rule 39.6 is as follows:

(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.

[9] The court agrees that rules 39.5 and 39.6 are the governing rules. The order is this case was a final order giving the full remedy sought and therefore rule 11.8 is not the applicable rule.

[10] A bit more information. According to documents from the Registrar of Companies the registered office of the company was and still is shop 3, Savannah Plaza, Constant Spring Road, Kingston 10, St Andrew. This means that service at shop 3 is good service on the company and it necessarily follows that Mr Stewart's submission that service on the company was bad because shop 3 was not the business office of the company and that this was known to the NHT. Respectfully, the Companies Act permits service at the registered office and that was done in this case which means that the point about service in respect of the company fails.

[11] In respect of Mr Foreman himself, it appears that the NHT had problems finding him in order to serve him. The problem was resolved by an application asking the court for an order approving another way of serving Mr Foreman. That order was granted by Edwards J on October 23, 2014. The terms of the order were as follows:

(1) That service on the 2nd defendant of the Fixed Date Claim Form and affidavit filed with all other documents or subsequent court papers/proceedings filed herein be effected by:

(a) delivery or leaving a copy at shop #3 Savannah Plaza, 35 Constant Spring Road, Kingston 10, St Andrew;

(b) by registered mail at 38 Dewsbury Avenue, Kingston 10, St Andrew.

[12] The court does not read this order as requiring service at both addresses; service at one is sufficient. The naming of shop 3 Savannah Plaza as a place for service of Mr Foreman did not come out of the blue. Not only was it the registered office of the company but in February 28, 2014, some eight months before the application heard by Edwards J Mr Beresford Richards, a process server, took a sealed copy of the fixed date claim form, the affidavit in support, the prescribed notes for the defendant and the form of acknowledgment of service to shop 3. There he saw a Miss Chung who told him that Mr Ron Foreman came to the shop every two or three days. She assured him that she would give him the documents. It is important to point out that another business was located at the shop, namely, Earth Element, but that does not affect the validity of the service of the fixed date claim form on the first defendant. This was the context of the order of Edwards J.

[13] After the order of Edwards J service on Mr Foreman took place by leaving the documents at shop 3 Savannah Plaza. The notice of hearing was also served on the Foremans. In fact, Mr Stewart never contended that the notice of the hearing for April 22, 2015 was never served on the company. His main point was that shop 3 was not the business address of the company. The court has already indicated its understanding of Edward J's order.

The end

[14] The court has already concluded that service at any of the addresses in Edwards J's order is good service on Mr Foreman. The only question is whether the order can be set aside under rules 39.5 and 39.6 of the CPR.

[15] Rule 39.5 states that if a judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with the rules and no parties appear, the judge may (a) strike out the claim and counter claim or (b) if one or more,

but not all parties appear the judge may proceed in the absence of the absent party. The court is satisfied that Mr Foreman had notice of the April 22, 2015 proceedings. The remaining question is whether he can take advantage of rule 39.6.

[16] Rule 39.6 gives the absent party an opportunity to get back in the case if (a) he applies within 14 days of the date of service of the judgment or order; (b) the application is supported by affidavit evidence showing (i) good reason for failing to attend the hearing and (ii) that it is likely that had the applicant attended some other judgment or order might have been given or made.

[17] It is common ground that order of Sykes J was served on the defendants. It is also common ground that the Foremans' first application to set aside the order of Sykes J was made out of time. It was submitted that this initial application was made by the Foremans themselves because they did not have an attorney at law acting for them. They filed an amended application after retaining counsel.

[18] Mr Stewart asked that the court extend time for that initial application because they might have been labouring under some difficulty given the absence of an attorney at law acting for them. The court declines to extend the time.

[19] Mr Braham's response was to cite **Watson v Roper** SCCA No 42/2005 (unreported) (delivered November 18, 2005) where Karl Harrison JA held that the standard laid down by rule 39.6 is cumulative. This position was reaffirmed by the Court of Appeal in **Astley v The Attorney General** [2012] JMCA Civ 64. The legal position now is that under rule 39.6, all the conditions stated there must be met and if they are not met the judge cannot set aside the judgment or order. As Karl Harrison JA said in **Watson**, there is no residual discretion in the judge to set aside any order or judgment if there is a failure to meet the cumulative conditions.

[20] The affidavit filed by the second defendant simply states that the 'judgment in default was given against us because the matter did not come to our attention.' The first thing to note is that the order of Sykes J was not a judgment in default. Mr Braham pointed out that under rule 12.2 of the CPR a 'claimant cannot obtain default judgment

where the claim is a fixed date claim.' It was a final order disposing of the matter and so any setting aside or variation is to be considered under rule 39.5 and 39.6 and not under rule 11.8. Rule 39.5 authorised the judge to proceed to hear the matter in the absence of the party who fails to appear at the hearing provided that he has notice of the hearing. This is what happened here. The Foremans had notice of the April 22, 2015 hearing and failed to attend and the court decided to proceed in the absence of the Foremans.

[21] Karl Harrison JA in **Watson** noted that a good reason for setting aside the judgment or order would be that the applicant did not receive notice of the hearing date. The Foremans stated in their affidavit that 'judgment in default was given against us because the matter did not come to our attention.' This vagueness tells the story. Persons who are not served usually say, "I have not been served." However, the Foremans elected to say that the judgment was not brought to their attention. The problem for the company is that the law does not require service on an individual for service to be good service; service at the registered office is sufficient. In respect of Mr Foreman, the address is the one that he gave as his address as a director and shareholder of the company. Service at that address is sufficient in this case. The order of Edwards J still stands and has never been challenged and therefore once service takes place in accordance with her Ladyships order then such service is valid.

[22] Regarding the first criterion laid down in the applicable rules, not only is the Foremans' application out of time but no good reason has been advanced for failing to attend the April 22, 2014 hearing. The application therefore has failed on two of the three grounds for setting aside which the Court of Appeal have said are cumulative. The court need not consider whether another order might have been made had the Foremans attended. However, since Mr Stewart made extensive submissions on the third limb the court will address it.

[23] Mr Stewart submitted that had the Foremans or any of them been present the court might have made a different order because the court would have before it the fact that the consolidated 2013 claims were still unresolved and in one of those claims there

was a challenge to the arbitration award. On the other hand, the court would have also had before it the fact that the defendant was being deprived of his award which until set aside was lawfully obtained and binding. The court would have had before it the award and the court would have noted that the award contains two components: a monetary award and an award ordering that the defendants provide the NHT with a registrable transfer for each of the 160 units and if they failed to do so, that the Registrar of the Supreme Court is authorised to sign and execute the registrable transfers for each of the units listed in the schedule attached to the fixed date claim form. The court would have also had before it the fact that the defendants are not claiming any legal or any equitable interest in the 160 units.

Disposition

[24] The application to set aside the order of Sykes J made on April 22, 2015 is dismissed. Costs to the NHT to be taxed if the parties are unable to agree.