[2012] JMCA App 1

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 125/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN THE ATTORNEY GENERAL OF JAMAICA APPLICANT

AND JOHN MACKAY RESPONDENT

Miss Lisa White instructed by the Director of State Proceedings for the applicant

Mrs Alexis Robinson instructed by Myers, Fletcher and Gordon for the respondent

9, 16 December 2011 and 20 January 2012

MORRISON JA

Background

[1] By an amended notice of application for court orders dated 21 July 2010, the applicant seeks an extension of time to apply for leave to appeal and leave to appeal against an order made by Anderson J in the Supreme Court on 28 May 2010. By that order, the learned judge refused the applicant's application to set aside a judgment in default of defence entered against him on by order of Rattray J on 12 January 2010,

and on 7 July 2010 the learned judge also refused the applicant's application for leave to appeal against that order.

[2] This application arises in the following way. The respondent was at the material time the principal of Campion College, a Jesuit high school situated in Liguanea in the parish of St Andrew. Some time in August 1998, certain irregularities in the school's accounts were brought to the respondent's attention by the school's auditors and he in turn made a report to the ministry. On 21 May 1999, he was arrested and charged by Detective Sergeant Magloria Campbell, a member of the Constabulary Force attached to the Fraud Squad, with the offences of larceny as a servant and conspiracy to defraud the Ministry of Education. The respondent was in consequence imprisoned at the Central Police Station lock up from 21 to 22 May 1999. He was in due course prosecuted before the Resident Magistrate's Court for the Corporate Area and, on 4 September 2002, the bulk of the charges against him having previously been withdrawn by the prosecution, he was acquitted of the remaining charges.

[3] On 23 April 2007, the respondent filed a claim form and particulars of claim against the applicant, as representative of the Crown and pursuant to the Crown Proceedings Act, claiming damages for false imprisonment and malicious prosecution. The claim form and the particulars of claim were served on the applicant on 22 October 2007 and, on 11 December 2007, the applicant filed an acknowledgment of service of the claim form. Because of the applicant's insistence that the particulars of claim that had been served did not bear the stamp of the Registry of the Supreme Court, the

particulars of claim were re-served on the applicant on 21 August 2008. On 17 March 2009, the respondent applied for judgment in default of defence against the applicant.

[4] On 25 June 2009, the applicant filed an application for extension of time to file a defence, but no affidavit was filed in support of this application and no notice of it was served on the respondent. The application was therefore not before the court when the respondent's application for default judgment came on for hearing before Edwards J (Ag) (as she then was) on 22 July 2009. That application was adjourned until 12 January 2010, so that it could be heard with the applicant's application for an extension of time to file a defence to the claim.

[5] On 12 January 2010, the applicant filed an affidavit in support of the application for extension of time. The affidavit was sworn to by Miss Lisa White, attorney-at-law in the applicant's chambers, and to it was exhibited a draft of the applicant's proposed defence. Paragraph 5 of the draft asserted that Detective Sergeant Campbell had had "reasonable and probable cause" for arresting and charging the respondent, but the affidavit gave no explanation for the delay in making the application. Miss White did acknowledge, however (in para. 3), that there had been "some delay" on the part of the applicant. When the applications came on for hearing before Rattray J later that day, the learned judge refused to accept the applicant's late affidavit and granted the respondent's application for judgment in default of defence, for damages to be assessed and costs to be taxed. The judgment in default was served on the applicant on 22 January 2010.

[6] On 12 April 2010, the applicant filed an application to set aside the judgment (but not, as Mrs Robinson for the respondent pointed out, an application for extension of time to file a defence). From the stated grounds of the application, it is clear that it was made pursuant to the provisions of rule 13.3 of the Civil Procedure Rules ('the CPR'), which provides as follows:

> "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[7] This application was also supported by an affidavit sworn to by Miss White on 12 April 2010, in para. 3 of which it was stated that, before the date on which judgment in default was ordered, the applicant had sought and obtained instructions from the Commissioner of Police and that, based on those instructions, the applicant had "a good prospect of defending the Claim". Miss White went on to state that those instructions "show that the police had reasonable and probable cause to arrest and charge the [respondent]", in the light of "questionable dealings by the [respondent] with various sums of money that were to be managed by the signing officers of Campion College on

behalf of the said school and not for their personal use". The affidavit also exhibited a revised draft defence which, Miss White stated (at para. 5), "is supported by intended evidence which forms part of our instructions which the Crown can mount at trial".

[8] The application, which was served on the respondent on 19 May 2010, duly came on for hearing before Anderson J on 28 May 2010 and, as I have already indicated, the judge refused to set aside the judgment. Although there is no written judgment from the judge himself, we were very helpfully provided by counsel with an agreed note of Anderson J's stated reasons for refusing to grant the application to set aside. In response to a submission by Mr Gavin Goffe, who appeared for the respondent at that hearing, that there was no evidence that would allow the judge to form the view that the applicant had a real prospect of successfully defending the claim ("the draft defence is a pleading, not evidence"), the learned judge said that "Mr Goffe is correct...the affidavit doesn't provide basis [sic] for defending or give reasonable excuse for the delay". Further, the judge observed, "This is really an application for relief from sanctions" and the behaviour of the state "must be exemplary".

[9] No application for permission to appeal having been made orally at the hearing before Anderson J, on 23 June 2010 the applicant filed an application for permission to appeal, supported by a first affidavit of Miss White sworn to on the same day. In that affidavit, Miss White sought to amplify the factual basis of the application to set aside the judgment by praying in aid the contents of the respondent's witness statement, which had been served on the Director of State Proceedings (the DSP) on 3 June 2010 (that is, after the hearing before Anderson J), on the ground that it revealed that there

was "material evidence which arises on the Claimant's case and demonstrates that there are triable issues and that the defendant has a reasonable prospect of success" (para. 5). In a second affidavit also sworn to on 23 June 2010, Miss White stated (at para. 3) that the instructions received by the DSP "show that the police did not initiate proceedings against the [respondent]" and she exhibited a copy of an unsigned statement by Detective Sergeant Campbell.

[10] By a document headed "Furter [sic] Notice of Application for Court Orders", which was filed on 7 July 2010, the applicant also sought orders that the judgment in default be set aside and that permission to file a defence be granted. However, it does not appear that any affidavit was filed in support of this application and, on that same day, after a hearing before Anderson J, the learned judge refused the application for leave to appeal. This is counsel's agreed note of what the learned judge said in his ruling on that occasion:

> "Leave sought is leave to appeal my decision not to set aside default judgment. [The] Rules are clear, speaks to real prospect of success.
>
> What this court has to do is consider whether the basis upon which the decision not to set aside was made is likely to be seriously challenged.
>
> Part 13.3 sets out circumstances where court considers application to set aside. 13.3 and 13.4 does [sic] not appear that the bases are being seriously challenged, in particular whether the application to set aside has a real prospect of success or gives reasons for delay.
>
> On these narrow grounds, I dismiss application with costs to the respondent."

The renewed application for leave

[11] As aleady indicated, the application that is now before the court seeks, in the first place, an extension of time to apply for leave to appeal. However, at the outset of the hearing of this application, counsel for the respondent indicated that she did not propose to contend, as had been done before Anderson J, that the court should refuse to extend the time within which to file the application for permission to appeal on the basis of the failure of the applicant to file simultaneous applications in both the Supreme Court and the Court of Appeal. What therefore remains is the application for leave to appeal, which is based on the grounds that the proposed appeal has a real chance of success and that, if the applicant succeeds in setting aside the default judgment, the applicant will have a real prospect of success at the ensuing trial.

[12] In an affidavit sworn to and filed in support of the application on 21 July 2010, Miss White stated the following (at para. 10):

> "The Applicant has a real and not fanciful prospect of success in this matter as there is a limitation defence in respect of the claim for false imprisonment. Further, there is a defence in law in respect of the claim for malicious prosecution. Based on the instructions forwarded to the Director of State Proceedings, the police acted with reasonable and probable cause and without malice. Further, the police did not commence the prosecution against the Respondent."

[13] Further, Miss White, who also appeared for the applicant at the hearing of this application, filed wide-ranging written submissions, in which she sought, firstly, to challenge the basis upon which judgment in default was entered by Rattray J on 12

January 2010 and, secondly, to demonstrate that the applicant had reasonable prospects of defending the claim. Without in any way taking away from the obvious industry displayed by counsel in assembling her submissions on the first point, I do not propose to dwell on them in this judgment. At the outset of the hearing before us, Mrs Robinson for the respondent also indicated that she did not intend to pursue an argument that had been advanced before Anderson J on the application for leave to appeal, which was that the applicant ought to have appealed the decision of Rattray J, instead of applying to set it aside. In the light of the fact that Anderson J's reasons for refusing leave make no reference at all to that submission (indeed, the judge said plainly that he was deciding the matter on "narrow grounds"), I consider that this was an entirely realistic position for the respondent to have taken. As a result, absolutely nothing now turns on Rattray J's order (save as part of the history of these proceedings).

[14] What the court is now concerned with, therefore, is whether the applicant has shown that an appeal from the order made by Anderson J on 28 May 2010 "will have a real chance of success" (Court of Appeal Rules 2002, rule 1.8(9)). In order to show this, Miss White accepted that the applicant had to bring himself within the provisions of rule 13.3 of the CPR. The essential question was, Miss White submitted, whether Detective Sergeant Campbell acted with reasonable or probable cause, that is, whether the information which she had in her possession was sufficient to cause her to form a reasonable suspicion that the respondent had committed the offences for which he was ultimately charged. In order to determine this, Miss White submitted further, "the court

should have sight of what information operated on the mind of the police officer before she charged the [respondent]" and, given that the officer did not act on her own, that information would also bring into question the claim for malicious prosecution. On the issue of delay, Miss White submitted that delay was not by itself a reason for the refusal of an application to set aside, but was a factor that "may be taken into account" (in reliance on ***Finnegan v Parkside Authority*** [1998] 1 All ER 595). The primary consideration for the court was therefore whether there was a defence with a real prospect of success, which there was in this case. Further, if the judgment in default were not set aside, the applicant would be deprived of a limitation defence in respect of the claim for false imprisonment. In conclusion, Miss White submitted that at the time when judgment was entered against him, an application by the applicant for an extension of time to file a defence was pending and that judgment in default ought not to have been granted in those circumstances.

[15] As regards Anderson J's observation in his ruling on 28 May 2010 that "This is really an application for relief from sanctions" (see para. [8] above), Miss White submitted that what was before the judge was an application to set aside pursuant to rule 13.3 and not an application for relief from sanctions pursuant to rule 26.8 of the CPR.

[16] In response to these submissions, Mrs Robinson observed, firstly, that in order for this application to succeed, it was necessary for the applicant to show that the proposed appeal had a realistic chance of success. She submitted that the applicant was required to satisfy the court that Anderson J was plainly wrong in not exercising his

discretion to set aside the default judgment and that this had not been done in this case.

[17] Turning specifically to rule 13.3, Mrs Robinson submitted that the applicant had not shown that it had a real prospect of successfully defending the claim, in that the affidavits sworn to by Miss White did not provide an evidential basis for such a prospect. As regards the additional factors relevant to the judge's exercise of his discretion referred to in rules 13.3(2)(a) and (b), Mrs Robinson pointed out that, the applicant having been present when Rattray J made the order granting the default judgment on 12 January 2010, the application to set it aside was not made until 12 April 2010, three months later, and it was not served on the respondent until 19 May 2010, a further five weeks later. No explanation had been offered for this period of delay, which was "inexcusable by any standard". And, as for an explanation for the failure to file a defence, Mrs Robinson submitted that there was none, despite the period in excess of 16 months between the date that service of the particulars of claim was admitted and the date on which a draft defence was finally filed in support of the application for an extension of time.

[18] In all the circumstances, Mrs Robinson submitted, it could not be said that the learned judge had been plainly wrong in refusing to set aside the default judgment. In the light of this, Mrs Robinson considered that any question relating to rule 26.8(1) and (2) was "somewhat academic", but nevertheless referred us briefly to two recent decisions of the Privy Council on appeal from the Court of Appeal of Trinidad & Tobago (***Attorney General v Keron Matthews*** [2011] UKPC 38 and ***Attorney General v***

Universal Projects Ltd [2011] UKPC 37, in which both judgments were written by Lord Dyson and delivered on the same day). In those cases, the Board has sought to clarify the interplay between the rules of the CPR permitting an application to be made to set aside a default judgment in certain circumstances (rule 13.3) and for relief from sanctions (rule 26.8). On the basis of these decisions, Mrs Robinson submitted that Rattray J's order granting a default judgment against the applicant was the imposition of a sanction for non-compliance with the rules, with the result that the applicant was therefore obliged to seek relief from sanctions under rule 26.8.

Discussion and analysis

[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular

facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it".

[21] As has already been seen, rule 13.3 requires the applicant to demonstrate that he has a "real prospect of successfully defending the claim" (rule 13.3(1)). In considering whether to set aside the judgment, the court is also mandated to consider whether the applicant had (a) applied to the court as soon was reasonably practicable after finding out that judgment had been entered against him and (b) given a good explanation for his failure to file a defence in time (rule 13.3(2) (a) and (b)).

[22] In my view, the applicant failed to satisfy any of these criteria. Firstly, as regards the "real prospect" of successfully defending the claim, the only evidence (if it can be so described) before the judge was to be found in the affidavit of Miss White, in which she asserted that her instructions "show that the police had reasonable and probable cause to arrest and charge the [respondent]", and to which she exhibited a draft defence, which was said to be "supported by intended evidence which forms part of our instructions which the Crown can mount at trial".

[23] It seems to me that the learned judge's conclusion that Miss White's affidavit did not provide a basis for defending the action is plainly irresistible. As long ago as 1961, in ***Ramkissoon v Olds Discount Co (TCC) Ltd*** (1961) 4 WIR 73, a decision under rules of court long predating the CPR, the Supreme Court of Trinidad & Tobago (Appellate Jurisdiction) held, on an application to set aside a regularly obtained default

judgment, that an affidavit sworn to by the defendant's solicitor, in which there was nothing to suggest that the solicitor had any personal knowledge of the facts of the case, or that what appeared in the draft defence exhibited by him was true, was not a sufficient affidavit of merit for the purposes of setting aside the judgment. Under the rules then applicable, a defendant was only obliged to demonstrate on affidavit that in the main action he had "a prima facie defence" (***Evans v Bartlam*** [1937] AC 473, per Lord Atkin at page 480). The language in the CPR is obviously stronger, with the result that, as Mr Stuart Sime puts it in 'A Practical Approach to Civil Procedure' (10th edn, para. 12.35), "the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits".

[24] Miss White's affidavit in this case was hardly an improvement on that in the ***Ramkissoon*** case, suggesting as it did, no more than that there was "intended evidence", which it was the intention of the Crown to advance at trial. It is also clear from the fact that, on the subsequent application for leave to appeal, Miss White felt it necessary to swear to two further affidavits purporting to demonstrate the applicant's prospects of success at trial (see para. [9] above) that she herself appreciated that the original application as filed lacked a proper evidential basis.

[25] Nor did the applicant satisfy either of the discretionary criteria set out in rule 13.3(2)(a) and (b). As Mrs Robinson submitted, no explanation whatever was offered for either the fact that, despite the applicant having been represented at the 12 January 2010 hearing before Rattray J, it nevertheless took a full three months for an application to be made to set aside the default judgment granted on that day; or for the

failure to file a defence during the period in excess of 16 months between the admitted date of service of the particulars of claim on the applicant and the date on which a draft defence was finally exhibited in support of the application for an extension of time.

[26] In my view, it accordingly follows that this application must be dismissed, the applicant having failed to demonstrate that Anderson J acted on any wrong principle in concluding that the case for setting aside the default judgment entered by Rattray J on 12 January 2010 had not been made out.

[27] In these circumstances, it is unnecessary – and perhaps undesirable - to dwell at any length on Mrs Robinson's further submission, based on the two recent decisions of the Privy Council in ***Keron Matthews*** and ***Universal Projects Ltd***, that the applicant was in any event obliged to seek relief from sanctions under the provisions of rule 26.8. However, in deference to counsel's thoughtful submission on the point, I will permit myself a brief word on the matter.

[28] Rule 26.7(1) of the CPR provides that, where the court makes an order or gives directions, it "must whenever practicable also specify the consequences of failure to comply". Rule 26.7(2) provides that where a party fails to comply with any rule, direction or 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…" Rule 26.8, under the rubric "Relief from sanctions", provides as follows:

> "(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.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[29] In ***Keron Matthews***, the Board held that the entering of a default judgment pursuant to rule 12.4 or 12.5 of the rules (providing for the entry of default judgment for failure to file an acknowledgment of service or a defence within the time limited by the rules) was not an 'implied sanction'. A defendant who wished to set aside such a judgment was therefore only obliged to satisfy the conditions of rule 13.3, which sets out the criteria for setting aside default judgments, and not of rule 26.8, which sets out

the conditions upon which the court will grant relief from sanctions. Delivering the judgment of the Board, Lord Dyson said this (at para. 18):

> "It cannot have been intended that a defendant who wishes to set aside a default judgment must satisfy the requirements of both rules. If a defendant satisfies the two conditions specified in rule 13.3, his application to set aside the judgment should succeed. The court cannot refuse the application on the grounds that, although the rule 13.3 conditions have been satisfied, the further conditions specified in rule 26.8(1) and(2) have not been. If it had been intended that, unless a defendant satisfies these further conditions, the court may not set aside a default judgement, this would have been stated in rule 13.3. The fact that it is not stated in rule 13.3 indicates that the rule 26.7(3) conditions have no part to play when the court decides whether to set aside a default judgment. It follows that an application to set aside a default judgment is 'not an application for relief from a sanction imposed by the rule'."

[30] In ***Universal Projects Ltd***, the issue was slightly, but as it turned out, significantly different. This is how Lord Dyson framed it (at para.1):

> "…whether an application to set aside a judgment following non-compliance with a court order extending time for filing a defence in default of which permission is given to the claimant to enter judgment is (i) an application to set aside judgment under CPR 13.3…or (ii) an application for relief from sanctions under CPR 26.7…"

[31] It was held that the application to set aside the judgment in such a case was an application for relief from sanctions, the judgment having been entered as a consequence of a term imposed by the court in granting the defendant an extension of time within which to file a defence. In other words, the entry of the judgment was a

penalty (a 'sanction') imposed by the court in the event of a failure by the defendant to file the defence within the time specified on the application for extension of time. Lord Dyson explained the different result in this case in this way (at para. 14):

> "Rule 13.3 and rule 26.7 are dealing with different situations. Rule 13.3 is dealing with the setting aside of a default judgment where it has been entered in the circumstances specified in Part 12 ie where there has been a failure to enter an appearance or file a defence as required by the rules. Rule 26.7 is dealing with applications for relief from any sanction, including any sanction for non-compliance with a rule, direction or court order where the sanction has been imposed by the rule or court order. The distinction is important: see the judgment of the Board in *The Attorney General v Keron Matthews* [2011] UKPC 38."

[32] Mrs Robinson submitted (while conceding that the point was "somewhat academic in the context of the respondent's overall submissions") that the entry of judgment by Rattray J in this case was the imposition of a sanction against the applicant for non-compliance with rules of court and that the case therefore fell within ***Universal Projects Ltd*** and that what was required from the applicant was an application for relief from sanctions. I disagree. It seems to me that, despite the fact that Rattray J did make an order that default judgment be entered in this case, the judgment thus entered was essentially a judgment entered pursuant to rule 12.5, as in ***Keron Matthews***, rather than a judgment entered by way of a sanction for failure to comply with an order of the court, as in ***Universal Projects Ltd***. It seems clear that the only reason why the entry of the judgment in the instant case required judicial intervention of any kind was because the claim against the applicant was a claim

against the State and thus the court's permission was required as a precondition of the entry of a default judgment (see rule 12.3(1)). Had it been otherwise, the default judgment would no doubt have been entered by the Registrar as a purely administrative matter in the ordinary way and there would have been no question that the appropriate application would have been one which was in fact made by the applicant, viz., under rule 13.3, in which no issue of relief from sanctions would arise.

Conclusion

[33] For these reasons, I therefore conclude that the application for leave to appeal must fail in this case, on the ground that the applicant has not shown he has an appeal which has a real chance of success. The respondent must have the costs of the application, to be taxed, if not sooner agreed.

PHILLIPS JA

[34] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion. There is nothing further that I wish to add.

HIBBERT JA (Ag.)

[35] I too agree with the reasoning and conclusion of Morrison JA and have nothing to add.

MORRISON JA

ORDER

Application for leave to appeal refused. Costs to the respondent to be agreed or taxed.