[2010]JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 57/2010

BETWEEN	**CHARMIN BLAKE (Administratrix of the Estate of Ernest Blake, deceased)**	**APPELLANT/ CLAIMANT**
A N D	**ALCOA MINERALS OF JAMAICA INC.**	**RESPONDENT/ DEFENDANT**

PROCEDURAL APPEAL

Written submissions made by Taylor Wright & Company attorneys-at-law for the appellants, and by Dunn Cox attorneys-at-law for the respondent.

19 July 2010

PHILLIPS, J.A.

[1] This is a procedural appeal filed on behalf of the appellant/ claimant against an order of Rattray J, made on 4 May, 2010 wherein he refused a preliminary objection made by the appellant to the application for stay of proceedings taken out by the respondent/defendant.

The appellant challenged the court's finding in law in the following manner:

> "That despite the wide wording of rule 12.3 of the Civil Procedure Rules 2002, rule 26.2(1) and the overriding objective gives the court the power to exercise its discretion in the interests of justice to allow a Defendant against whom a Claimant has

obtained a default judgment which has not been set aside to proceed to make an Application to stay all proceedings."

[2] The grounds of the appeal are set out as follows:

"(a) The learned trial judge erred in law in holding that **rule 26.2 (1)** of the Civil Procedure Rules 2002 and the overriding objective invests him with power to override the clear wording of rule 12.13 of the said Rules in the interest of justice.

(b) The learned trial judge erred in law in holding that the Respondent/Defendant was entitled to pursue an **Application to Stay all Proceedings** in the claim at first instance in circumstances where the Appellant/Claimant holds a Judgment in Default in her favour, which judgment has to date not been set aside."

[3] The submissions of the appellant can be summarised as set out below:

It was the appellant's contention that she had duly prosecuted her case and had served the originating documents, namely the claim form and the particulars of claim by registered post since October 2008. The amended claim form and amended particulars of claim had also been served by the said registered post by 3 February 2009. Notice of application for court orders was filed requesting judgment in default of acknowledgement of service and the Judgment in default was duly entered on 21 September 2009.

[4] The respondent filed an application to set aside the default Judgment, which, as far as I know, has not yet been heard, although it had been set to be

heard on 10 June 2010. The respondent then filed the application to stay proceedings and it was at the hearing of that application that the preliminary point was taken by counsel on behalf of the claimant objecting to the hearing of that application, which was refused and forms the basis of this appeal. The appellant took the position that the respondent's application was misconceived since the only rights available to the respondent following the entry of the default judgment were as circumscribed by rule 12.13, being that the case was closed unless there was in fact an order obtained to set aside the default judgment.

[5] The appellant relied on the specific wording of rule 12.13, and what the appellant submitted was trite law, in that civil litigation commences with the claim form or the fixed date claim form and ends with a judgment, obtained after a trial on the merits of the case or by default of one party acknowledging service or defending the claim. Thus, the argument runs, having obtained the judgment in default, the litigation was at an end, and the lawsuit is effectively terminated until and unless the judgment is set aside. The appellant further submitted that rule 26 of the Civil Procedure Rules (CPR), on which the respondent relied, did not apply and as the application before the court was not for a stay of execution and no attempt had been made to enforce the judgment, then any attempt to stay proceedings would be in vain as the

proceedings were already terminated, and the matters on which the respondent could be heard pursuant to rule 12.13 were very clear.

[6] Counsel relied on the case of ***Delroy Rhoden v Construction Developers Associates Limited and Trevor Reid***, SCCA No. 42/2002 delivered on 18 March 2005, to say that any proceedings embarked upon after the entry of a default judgment, while that judgment remained extant, would be a nullity. Counsel concluded that the learned trial judge had therefore fallen into error as no proceedings remained to be stayed, the proceedings having already been terminated.

[7] The respondent in reply submitted that the respondent had not received by registered post or otherwise the sealed copies of the claim form or amended claim form and/or the particulars of claim or amended particulars of claim. The respondent only became aware of the proceedings when the application was filed to obtain judgment in default and, when the respondent became aware that the default judgment had been entered against it, took steps to set the same aside. That application came up for hearing but was not heard, as the claimant required time to respond to certain affidavits filed on behalf of the respondent. It was the respondent's contention that in spite of knowing about the application to set aside the default judgment, which had been adjourned at her request, and that a date had been fixed for the hearing of the same, in June, 2010, the claimant none the less proceeded to serve a bill of costs,

thereby endeavouring to enforce the judgment, thus the filing of the application to stay all proceedings pending the outcome of the application to set aside the judgment.

[8] The respondent's application for a stay of proceedings was not heard, although the learned trial judge ruled that he was prepared to allow it to proceed, but he also granted leave to appeal. The respondent submitted that rule 12.13 does not apply to an application involving the court's case management powers or general powers to act in the interests of justice. The respondent also submitted that the rule should be interpreted in the context of the overriding objective and that clear words would be necessary to oust the jurisdiction of the court to make orders ancillary to applications before it, which are necessary in the interest of justice. Additionally the respondent relied on rule 26.1 (2) (e), which permits the court to stay the whole or part of any proceedings generally or to a specified event. Further in rule 26.2 (1) the court can act and make orders on its own initiative. It was therefore submitted that rule 12.13 does not affect those case management powers of the court. The respondent relied on rule 26 as a complete answer to the application before the learned judge and also before this court.

[9] The respondent also submitted that in any event its application fell squarely within rule 12.13 (a) and (c) as the order included one of costs and the claimant

was trying to enforce that aspect of the order. The respondent could therefore be heard on an application to stay those proceedings as there is no limitation on the issues which may be heard in relation to costs and enforcement.

[10] The respondent challenged the claimant's contention that the default judgment terminated the proceedings submitting that if that were so then the rules would not provide for the setting aside of the judgment. The respondent also challenged the position taken by the claimant that it had not applied for a stay of execution, as it contended that a stay of proceedings included a stay of execution, as it brought all proceedings to a pause which also included a stay of execution, and so an application for a stay of proceedings was wider than and includes a stay of execution.

[11] The respondent submitted that the **Delroy Rhoden** case did not apply. Counsel for the respondent also submitted that the learned judge was correct in rejecting the preliminary objection, as the taxation proceedings were a part of the proceedings as a whole, and rule 26 was therefore applicable and the court has the power to order a stay of proceedings in the circumstances.

Analysis

[12] This claim relates to a breach of contract, to wit an option agreement (number B-EX-206) made between the parties on 29 November 1985, wherein Ernest Blake deceased was to exchange certain lands he owned for certain

lands belonging to the respondent. However, as the latter lands had sink holes, (alternatively) a separate agreement was entered into between the parties, on 8 April 1991, wherein the respondent agreed to give to Mr. Blake an additional ¾ acres of land in final settlement and to compensate him for loss of crops. There was yet a further agreement in January 2003 to allegedly resolve the impasse whereby the respondent agreed to transfer to Mr. Blake one parcel of land comprising 3 acres of land in Mocho. The claimant indicated that it intended to rely on the 3 agreements and pre-checked diagrams Nos. 215883 and 106946 and letter dated 3 October 2001 from the respondent. The particulars of claim expanded on these claims and stated how the agreements came about, allegedly to facilitate the mining of the respondent on the land of the deceased.

[13] On 21 September 2009 on an application for court orders, made by the claimant and in the absence of the respondent, Evan Brown J, made the following orders, namely the default judgment, which was entered in judgment binder 747 folio190:

> "1. W & L Associates Ltd., Real Estate Appraisers of 27A Beechwood Avenue, Kingston 5 in the parish of St. Andrew be appointed as Valuator for the purpose of providing a report on the market value of all that parcel of land, comprising three (3) acres as well as the replacement value of the house which was accepted by the deceased by way of exchange for his original land and dwelling house in accordance with Property Option Agreement No. B-

E-X-206. The valuation should include cost of fencing the land, an estimate of the value of 15 citrus seedlings, a tank of 2000 gallon capacity and a pit latrine measuring 22.5 square feet.

2. The Defendant do pay to the estate the amount assessed by the Valuator as the market value of the said land, house, seedlings, tank, fence and pit latrine within 180 days of the date of this Order.

3. That in accordance with clause 10 (c) of the Option Agreement No. B-E-X-206 the Defendant do pay to the estate a cash payment in the sum of $62,088.39.

4. That interest be awarded in the sum of 15% per annum on the said sum from the 26th day of November, 1985 to the date hereof.

5. Costs to the Claimant to be taxed or agreed.

6. Order to be prepared and filed by Claimant's Attorneys- at-law."

It is clear from the above judgment of Brown, J (Ag) that a valuation of (1) three acres of property, (2) replacement of a house, (3) cost of fencing (4) 15 citrus seedlings, (5)a tank of 2000 gallon capacity, and (6) a pit latrine measuring 22.5 square feet, would have to be done before the judgment can be effected.

[14] I must state right away, that although the submissions of both counsel refer to the application to set aside the default judgment and to the application to stay the proceedings, neither of those applications was in the bundle of documents submitted to me, but I assume that the former having been filed in November, 2009 and the latter in March 2010, that Rattray, J who was hearing

the matter in May, 2010 would have had sight of both applications on the court file before him. In my view, this matter can be disposed of quite quickly.

[15] The appellant has submitted that on the entry of a default judgment the law suit is terminated unless and until it is set aside. This however would only be so if the default judgment relates to a specified or liquidated sum and the judgment entered is therefore a final judgment and nothing remains except to enforce it. This is not so if the judgment entered in default is an interlocutory judgment with damages to be assessed or in respect of which some other remedy is claimed which has to be determined. At the interlocutory judgment stage, it is only liability which has been determined between the parties.

[16] The appellant has also relied on the entry of the default judgment to trigger rule 12.13 of the CPR, which limits the matters on which the defendant can be heard, but the preamble to that rule states, "unless the defendant applies for and obtains an order for the judgment to be set aside". That application has already been filed and when heard, if an order is made in favour of the defendant, the claimant would not be able to proceed on the judgment, and the application for the stay of proceedings as set out in counsel's submissions sought the stay only pending the outcome of that application.

[17] In the submissions of counsel for the defendant, counsel stated that it was the defendant's contention that it had never received the original documents filed on behalf of the claimant. The claimant has put before me as exhibit "DB 1", attached to an affidavit of service of registered post of Donna Barracks, a certificate of posting which is addressed to, "Jamalco lands and mine Engineering, 13 Waterloo Road, Kingston 10". This, on the face of it, appears to be a different company, from the defendant sued herein, but that is something that will have to be decided by the court hearing the application to set aside the default judgment, as to whether it is a judgment entered irregularly and therefore must be set aside ex debito justitiae, or whether if properly served, the defendant would be required to show that it has a realistic prospect of successfully defending the case and can satisfy the other considerations set out in rule 13.3.

[18] In the meantime though, the appellant wishes to enforce the costs ordered by the court and has filed a bill of costs, and is proceeding to have the costs taxed in order no doubt to collect the same, and then one would expect, would be proceeding also to have the valuation done in order to effect the default judgment entered by E. Brown, J (Ag). There is no evidence that the valuation has been requested but the stay of proceedings could affect the valuation being done if the application is granted, and if the valuation has not yet been requested, then no harm would have resulted, if that too is made to ultimately await the application to settle the rights under the judgment entered

in default between the parties. However, one must remember that this is not an appeal from the application to stay proceedings but from the refusal of the judge to restrain that application from being heard.

[19] **The real issue then is, is this a proper use of the court's process? Do the rules permit it? Was the learned judge correct?**

It is important to remember that the learned trial judge in utilizing the court's general case management powers was exercising a discretion, and it would therefore be incumbent on the appellant to show that he erred in principle. Rule 1.2 of the CPR states:

> "The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules. "

Rule 1.3 states:

> "It is the duty of the parties to help the court to further the overriding objective."

It is accepted though and the court must be mindful, as made clear in the judgment of Kay, L.J in ***Totty v Snowden*** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules, "Where there are clear express words, as pointed out by Peter Gibson, LJ in ***Vinos***' case, the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'."

However, "Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective".

There is no doubt therefore that the court in interpreting the rules must at all times give effect to the overriding objective, and to that extent in the circumstances of this case, in dealing with the case justly, would include although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court's time.

[20] Under Part 26, dealing with the court's general powers of management, in rule 26.1 (2) (e), the court clearly has the power to stay the whole or part of any proceedings generally or until a specified date or event. In this case the specified date or event would be the determination of the application to set aside the default judgment. The court also can exercise its powers on an application or of its own initiative, (26.2 (1)) so even without hearing the application for stay which if this appeal succeeds would still be pending, the court could in the exercise of its own protection of its process, and in order to avoid duplication of hearings, stay all proceedings in the matter until the application envisaged under rule12.13 has been heard and determined.

[21] As indicated earlier in this judgment I do not know whether the application to set aside the default judgment has been heard, but it is certainly

my view that that is the application in which the parties should have concentrated their energies. That application should be heard. There ought to be an outcome in respect thereof as quickly as possible. The judgment may be set aside. In that case there would not seem to be any useful purpose proceeding with the valuations as required under the judgment, and also with the taxation of costs at this stage. If the application is not successful then the claimant should pursue enforcing its judgment and costs without restraint. All of this is particularly important, if the respondent can show that it was not properly served with the originating documents.

[22] Part 26, in my view was promulgated for just these purposes, for the court to manage the cases through its general powers, and by doing so, make the best use of the court's time. I am also of the view that rule 12.13 acknowledges that if the defendant applies for and obtains an order setting aside the default judgment, then that particular provision would have no applicability to that defendant, as he would be able to be heard generally in the action. The limitations relating to the matters on which one could be heard would no longer be relevant. There are no express provisions prohibiting the defendant from making an application to stay the proceedings in order for it not to be limited to those matters set out in rule 12.13.

[23] In any event, costs were awarded on the default judgment and the claimant has filed a bill of costs in an effort to pursue enforcement of that

aspect of the judgment. I agree with counsel for the respondent that based on the strict interpretation of rule 12.13, the respondent ought to be able to be heard in respect of rule 12.13 (a) and (e) as those subsections relate to costs and enforcement. The application to stay the proceedings would be the means by which the respondent would be heard, bearing in mind that it would be pending the outcome of the application to set aside the default judgment which is envisaged as stated in the preamble to the provision.

[24] Under the former regime, namely the civil procedure code, this court, in ***The Jamaica Record Limited et al v Western Storage Ltd*** (1990) 27 JLR, when looking at the question as to whether to proceed to hear a summons to proceed to assessment which was set for hearing on the particular day, or to permit an adjournment to hear a summons to set aside a default judgment which was on the court file, but not yet fixed for hearing, the court below having made the order on the summons to proceed to assessment, made the following observations. The court ought to have considered whether it was more desirable and for practical reasons to hear the latter summons first. The Master should have considered whether the refusal of the adjournment could not arguably, albeit erroneously, be said to have been predicated on a view that the application to set aside the judgment of which he was aware was without merit, and that its subsequent dismissal would be a mere formality. So although not a rule of law, common sense, economy in the use of judicial time, and the avoidance of any suggestion that a matter has been pre determined without

a hearing, would require that as far as possible, the procedure should be adopted that the summons to set aside the default judgment of which the court is aware be heard and determined before hearing the summons to proceed to assessment of damages.

[25] In the instant case, hearing the application for the stay of proceeding would have the similar effect of hearing, by way of common sense, and with the economy of the use of judicial time, whether there should be further action on a default judgment, when the court is aware that the defendant is seeking to set it aside, on the basis inter alia, of non-service of the originating documents.

[26] The case of ***Delroy Rhoden v Construction Developers Associated Limited*** relied on by the appellant is not applicable to this case, as in that case, the parties continued to conduct the litigation subsequent to the default judgment having been obtained, although inadvertently without the defendant's knowledge, and without the defendant attempting to have the default judgment set aside. In this case, to the contrary, the defendant is pursuing having that application heard.

[27] I am of the view that the learned trial judge was quite correct in the exercise of his discretion to refuse the preliminary objection so that the application of stay of proceedings could proceed.

[28] I therefore hereby order that the parties should proceed to hear the application for stay of proceedings, but in my view, their time and energies would be better spent in pursuing the application to set aside the default judgment and to obtain a ruling thereon and be guided accordingly.

The appeal is dismissed with costs to the respondent.