[2012] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 106/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**WINSTON JOHNSON**	**APPELLANT**
AND	**NORBERT LAWRENCE**	**RESPONDENT**

Richard Reitzin instructed by Reitzen and Hernandez for the appellant

Miss Nicosie Dummett for the respondent

13, 14 December 2011 and 17 February 2012

HARRIS JA

[1] In this appeal, the appellant challenges the decision of K. Anderson J made on 21 September 2011 in which the following orders were made on an amended notice of application by the respondent seeking to set aside or vary a default judgment and to obtain certain consequential reliefs:

> "1. The defendant's application to set aside or vary the judgment in default of defence is refused;
>
> 2. The defendant's application for relief from sanctions is refused;

3. The defendant shall be permitted to challenge the assessment of damages by cross-examining the claimant and his witnesses and by making submissions;

4. The claimant shall file and serve upon the defendant by 4:00 p.m. on 26 September 2011 the claimant's witness statements;

5. The claimant's attorney shall prepare, file and serve these orders;

6. The defendant is to pay the claimant's costs of the defendant's application and amended application to set aside or vary the judgment as taxed if not agreed.

7. Permission to appeal is granted to the claimant."

[2] On 29 November 2010, motor vehicles of the appellant and the respondent were involved in an accident in which the appellant sustained injuries. On 3 February 2011, the appellant commenced proceedings against the respondent claiming damages for the injuries sustained as a result of the respondent's negligence. The claim was served on 11 February 2011 and the respondent filed an acknowledgment of service within the time stipulated by the Civil Procedure Rules 2002 (CPR), in which he indicated that he intended to defend the claim and did not admit to any part of it. However, no defence was filed within the requisite time and there was no agreement between the parties that the time should be extended.

[3] On 28 March 2011, the appellant filed a request for judgment to be entered in default of defence indicating that he was in a position to prove damages. On the same day, the registrar duly entered judgment in default of defence against the respondent

for damages to be assessed. The respondent subsequently filed a notice of application for court orders on 19 April 2011 seeking the following orders:

> "1. That Default Judgment filed March 28, 2011 be set aside.
>
> 2. The Defence filed on April 5, 2011 be allowed to stand as filed in time.
>
> 3. That the Defendant be granted relief from sanctions."

The grounds for the application were:

> "a) The Defence was not filed as a result of an administrative oversight on the part of the Defendant's legal advisors;
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> b) The Claimant will not be prejudiced as no trial date has been set;
>
> c) The Defendant would be prejudiced through no fault of his;
>
> d) The Defendant wishes to be heard on the issue of quantum;"

The application was subsequently amended to request that the default judgment be set aside or varied to enter a judgment on admission. A further ground in support of the application was also added. It states:

> "The Claimant will not be prejudiced as there will be no need to adjourn the Assessment of Damages hearing which has been set for the 27th September, 2011."

The original application was supported by the affidavit of the respondent Norbert Lawrence to which a draft defence was annexed. Paragraphs 1, 5 and 6 of this defence are most significant and I set them out below:

> "1. The Defendant admits liability but seeks to defend this matter on the issue of quantum.
> 2. …
> 3. …
> 4. …
>
> 5. The Defendant makes no admission to the loss and damage and expenses relating to Medical Expenses and Costs as stated in the Particulars of Injuries, Disabilities and Special Damages and contained in paragraph 6 of the Particulars of Claim as those losses have not been proved by the Claimant.
>
> 6. The Defendant further contest [sic] the claim for Personal Injury and puts the Claimant to the strictest of proof of same."

[4] The amended application came on for hearing before K. Anderson J who made the orders mentioned above (paragraph [1]).The learned judge gave brief oral reasons at that time, an agreed note of which was made available to this court by counsel. The agreed note states as follows:

> "The Appellant and the Defendant have agreed the following reasons:
>
> 1) Rule 16 did not make sense when read together with Rule 12.13 and Rule 16 would be pointless if the Rules permitted the exchange of witness statements after default judgment if it was not the intention of the Rules to permit a Defendant an opportunity to be heard at assessment, notwithstanding the default judgment.

The judge made reference to the heading 'Assessment of Damages' after Default Judgment to buttress his point that it must be taken that the Defendant should participate.

2) There was an internal conflict between Rule 16 and Rule 12.13 and where there is such a conflict, it was open to the Judge to use the overriding objective to do justice between the parties."

Unfortunately, it was subsequent to the hearing of the appeal that his written reasons became available. On the basis of the judge's oral reasons, seven grounds of appeal were filed. They are as follows:

"i) The learned judge failed to appreciate that rule 16.2(4) of the Civil Procedure Rules, 2002 is not in conflict with rules 10.2(1) and 12.13;

ii) The learned judge failed to appreciate that the true effect of rule 16.2(4) is to facilitate proof by the claimant of the amount of his damages where, and only where, the claimant is not in a position to prove the amount;

iii) The learned judge erred in holding that rule 16.2(4) required the court to allow the defendant to cross-examine the claimant's witnesses and make submissions at the assessment;

iv) The learned judge failed to appreciate that rules 10.2(1) and 10.2(4) of the Civil Procedure Rules, 2002 made it mandatory for the defendant to file a defence dealing with the issue of quantum if he admitted liability and wished to be heard on quantum;

v) The learned judge failed to appreciate that rule 12.13 precluded the defendant from being heard on quantum unless he obtained an order

setting aside the default judgment – which, under the order appealed from, the defendant did not do;

vi) The learned judge failed to appreciate that having refused to set aside or vary the judgment in default of defence in favour of the claimant, the defendant was not entitled to be heard on quantum and/or was not entitled to cross-examine the claimant's witnesses nor to make submissions;

vii) The learned judge failed to appreciate that because the defendant had not filed a defence as to quantum or at all he could not be heard on quantum;

viii) The learned judge erred in holding that the defendants [sic] could cross-examine the claimant and make submissions to the court notwithstanding that the defendants [sic] had not filed a defence dealing with the issue of quantum or at all."

[5] It is apparent from these grounds that, not surprisingly, the appellant has not sought to disturb the learned judge's refusal to set aside or vary the default judgment. Instead, his primary focus is on the rights of participation at the assessment hearing which the learned judge accorded the respondent. It is therefore necessary at this juncture to set out the rules relevant to this issue as raised by the grounds of appeal.

[6] Part 10 sets out the rules governing the filing of a defence. Rule 10.2 sets out the consequences of failing to do so. Rule 10.2(4) and (5) provides:

"10.2(4) In particular, a defendant who admits liability but wishes to be heard on the

issue of quantum must file and serve a defence dealing with that issue.

(5) Where a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered against that defendant if Part 12 allows it."

Rule 12.10, which sets out the nature of a default judgment, states:

"12.10(1) Default judgment-

(a) on a claim for a specified sum of money, shall be judgment for payment of that amount or, where part has been paid, the amount certified by the claimant as outstanding –

(i) (where the defendant has applied for time to pay under Part 14) at the time and rate ordered by the court; or

(ii) (in all other cases) at the time and rate specified in the request for judgment.

…

(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court.

(Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under this paragraph.)"

Rule 16.2 provides:

"16.2 (1) An application for a default judgment to be entered under rule 12.10(1)(b), must state –

(a) whether or not the claimant is in a position to prove the amount of the damages, and, if so

(b) the claimant's estimate of the time required to deal with the assessment.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing.

(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The registry must then fix:

(a) The date for the hearing of the assessment;

(b) A date by which standard disclosure and inspection must take place;

(c) A date by which witness statements must be filed and exchanged; and

(d) A date by which a listing questionnaire must be filed."

Rule 12.13, which is of great significance, reads:

"12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matter on which a defendant against whom a

default judgment has been entered may be heard are –

(a) costs;

(b) the time of payment of any judgment debt;

(c) enforcement of the judgment; and

(d) an application under rule 12.10(2)"

[7] Mr Reitzin submitted that at a hearing of an assessment of damages, there are three levels of participation by a defendant, viz, (i) he or she cannot participate, (ii) he or she can participate to the extent of cross-examination and making submissions, or (iii) he or she may bring affirmative evidence through witnesses. It was also his submission that where a default judgment has been entered, the defendant has very limited rights as set out in rule 12.13 of the CPR. A defendant, he contended, is not entitled to cross-examine any witness called on behalf of the claimant or to make submissions to the court. This, he argued, is underscored by the form "Prescribed Notes for Defendant" in the CPR, in particular the section headed, "Action to be Taken". Rule 12.13, he submitted, was designed to prevent delay and to reduce the backlog of cases as it was really a policy decision to ameliorate the difficulties that beset the administration of justice. He submitted that decisions emanating from the United Kingdom would be of no guidance as rule 12.13 does not apply in the United Kingdom. Relying on the case of ***Harris v Fyffe and Lopez-Gordon*** claim no 2005/HCV 2562, delivered 30 July 2007 which shows that on an application to set aside or vary a default judgment, a judgment on admission may be entered, he submitted that it was not

being contended that the defendant should be forever shut out. However, if the defendant wishes to participate, he stated, he must have the judgment set aside.

[8] It was also his contention that the learned judge had erred in relying on the provisions of rule 16.2(4) as that rule does not expressly confer any rights upon a defendant in participating in an assessment of damages and the rule is inapplicable to this case. The right to cross-examine and make submissions to the court could not be implied from this provision as such an interpretation would run counter to the express provisions of rule 12.13, he argued. Such an implication could not be found in the face of the words of rule 12.13 which are clear and jussive, he submitted.

[9] Mr Reitzin further argued that the appellant having stated in his request for default judgment that he was in a position to prove damages, his case was governed by rule 16.2(2). Rule 16.2(4) should be read together with rule 16.2(3), he argued, as both rules apply where the claimant has indicated that he is not in a position to prove damages. He referred to rule 16.3 (which relates to assessment of damages where there is a judgment on admission), and by way of comparison pointed out that rule 16.3(6) specifically gives the defendant the right to cross-examine whereas rule 16.2(3) and (4) does not. Had it been the intention to confer a right to cross-examine in the circumstances of a default judgment, he argued, this could easily have been done. In the absence of express words in rule 16.2(4) conferring these rights upon the defendant, no such rights existed, he submitted.

[10] In her written submissions, Miss Dummett challenged the judge's refusal to extend the time for filing the defence and to set aside or vary the default judgment. She also sought to support the judge's decision to allow the respondent to cross-examine and make submissions. However, before this court, she accepted that there having not been a counter notice filed challenging the former orders, the issue to be decided was whether the respondent could participate in the assessment hearing to the extent ordered by the judge. She submitted that although a default judgment is conclusive on liability, damages still have to be proved. Relying on ***Lunnun v Singh*** [1999] EWCA Civ 1736, a judgment of the English Court of Appeal, she submitted that a defendant can raise any issue which is not inconsistent with the judgment. She made specific reference to the dictum of the court that "all questions going to quantification, including the question of causation in relation to particular heads of loss claimed" are open for challenge by the defendant.

[11] She further submitted that giving the defendant an opportunity to cross-examine "goes to the heart of what the Claimant must prove to establish the fact that the losses have in fact flowed from the negligent act of the Defendant". To illustrate this point, she pointed to the appellant's claim for loss of earnings, which she submitted comprised the "bulk of the Claimant's claim", but which had not been pleaded in the claim "though the Claimant contends that his losses were continuing and would be presented as and when received". She also contended that without the defendant participating at an assessment of damages hearing, the veracity of the claimant's claims remains untested and could hardly be said to meet the standard of proof. She pointed out that she was

not contending that the court would make an award to which the claimant is not entitled. However, she argued, where the defendant is not able to say, "I did not cause this loss for the following reasons, the court is left only with the assertion of the Claimant that the Defendant has caused his loss".

[12] Miss Dummett relied on several authorities from the United Kingdom in support of her submissions. She acknowledged however, that our CPR had gone further as there is no express provision in the English Civil Procedure Rules, "which seems to shut out the defendant completely if the defendant has failed to set aside" default judgment. She nonetheless submitted that rule 12.13 must be read in conjunction with rule 16, the latter rule containing the requirement for the exchange of witness statements between the parties. This latter provision (rule 16.2(4) specifically), she submitted, seemed to be contradicting rule 12.13. Both, she argued, could not "exist together and be read in a way that makes sense". Where there is such a conflict, it is open to a court to interpret the rules in such a way as to do justice as between the parties. She submitted that in a case such as this, the defendant ought to be given an opportunity to cross-examine at the very least.

[13] In my view, two issues arise for determination:

(i) What is the extent to which a defendant is allowed to participate in an assessment of damages hearing in circumstances where a default judgment has been obtained against him?

(ii) What is the procedure to be adopted in relation to the assessment of damages after a default judgment?

[14] In ascertaining the rights of a defendant at an assessment of damages, following entry of a default judgment, one must have regard to rule 12.13. This rule is unequivocal in its wording as to the extent to which a court will entertain a defendant at the hearing of an assessment of damages. It permits a defendant to be heard only on the areas of costs, the time of payment of any judgment debt and enforcement of the judgment. This proposition is fortified by the findings and conclusion of Cooke JA in ***Jamalco v The Owners and Persons Interested in the Ship M/V Asphalt Leader of the Port of Piraeus Greece and Her Cargo*** [2011] JMCA Civ 47. In that case, a default judgment in admiralty proceedings was obtained. In a request for default judgment, the claimant indicated that it was in a position to prove damages. Upon the defendant's notice of application for court orders seeking standard disclosure, inspection of documents, the appointment of an expert assessor and the filing of witness statements by the claimant, the court ordered disclosure and the exchange of witness statements. The appeal was allowed and the orders for disclosure and the service of witness statements were set aside. At paragraph [12], Cooke JA said:

> "The provisions in this rule (12.13) do not suffer for want of clarity. The defendant will not be allowed audience except in those areas stipulated by that rule. It would seem to me that this rule (rule 12.13) precluded any prospect of success as regards the application of the respondent [the defendant]."

[15] I agree with Mr Reitzin that the English authorities relied on by Miss Dummett are of no assistance. Further, as Miss Dummett rightly pointed out in her written submissions, those decisions were not made in relation to rules which include any provision that is similar to rule 12.13. It follows from this that cross-examination of a

witness and making submissions to the court are not among the entitlements accruing to the defendant under a default judgment. It seems to me that implicit in the amendment of the application of 11 April 2011 to include a request for judgment on admission, was a recognition that the respondent's entitlement did not include cross-examination and the making of submissions and that in the face of an admission of liability, to access these privileges, there had to be a judgment on admission, in place.

[16] It was also Miss Dummett's submission that rule 12.13 ought to be read in conjunction with rule 16.2. There is no doubt that rule 16.2(4) stipulates that the registry must fix dates for the assessment hearing, standard disclosure and inspection, the exchange of witness statements and the filing of the listing questionnaire. However, this provision must be viewed in the light of the scheme of the rule within which it falls. It must be borne in mind that rule 16.2 in its entirety, deals with the assessment of damages after default judgment. The rule makes provision for the procedure to be adopted in two situations, namely: where the claimant has stated that he is in a position to prove damages and where the claimant has stated that he is not in a position to prove damages. In my view, rule 16.2(2) quite clearly addresses the situation where the claimant is in a position to prove damages. In that instance, the registry must fix a date for the assessment and give notice of this to the claimant. Rule 16.2(3) speaks clearly to the situation where the claimant is not in a position to prove damages. The use of the words "must then fix" in my view suggests that rule 16.2(4) is a natural progression from rule 16.2(3) only. That this is obviously the case is underscored by the fact that rule 16.2(2) has its own regime in relation to the fixing of

a date for the assessment of damages. It is my view that to construe rule 16.2(4) as applying to both rule 16.2(2) and rule 16.2(3) would make nonsense of rule 16.2(2). Mr Reitzin's submissions that rule 16.2(2) is to be read separately from rule 16.2(3) and rule 16.2(4) and that the latter two provisions should be read together have great force. In **Jamalco**, Cooke JA in addressing these provisions stated:

> " In the application for default judgment it was stated that –
>
> 'The claimant is in a position to prove the damages.'
>
> Accordingly, the next step was that –
>
> 'The registry must then fix the date … for the hearing of the assessment.' (Rule 16.2).
>
> It follows that since the claimant (appellant) was in a position to prove the amount of damages rule 16.2(4) is not relevant."

It follows from this that the appellant, in this case, having stated that it was in a position to prove damages, rule 16.2 (3) and (4) would not apply. The learned judge therefore erred in applying the rule to the circumstances of this case.

[17] It is now necessary to address the question as to what would be the result in circumstances where the claimant has stated that he is not in a position to prove damages. Surely, in those circumstances, rule 16.2(3) and (4) applies. What is the effect of these provisions on the participatory rights of the defendant? Do these provisions allow for cross-examination and the making of submissions by the defendant? The answer, in my view, is a resounding "no". To so interpret the rules

would be to ignore the very plain words of rule 12.13. The rule is plain and unambiguous and must be given its ordinary meaning. In ***Vinos v Marks & Spencer*** [2001] 3 All ER 784 Peter Gibson LJ in dealing with the question of the construction of the rules of the English CPR which are substantially similar to our rules, said at paragraph 26:

> "The construction of the CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR, unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code."

[18] It is a cardinal principle of construction that general provisions do not derogate from specific provisions. The provisions of Part 16 are general provisions relating to the assessment of damages and must be read subject to the very specific provisions of Part 12 dealing with default judgments. Further, as Mr Reitzin has pointed out in his comparison of these provisions and the provisions relating to judgment on admission (rule 16.3), there is noticeably absent from rule 16.2(4) any express words giving the defendant the right to cross-examine, whereas in rule 16.3, such an entitlement is expressly conferred. Smith JA made this observation at page 12 of his judgment in ***Rexford Blagrove v Metropolitan Management & Hutchinson*** SCCA No 111/2005 delivered 10 January 2006. He stated:

> "It is interesting to compare the procedure in respect of the assessment of damages after default judgment (Rule 11.2) [sic] with that after admission of liability (Rule 16.3) … The following differences are noteworthy. ...

> (3) At the assessment of damages after admission the defendant is entitled to cross-examine the claimant's witnesses and make submissions. There is no corresponding entitlement in respect of a defendant against whom default judgment is entered."

A defendant against whom a default judgment has been entered therefore has no right in relation to cross-examination, the making of submissions or the calling of witnesses even where the claimant has stated that he is not in a position to prove damages.

[19] What then is the purpose of rule 16.2(4)? I confess that in light of the conclusion to which I have arrived, it does not seem that any useful purpose would be served in the exchange of witness statements as the defendant would not be able to make use of the claimant's statement; nor does there seem to be any purpose for a listing questionnaire. There is, however, merit in the submission that rule 16.2(4) can facilitate the claimant in proving damages where he is not in a position to do so. To embrace an example to which Mr Reitzen made reference, it may be of usefulness where the claimant needs to see the defendant's documents to prove his claim as may be the case in a passing off claim. This restricted use, however, cannot be a basis for praying in aid the overriding objective to adopt an interpretation that does not accord with the unambiguous words of the rule. In ***Vinos v Marks & Spencer,*** Peter Gibson LJ said this in respect of the application of the overriding objective:

> "The court must give effect to that objective (the overriding objective) when it exercises any power given to it by the rules or interprets any rule. But the use in rule 1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give

> effect to what it may otherwise consider to be the just way of dealing with the case."

[20] In passing, it is necessary to mention that if the framers of the rules had intended that rule 16.2(4) should allow for a level of participation greater than that which is envisaged in rule 12.13 as it is presently couched, then the rules ought to be amended accordingly.

[21] Miss Dummett's concerns about the appellant's claim for damages are legitimate and, quite possibly, cross-examination could assist in addressing these concerns. However, to argue that without cross-examination a claimant's loss will not be required to be proven is to ignore the assessment judge's duty to adhere to the principle of law that proof of damages is an essential pre-requisite for an award of damages. The assessment judge will no doubt apply the relevant principles irrespective of whether submissions are advanced on behalf of the defence. There may be instances in which the defendant has a strong challenge to the claim for damages but that, in my view, would provide ample ground to cross the threshold of a good defence dealing with quantum as is contemplated by rule 10.2. In those circumstances, that defence if filed in time would constitute a good prospect of successfully defending the claim so as to warrant a setting aside of the default judgment or a variation of that judgment so as to allow for a judgment on admission to be entered and with it, access to all the attendant privileges of cross-examination, the making of submissions and the calling of opposing evidence.

[22] I would therefore allow the appeal and set aside items 3 and 4 of the orders made by K. Anderson J. I would remit the matter to the Supreme Court for an assessment of damages in which the respondent would only enjoy the right of audience in accordance with the prescription of rule 12.3. I would award costs to the appellant to be agreed or taxed.

MORRISON JA

[23] I have read in draft the judgment of my sister Harris JA and agree with her reasoning and conclusion. There is nothing I wish to add.

PHILLIPS JA

[24] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal is allowed. Orders three and four made by the learned judge on 21 September 2011, are set aside. The matter is remitted to the Supreme Court for an assessment of damages in which the respondent may only be heard in respect of the matters prescribed under rule 12.13 of the Civil Procedure Rules.

Costs to the appellant to be agreed or taxed.