[2015] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 82/2012

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

BETWEEN ANTHONY LYNCH APPELLANT

AND THE ATTORNEY GENERAL OF JAMAICA RESPONDENT

Mrs Arlene Harrison Henry and Miss Rachael Dibbs for the appellant

Miss Lisa White and Miss Alicia McIntosh instructed by the Director of State Proceedings for the respondent

18 October 2012 and 12 June 2015

HARRIS JA

[1] I have read in draft the judgment of my brother Dukharan JA and agree with his reasoning and conclusion. I have nothing further to add.

DUKHARAN JA

[2] This is a procedural appeal against an order of the master in chambers, who, on 12 June 2012, made the following orders:

"1. Permission is granted to the Claimant [appellant] to amend his Claim Form and Particulars of Claim to indicate the capacity in which the Defendant [respondent] is sued and to file and serve Amended Claim Form and Particulars of Claim on or before June 26, 2012.

2. The Defendant [respondent] is to file and serve his Defence within twenty-eight (28) days of the date of service of the Amended Claim Form and Particulars of Claim;

3. Leave to appeal granted, if necessary;

4. Costs to be costs in the Claim; and

5. Defendant's [respondent's] Attorney-at-Law to prepare, file and serve orders made herein."

Background

[3] On 6 November 2009, the appellant was lawfully seated in an airplane bound for Toronto, Canada, at the Sangster International Airport in Montego Bay, Jamaica. At the instance of the police, servants or agents of the respondent, immigration officers removed the appellant from the aircraft and handed him over to members of the Jamaica Constabulary Force in Montego Bay without reasonable or probable cause, who detained him.

[4] On 28 January 2011, the appellant filed in the Supreme Court, a claim form and particulars of claim, by which he sought to recover damages for wrongful arrest, assault and battery, and false imprisonment as a result of being detained by the police on 6 November 2009. The claim form and particulars of claim were served on the Director of State Proceedings on 14 February 2011.

[5] No acknowledgement of service was filed within the time specified by the Civil Procedure Rules, (2002) (CPR). Instead, a request for information, was filed and served on behalf of the respondent on 25 February 2011 by the Director of State Proceedings, in which the respondent requested information, inter alia, regarding the names of Crown servants involved, which he alleged ought to have been pleaded and particularised. The respondent claimed that the appellant failed to indicate or identify the name(s) of the officers or Crown servants who allegedly committed the torts against him. This was to assist in the investigation and response to the claim.

[6] A letter dated 11 July 2011 was sent by the appellant's attorney-at-law to the respondent's attorney-at-law in response to the formal request for information. However, it did not comply with rules 3.12 and 34.4 of the CPR as it did not contain a certificate of truth.

[7] On 28 July 2011, an acknowledgment of service was filed on behalf of the respondent. However, at the time of its filing, the appellant had not responded in accordance with rules 3.12 and 34.4 of the CPR for the request for information. The time for the filing of the acknowledgment of service had still not started to run according to the respondent.

[8] On 8 December 2011, the appellant filed a notice of application for court orders, requesting, inter alia, the entry of judgment in default of defence and in admission and

for the matter to proceed to assessment of damages. This application was served on the respondent on 1 February 2012.

[9] On 20 February 2012, the Director of State Proceedings, on behalf of the respondent, filed a notice of application for court orders, supported by an affidavit of Latoya Bernard, sworn to and filed on 23 February 2012. The said application sought the following orders:

> "(1) That the Claimant be ordered, pursuant to rule 34.4 of the *Supreme Court of Jamaica Civil Procedure Rules, 2002 (CPR)*, to verify the *Answer to Request for Information* given in letter dated July 11, 2011, with a certificate of truth, in accordance with rule 3.12 of the *CPR, 2002,* within 14 days of the date of this order;
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> (2) That the Court makes a declaratory order, pursuant to rule 59.2(3)(b) of the *CPR*, 2002, as to the adequacy of the Claimant's Response to the *Defendant's Request for Information*, filed and served February 25, 2011, since the Defendant is not satisfied with the response to the Request for Information, and to Order the Claimant to amend same to verify the said information, with a certificate of truth, and to file and serve same;
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> (3) That the Claimant, pursuant to rule 8.7(6) of the *CPR*, 2002, be ordered to amend the Particulars of Claim, to indicate specifically, the capacity in which the Defendant is being sued, within 14 days of the date of this order and to file and serve same on the Defendant;
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> (4) That pursuant to rule 59.2(4), the Defence is to be filed within twenty-eight (28) days of the date of service of the Amended Answer to Request for Information and Amended Particulars of Claim;

(5) That the Claimant's Notice of Application for Court Orders, filed December 8, 2011 and served February 1, 2012, be withdrawn, on the basis of same being premature and the orders sought therein cannot be made by this court, at this time; and

(6) Such further and other relief as the Court deems just in the circumstances."

[10] On 25 April and 7 May 2012 the applications were heard before Master Lindo, who on 12 June 2012 made the orders as stated at paragraph [1] of this judgment.

[11] In giving oral reasons for her ruling, the learned master found that neither party sought to utilize the provision of rule 34.2 of the CPR initially. However, the respondent subsequently, on 20 February 2012, sought certain orders, inter alia, that the appellant be ordered to verify the answer to request for information with a certificate of truth, in accordance with rule 3.12 of the CPR and a declaratory order from the court as to the adequacy of same, as a response to the respondent's request for information filed since 25 February 2011, within 14 days of the date of service of this claim. The learned master found that there were deficiencies in the appellant's claim, which included the absence of a specifically pleaded capacity in which he sued the respondent.

[12] It was her further finding that there was no evidence before the court from which the court could be satisfied that the filing of the acknowledgement of service by the respondent was an indication that the respondent was satisfied with the appellant's response to the request for information which was filed and served since 25 February 2011. She also found that the purported response sent by the appellant in the form of

a letter, dated 11 July 2011, did not satisfy or conform to rule 34.4 of the CPR and the time for the filing of an acknowledgement of service by the respondent had not lapsed and accordingly the time for the filing of the defence had also not lapsed.

[13] Subsequent to the order of the master, the appellant did not file an amended statement of case and no defence was filed. The appellant has opted to appeal the order of Master Lindo. The grounds of appeal are as follows:

> "(a) The learned Master erred as a matter of fact and law in coming to her decisions.
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> (b) The learned master erred as a matter of fact and/or law in failing to appreciate the significance, meaning and purpose of filing and serving an Acknowledgment of Service and the interconnectedness between Part 59 and Part 9 of the CPR.
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> (c) The learned Master failed to apply the Overriding Objective in interpreting Part 59.
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> (d) The learned master erred as a matter of fact and/or law in failing to appreciate the specific circumstances in which Parts 34 and 59 are to be used when Requests for Information are made, and that those circumstances had not arisen on the Defendants request of February 28 2011 in that the claimant/appellant pleadings contained reasonable information as to the circumstances in which it is alleged that the liability of the Crown had arisen and as to the Government Department and officers of state involved.
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> (e) The Master having found that the information supplied in document of April 18 2012 (same as contained in letter of July 11 2011) was adequate failed to appreciate that the defendant's application was without foundation and the defendant's utilization

of Parts 34 and 59 was not premised on the provisions contained in those parts of the CPR.

(f) The Master failed to appreciate that the defendant being out of time in which to file and serve a defence ventured on a fishing expedition to enlarge time instead of simply asking for time.

(g) The Master having found that the claimant/appellant answers were adequate and in the defendant's possession from July 11 2011 in the form of a letter and repeated verbatim in a document filed in Court on April 18 2012 failed to appreciate that the defendant's Notice of Application for Court Orders was filed on February 20 2012 only after the defendant had been served with the claimant/appellant Notice of Application for the entry of judgment by admission and in default of defence. The claimant/appellant Notice of Application for Court Orders was filed on December 8 2011 and served on February 1 2012. It was only after the service of the claimant's applications that the defendant made complaints about the claimant's answers and sought a series of orders.

(h) The learned Master failed to appreciate that the answer contained in the letter and subsequently filed in Court merely repeated all that which was contained in the Claim Form and Particulars of Claim.

(i) The Learned Master failed to appreciate that the very information the defendant sought to get from the claimant/appellant was information that was in the possession of the state and agents of the state all of which or whom were identified in the Claim and Particulars. Further, that over and above the information which the claimant supplied in the Claim and Particulars would require an order for discovery of the defendant as the information the defendant wanted was and is in the possession of the state and its agents and by extension the defendant the representative of the state.

(j) The learned Master failed to recognize that the Claim Form and Particulars of Claim specified the capacity in which the Defendant was being sued.

(k) The learned Master failed to recognize that the Claimant was still able to amend its Claim Form and Particulars of Claim at any time before the case management conference (Rule 20.1) and that the claimant had no application before her for permission to amend.

(l) It is never in the defendant's place to tell a claimant how or what to plead or how to manage his case. The Learned master made the order for amendment without pointing out what paragraph or paragraphs ought to be amended.

(m) The learned master omitted to address the application for Judgment on Admission."

[14] The orders sought by the appellant are as follows:

"I. The orders of the learned Master made on June 12 2012 be set aside.

II. Judgment be entered in the Appellant's/Claimant's favour in terms of the reliefs and orders sought in paragraphs 1, 2, 3, 4 and 6 in the Notice of Application for Court Orders dated December 8 2011 filed on December 8 2011 in the Supreme Court of Judicature by the Claimant namely:

1. That judgment in default of defence of defence [sic] be entered against the defendant for failure to file and serve a defence within the time prescribed by the Civil Procedure Rules

2. Judgment of admission be entered against the defendant

3. That the applicant [sic] be allowed to proceed to an assessment of damages

4. That a date be set for assessment of damages

5. Costs to the claimant/appellant.

6. Such further and other relief as this Honourable Court deems just

lll. A declaration that the Defendant has 28 days within which to file a defence after an Acknowledgment of Service is filed where Part 59 is applicable.

lV. That the Costs of this Appeal and the Court below be borne by the Respondents/Defendants.

V. Such further and/or relief as this Honourable Court deems just."

[15] Mrs Harrison-Henry submitted in her written and oral submissions that the orders complained of is the notice of application for court orders filed by the respondent. She submitted that the master's findings of fact and law are erroneous and the orders made should be set aside.

[16] Counsel submitted that the capacity in which the respondent is sued is stated in paragraph 16 of the particulars of claim and the fifth paragraph of the claim form, and there is no need for any amendments. Counsel contended that the respondent was allowed to file a defence based on the fact that the appellant had been granted permission to amend its claim when the appellant had not requested permission to amend and also that the case management conference had not arisen (see CPR 20.1).

[17] Counsel further submitted that the respondent acknowledged service on 28 July 2011 and was clearly out of time to file a defence. The respondent made no application to extend time within which to file a defence and made no agreement with counsel for the appellant to file a defence out of time.

[18] It was the contention of counsel that the master made a declaration that no further information was required after the appellant filed and served its response with an adequate certificate of truth. This was the very same information provided by the appellant to the respondent by way of letter of 18 July 2011. It was further submitted that the requests made by the respondent were unreasonable, disproportionate and oppressive to the appellant and not in keeping with parts 34 or 59 of the CPR and the overriding objective.

[19] Counsel contended that the master failed to address the application for judgment on admission which had nothing to do with part 59 and had to be considered on its own merits. The circumstances where judgment on admission has arisen, counsel argued, is plain from the letter of Senior Superintendent E Grant of 10 February 2010 to the Canadian High Commission, where he indicated that the appellant was "held and taken into custody" and "after thorough investigation there was nothing linking Mr Lynch to this murder".

[20] Miss McIntosh for the respondent, submitted in her oral and written submissions that the reasons outlined by the master for her ruling indicated that she took the correct law into consideration in arriving at her decision. She submitted that there was

no satisfactory response to the respondents request for necessary information and this was a good reason for the delay in filing the defence. The response was neither verified by a certificate of truth, nor signed by the lay person or the appellant in accordance with rules 3.12 and 34.4 of the CPR. Counsel further submitted that until the respondent had all the necessary information to respond adequately to each paragraph of the particulars of claim and the allegations made therein, the respondent had no duty to file a defence.

[21] Counsel submitted that there was no evidence before the court from which the master could have been satisfied that the filing of the acknowledgement of service by the respondent was an indication that the respondent was satisfied with the appellant's response to the request for information.

[22] Counsel further submitted that the respondent has not admitted liability for the appellant's claim and that judgment cannot be entered on admission of liability. The letter purported to be written by Mr E Grant, Senior Superintendent of Police, cannot be taken lawfully as an admission of liability. The said letter was written before the claim was filed and was not written by the respondent or its authorised attorney-at-law.

[23] Counsel concluded that the nature of the claim, and in the interest of justice, the claim should be tried on the merits. Counsel cited **Philip Hamilton v Frederick Flemmings and Anor** [2010] JMCA Civ 19 (paras [21] and [41]).

Analysis

[24] Under part 34 of the CPR, a party has the right to request further information from any other party where the purpose is to narrow the area of dispute between the parties and avoid surprises- see **Johnson v Medical Defence Union Limited** [2005] 1 All ER 87. This right, under the CPR, is to assist either party in getting the information necessary for it to properly and adequately prepare its case. Where a request has to be made, it implies that the party making the request has not been provided with enough information so as to be properly instructed on how to address the matter at hand. Rule 34.2 of the CPR provides that where a party makes a request for information and the other side on whom the request has been made, fails to respond, the requesting party has the right to make an application to the court asking the court to compel the other party to provide the information being requested. The rules make no provision on how the request is to be made or responded to, except that it should be in writing and it is to be served on the other party and that the response must be verified by a certificate of truth.

[25] Part 59 of the CPR provides specific rules for matters being brought by and against the Crown. Rule 59.2(1) provides that the claim form and particulars of claim must include reasonable information as to the circumstances which lead to the Crown's liability in the matter and rule 59.2(2) gives the Crown the right to request further information. This right must be exercised within the 14 days a defendant is required to file an acknowledgement of service. Rule 59.2(3) stipulates that the time for acknowledging service extends for an additional four days after a defendant informs the

claimant, in writing, that the response is sufficient or the court makes a ruling on an application brought by a claimant to the effect that the information given was sufficient and no further information was required. A defendant then has an additional 28 days in which to file a defence as provided for by rule 59.2(4).

[26] The first order granted by the master gave the appellant permission to amend the claim form and particulars of claim filed on 25 February 2011. The order implies that the appellant had filed an application to the court making a request for them to be allowed to amend their claim form and particulars of claim. There is nothing to show that the appellant requested this permission. In fact, the appellant has remained resilient to the fact that their documents filed and served on 25 February 2011 provided substantial and reasonable information within the requirements of the rules as seen expressly in their responses to the request for information served on the respondents on 18 July 2011 and then filed and served on 18 April 2012.

[27] Under part 20 of the CPR, a claimant has the right to amend his statement of case at any point before the case management conference without the permission of the court, and as this case is one in which the respondent had not filed a defence resulting in the matter not yet being brought to the stage of case management, the appellant could have amended his statement of claim if the situation so warranted. However, it would have been unnecessary for him to have done so, or for the court to have made such an order.

[28] It seems to me that the appellant's claim form has met the requirements of the rules set out in rule 8.7 and particularly rule 59.2(1) of the CPR which states that the liability of the Crown must be established for a case to be brought against them. The appellant has identified the officers as "servants and or agents of the defendant" in paragraphs 1 and 3 of the claim form and 3 and 4 of the particulars of claim. The appellant also identified the capacity in which the respondent is being sued, that is, "in a representative capacity as a representative of the Government of Jamaica" in paragraphs 5 of the claim form and 16 of the particulars of claim. The appellant having established that the officers were agents of the State and were acting in that capacity when they took him into custody, and then establishing that the respondent is the representative of the State has provided, in my view, reasonable information as to the liability of the respondent in the matter.

[29] The second order granted by the master was that the respondent, within 28 days, file his defence after the appellant files an amended claim form and particulars of claim. Based on this order by the master, should the respondent be allowed to file a defence at this late stage? The appellant's response came on 18 July 2011, five months after the request for information by the respondent was made and even though this time period cannot be considered to have been a response within a reasonable time, as is required under rule 34.2(1), the respondent did not exercise its right as given to them under the same part for request that the court compels a response.

[30] The response was received on 18 July 2011. The respondent did not expressly inform the appellant of their satisfaction or dissatisfaction with the response received, but instead filed an acknowledgment of service on 28 July 2011. It is therefore reasonable and fair to take this to mean that the information provided by the appellant was sufficient and that the respondent then had 28 days to file and serve their defence. It seems quite clear, that if the appellant had not filed a notice of application for default judgment and judgment on admission of liability against the respondent on 8 December 2011, the respondent would not have acted, that is, they would not have brought an application, seven months later, for a court order on 20 February 2012 that the information provided was not sufficient.

[31] This court has said repeatedly that the CPR provides for timelines that should be adhered to, unless good reason is given for non-compliance. Litigants cannot abuse the process and expect the court to sanction such abuse.

[32] Rule 12.1(1) of the CPR gives a claimant the right to apply for judgment in default where a defendant has failed to file an acknowledgment of service or a defence within the time frame provided for by the CPR. However, where the claim has been brought against the Crown, permission must be sought and granted by the court before an application for default judgment may be pursued. It is a procedural requirement that this permission is sought and granted before the application is permissible and failure to adhere to this rule will result in the application being faulty - see rule 12.3. The appellant has in fact applied for such permission.

[33] The respondent clearly stated that they were not admitting liability when they filed the acknowledgment of service and an intention to defend the claim. The appellant sought to rely on a letter dated 10 February 2010, signed by Mr E Grant, Senior Superintendent of Police, addressed to the Canadian High Commission, as evidence of the respondent's admission of liability. The letter sought to inform the Canadian government that the appellant had in fact been arrested on suspicion that he was connected to a murder, but after investigations, was released, as there was no evidence connecting him to the incident. In my view, the contents of the letter do not purport an admission. Superintendent Grant makes it clear in the letter that the arrest of the appellant was on reasonable suspicion. Under the Constabulary Force Act, an officer has the right to arrest any person on the grounds of reasonable suspicion of guilt as they were acting within the statutory powers.

[34] There were applications by both parties that were before the master. However, it appears that none of them were adequately addressed. The orders made by the master therefore cannot stand. I am of the view that judgment in default of defence should be entered against the respondent and that the appellant proceed to assessment of damages and that the appellant be allowed the cost of the appeal.

PHILLIPS JA

[35] I too have read the draft judgment of my brother Dukharan JA. I agree with his reasoning and conclusion and have nothing to add.

HARRIS JA

ORDER

The appeal is allowed.

The orders made by the learned master on 12 June 2012 are set aside.

Judgment in default of defence is entered in favour of the appellant.

Appellant to proceed to assessment of damages.

Costs of the appeal to the appellant to be taxed, if not agreed.