[2013] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 47/2010

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

BETWEEN	**ALTON BROWN**	**APPELLANT**
AND	**ATTORNEY GENERAL**	**1ST RESPONDENT**
AND	**REVENUE PROTECTION DIVISION**	**2ND RESPONDENT**

Franklin Halliburton instructed by Halliburton & Associates for the appellant

Miss Tamara Dickens instructed by the Director of State Proceedings for the respondents

23 April and 31 May 2013

BROOKS JA

[1] On 23 April 2013, after hearing counsel and considering this appeal, we made the following orders:

"1. The appeal is allowed.

2. The counter-notice of appeal is dismissed.

3. The order of Donald McIntosh J is set aside.

4. The matter is remitted to the Supreme Court for the trial of the issue as to liability concerning the date of detention of the motor vehicle prior to 19 February 2001 and for an assessment of damages immediately following the determination of liability of the issue in dispute.

5. On the assessment of damages, the court must consider the period from 19 February 2001 to the date of assessment as well as any period prior thereto if the defendants are found liable in respect of that prior period.

6. There shall be no order as to costs."

The following are our reasons for that decision and those orders.

[2] The issue in the appeal concerns the question of whether McIntosh J made an appropriate award of damages in a claim for damages for detinue brought by the appellant, Mr Alton Brown, against the respondents, the Attorney General of Jamaica and the Revenue Protection Division (RPD). Both sides are dissatisfied with the award and have asked for it to be set aside. Their respective reasons and the orders that they seek, however, differ radically.

The factual background

[3] The award concerned the seizure on 11 May 1993, and subsequent detention (to this date) by the RPD, of a BMW motor car in Mr Brown's possession. According to him, the reason given for the seizure was that the RPD was conducting investigations. Mr Brown sued the respondents in 1993 for a declaration that the seizure was unlawful. The Supreme Court, in a judgment by Malcolm J, ruled that the seizure was lawful.

[4] The RPD retained the vehicle while it pursued criminal charges against Mr Brown in respect of other matters. There were no other court proceedings that concerned the BMW. On 24 May 2000, those other matters were resolved in Mr Brown's favour. Despite that development, and despite letters of demand by his attorneys at law, one of which was dated 19 February 2001, the BMW was not returned to him.

[5] On 8 February 2007, Mr Brown initiated the present matter by way of a fixed date claim. In it, he sought the return of the vehicle or alternatively "compensation for its wrongful seizure and detention". The claim went before Thompson-James J on 23 March 2009. Before her, the respondents made certain admissions as to liability, and she made the following orders:

> "1. Judgment by admission against the 1st and 2nd Defendants [for the detention] from February 19, 2001 until the date of assessment of damages;
>
> 2. The Fixed date Claim Form herein to be treated as if it were a Claim Form and **the Trial Judge to determine the Claim for seizure and detinue prior to February 19, 2001**;
>
> 3. **The date for assessment of damages is set for June 17, 2009**;
>
> 4. Cost [sic] to be cost in the claim; and
>
> 5. The Claimant's attorney-at-law to file and serve the herein Order." (Emphasis supplied)

[6] It would be noted that that order required two distinct processes: firstly, the determination of the question of liability for the detention of the vehicle prior to 19 February 2001, and secondly, the assessment of the damages due to Mr Brown.

Nothing in that order suggests that those processes should be conducted on separate occasions. Indeed, the principle requiring the most efficient use of the court's time would have mandated that those processes be conducted at the same sitting of the court.

[7] As stipulated by Thompson-James J, the matter came on for assessment of damages on 17 June 2009. Morrison J, before whom the assessment was listed, dealt with the matter in chambers. The reason for the hearing in chambers, when the matter was listed as an assessment, is unclear to us. Regardless of the reason for that development, he made a number of case management orders as follows:

> "1. Standard Disclosure is to be done by 17th July 2009;
>
> 2. Inspection is to be done by the 31st of July 2009;
>
> 3. Witness Statements to be filed and exchanged by August 10, 2009;
>
> 4. Listing Questionnaire to be filed by August 24, 2009;
>
> 5. Each party to narrow Facts and Issues to be filed by 8th day of September 2009;
>
> 6. Pre-Trial Review to be held on September 21st 2009 at 11 am for ½ hour;
>
> 7. **Paragraphs 1 and 2 of the order of Justice Thompson-James dated 23rd of March 2009 is hereby preserved**.
>
> 8. **Trial on November 13, 2009 for one day**.
>
> 9. Costs to be cost [sic] in the claim.
>
> 10. Counsel for the Defendant to file prepare and serve order." (Emphasis supplied)

It could be inferred, from orders 7 and 8 above, that Morrison J contemplated that both processes mentioned above were to be undertaken on the same occasion. Certainly, there was no order that the question of liability and the assessment of damages should be dealt with on separate occasions. The pre-trial review was conducted by Jones J on 5 October 2009. He made no major adjustment to the progress of the claim and it came on before McIntosh J on 13 November 2009 as was scheduled.

[8] When the matter came on for hearing before McIntosh J, only two witness statements were before him. One of those was from Mr Brown. That statement spoke to the seizure of the vehicle and his attempts to recover the vehicle. The other statement was from Mrs Nataline Robb-Cato of the RPD. She spoke to irregularities concerning the vehicle being in Mr Brown's possession, its seizure from him, and the proceedings before Malcolm J in 1993. She also spoke to her efforts to secure valuations for the vehicle in 2007. Both those persons testified before McIntosh J and both were cross-examined. No other evidence was adduced.

The award by McIntosh J

[9] McIntosh J did not expressly state in his judgment whether he had conducted a determination of liability as well as an assessment of damages or had only assessed the damages due to Mr Brown. In the course of his written judgment, the learned trial judge made pronouncements that could allow for arguments either way. He commenced the judgment by stating as follows:

> "This matter came up for assessment of damages pursuant to the order of Mrs. Justice Thompson-James, made on March 23, 2009."

[10] Nonetheless, McIntosh J, at pages two and three of the judgment, made statements that could be considered a finding in respect of liability and a fixing of the time from which damages were to be assessed. He said:

> "To arrive at this assessment, this court accepted May 24, 2000 as the date when the goods were detained by the [RPD] or the date when the vehicle should have been returned to [Mr Brown]. The detention of the vehicle before that date must be deemed lawful as per order, of the court [Malcolm, J].
>
> When the charges against the claimant were dismissed, in the Resident Magistrate's Court, the vehicle should have been returned to the claimant forthwith, and the court should have so ordered.
>
> This Court is of the view that the measure of damages should be the value of the motor vehicle in May, 2000."

[11] The learned judge used a customs entry form to identify a starting point for calculating the value of the vehicle. He used the value of $339,549.00, set out as the value of a BMW car body mentioned in that document, applied an annual depreciation to that figure and arrived at the position that, as at May 2000, Mr Brown's vehicle was valued at $271,630.20. The resulting award is recorded in the last two paragraphs of the judgment:

> "The Court assessed claimant's damages at $271,630.20 with interest at 3 percent from 14th February, 2007 to the 11th December, 2009.
>
> Costs to the claimant to be taxed if not agreed."

Mr Brown's complaint against the award

[12] Mr Halliburton, on behalf of Mr Brown, argued that the learned trial judge erred when he chose May 2000 as the date for fixing the value of the vehicle. Learned counsel submitted that, as the court proceedings that were determined in May 2000 had nothing to do with the BMW, that date was an incorrect point of reference.

[13] Mr Halliburton also argued that the learned trial judge erred in assessing damages as that issue was not before him. According to Mr Halliburton, who was not counsel who appeared below, Mr Brown did not place any evidence before the court concerning damages because he was of the view that the proceedings were only for the purpose of determining the date from which the respondents' liability would commence.

The respondents' complaint against the award

[14] Miss Dickens, for the respondents, took issue with that last argument by Mr Halliburton. She submitted that there was nothing in the record of the proceedings of the court below that should have suggested to Mr Brown that the exercise before McIntosh J was restricted to the issue of ascertaining liability. Learned counsel argued that the complaint that there ought to have been two separate processes is a late contention by Mr Brown. She pointed out that there was no ground of appeal before this court making that complaint.

[15] Learned counsel argued that, on the contrary, the indications were that Mr Brown accepted that there was to have been an assessment of damages before McIntosh J. She submitted that the notice of appeal supports her position because:

a. it contended that the learned trial judge erred when he failed to appreciate that the import declaration form only accounted for a BMW auto body and thereby did not use a motor car for determining the value of Mr Brown's property (ground (b));

b. it contended that the learned trial judge erred in failing to consider Mr Brown's loss of use (ground (e)); and

c. it sought a dismissal of the assessment and an order for a new assessment of damages.

[16] Miss Dickens submitted that, against that background, Mr Brown failed in his duty as a claimant to prove his damages. Not having produced any evidence of his loss, she argued, Mr Brown was only entitled to an award of nominal damages. Learned counsel also complained that the learned trial judge erred in making reference to the customs entry form. This is because it had not been admitted into evidence.

The analysis of the issues

[17] Miss Dickens is correct in respect of the complaint about the learned trial judge reference to the customs entry form. The document had not been admitted into

evidence and therefore should not have played a part in the court's deliberations. We are convinced that Miss Dickens is also correct in her submission that both parties appeared before McIntosh J contemplating that the court was to conduct at least an assessment of damages. This is apparent from the judgment of the learned trial judge. Apart from his opening statement and other statements in the judgment to the effect that he was conducting an assessment of damages, the learned trial judge, at pages two and three of his judgment, makes it clear that Mr Brown engaged the issue of damages. At page two, McIntosh J said in part:

> "It is for the claimant to adduce before the court, credible evidence of his loss and/or damages so that the court can properly make its assessment. **The claimant cannot merely conjure up a figure and throw it at the court**. The same rule applies as in an assessment of Special Damages."

At page three, the learned judge specified the figure, apparently "thrown" at him:

> "**While** [sic] **claimant seeks to recover sums in excess of 4 million dollars**, [sic] claimant has adduced no evidence before this Court relevant to the value of the vehicle at May, 2000 or any evidence of loss which could go towards **proof of the sums claimed**." (Emphasis supplied)

[18] We, however, disagree with Miss Dickens that, having agreed with the learned trial judge that Mr Brown had failed to produce evidence of his loss, the next step for this court is to rule that Mr Brown was and is, only entitled to nominal damages. Instead, we find that our next step is to examine the approach that the learned trial judge took to his task. In doing so, we find that he erred in both his approach to the question of liability as well as in his approach to the assessment of damages. We,

however, appreciate that it was an attempt to arrive at an award, in the face of an absence of evidence, which led the learned trial judge into error.

[19] On the question of liability, we find that the learned trial judge erred in his reason for selecting the date of May 2000 as the date for determining the commencement of the respondents' liability. This is only to the extent that it appears that the learned trial judge seems to have linked the dismissal of the charges to the issue of the BMW. In the absence of any detailed reasoning from him, it appears that he did not appreciate that the dismissal of the charges against Mr Brown on that date, had nothing to do with the BMW, the subject of this claim. We make no suggestion as to what the correct date should be. That task is the responsibility of the court that will consider the issues that were identified by Thompson-James J.

[20] The learned trial judge erred in respect of the assessment of damages in two ways; firstly, he used a document that was not in evidence, namely the customs entry form, in order to start the exercise of valuing Mr Brown's loss. Secondly, he used the value of a BMW "motor car body, without engine" as the basis for calculating the value of a BMW car.

[21] It is based on those errors that we found that the appeal should have been allowed and the counter-notice of appeal dismissed.

Conclusion

[22] Although Mr Brown failed to place any evidence concerning his loss before the court that was considering both the issue as to liability as well as conducting an assessment of damages, the learned trial judge who conducted the proceedings made errors in respect of both exercises. He erred in his selection of a date for the commencement of the respondents' liability and he used a document, which was not in evidence, to base his assessment of the damages.

Costs

[23] Although Mr Brown has succeeded in his appeal, we were of the view that he was not entitled to costs as his failure to place any evidence before the court was not insignificant in contributing to the errors which we have identified.

[24] It is for those reasons that we made the orders mentioned at paragraph [1] above.