[2019] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00056

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**WINSTON CHARLES**	**APPELLANT**
AND	**VICTORIA MUTUAL BUILDING SOCIETY**	**1ST RESPONDENT**
AND	**WESCAR DEVELOPMENT LIMITED**	**2ND RESPONDENT**

Isat Buchanan for the applicant

Emile Leiba, Jonathan Morgan and Ms Danielle Reid instructed by DunnCox for the 1st respondent

2nd respondent not appearing or being represented

17, 23 October and 20 December 2019

PHILLIPS JA

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

BROOKS JA

[2] In this appeal, Mr Winston Charles seeks to set aside a refusal by a judge of the Supreme Court to restore his claim in that court. Victoria Mutual Building Society (VMBS) had previously had the claim dismissed for want of prosecution. Mr Charles asserts that the learned judge's refusal was wrong because the claim has merit and that it was struck out without VMBS giving any proper notice to him, that it was seeking to do so.

[3] VMBS was one of the defendants to Mr Charles' claim. It asserts that the learned judge properly exercised her discretion when she refused to restore Mr Charles' claim. Firstly, VMBS asserts that it followed the provisions of the Civil Procedure Rules (CPR), in attempting to give notice to Mr Charles of the application to strike out his claim. Secondly, VMBS says, if Mr Charles' claim is restored it would cause VMBS irremediable prejudice. According to VMBS, Mr Charles delayed prosecuting his claim for so long that in the meantime the witness, who VMBS would have relied upon for its defence, has since died.

The background facts

[4] The claim arose out of VMBS' sale of Mr Charles' premises at 15 Portlandia Close, Long Mountain, in the parish of Saint Andrew (the premises). It carried out the sale under the powers of sale contained in a mortgage. Mr Charles had mortgaged the premises to VMBS, but he fell into arrears, and VMBS threatened to sell. As preparation for the sale, VMBS secured a valuation of the premises. The valuation was done by

Wescar Development Limited (Wescar), which was the other defendant to Mr Charles' claim.

[5] VMBS' attempts to sell by public auction were unsuccessful, so it tried to sell by private treaty. During the time that it was attempting to secure a private treaty sale (and allegedly had already entered into a contract for sale), Mr Charles had his then attorneys-at-law write to VMBS informing it of inaccuracies in the description of the premises in advertisements. He informed VMBS that, whereas it was advertising the premises for sale as a two-bedroom, one-bathroom house, the premises were, in fact, a five-bedroom, five-bathroom, freestanding house. He also informed VMBS that the valuation that it had secured for the premises was also inaccurate as it described the premises as a semi-detached three-bedroom, two-bathroom property with a much smaller building area than in fact existed. He pointed out that the premises, as they had been described by VMBS, and its valuator, would fetch less than their true value. He also commissioned a valuator to appraise the premises.

[6] VMBS transferred the title to the premises on or about 5 September 2011. On 3 November 2011, it accounted to Mr Charles for the sale proceeds and delivered the surplus of $4,336,129.73 to him. Mr Charles alleges that the sale was at a gross undervalue. In December 2011, he sued VMBS and Wescar to recover damages for, among other things, collusion, negligence and fraud.

[7] Both VMBS and Wescar filed defences to Mr Charles' claim. He, however, failed to pursue the claim and VMBS applied to have it struck out. On 9 January 2018, Pettigrew-Collins J (Ag) ordered the claim dismissed for want of prosecution.

Mr Charles' application to restore the claim

[8] On 2 August 2018 Mr Charles, who was by then representing himself, applied for the claim to be restored. He based his application on three grounds:

(1) he was representing himself and was unable, despite many attempts, to access the Supreme Court file and ascertain the status of the litigation;

(2) he was not served with VMBS' application for the dismissal of his claim; and

(3) he was impecunious after his premises were sold and he was ejected from them.

[9] VMBS resisted his application. It asserted that it made all permissible attempts to serve Mr Charles, but he was not accessible for personal service.

[10] When Mr Charles' application came on for hearing before a judge of the Supreme Court on 11 January 2019, he was fortunate to have had the benefit of counsel. Nonetheless, the learned judge, who heard the application, refused it. She also refused him permission to appeal. He renewed his application for leave to appeal, and this court

granted it. Mr Buchanan, who represented Mr Charles before the learned judge, also represented him at the hearing of the appeal. Mr Charles, however, personally filed the application for leave to appeal.

The issues raised by the appeal

[11] The appeal raises four broad issues. They are, whether the learned judge erred in:

a. using the approach that she did in considering the application;

b. finding that Mr Charles was served with the application to strike out;

c. failing to find that Mr Charles' claim had merit; and

d. exercising her discretion in the way she did.

It should be noted, however, that this court is without the benefit of the learned judge's reasons for judgment.

The approach to the application

[12] In this appeal, Mr Buchanan argued that the learned judge, at the beginning of the proceedings before her, indicated a concern about the appropriateness of the application. He said that the learned judge expressed her concern as being grounded in the fact that the striking-out had been done by a judge of concurrent jurisdiction. Learned counsel said that the learned judge allowed counsel for both parties time to consider their respective positions and return. Mr Buchanan, having consulted with Mr Charles, decided to proceed with the application as it had been filed. Despite the

learned judge's concern, she agreed to hear the application, and having done so, made the order that she did.

[13] Before this court, Mr Buchanan contended that Mr Charles' application to restore the claim was properly within the ambit of either rule 11.16 or 11.18 of the CPR. He argued that either rule was available to Mr Charles, who was not present at the hearing of the application to strike out his claim. The implication of learned counsel's submission is that the learned judge was in error in law, to the extent that she was influenced by her view that she did not have the jurisdiction to set aside the striking out order. He further argued that technical procedural barriers ought not to be set up in civil litigation. They were inconsistent, he said, with giving effect to the overriding objective.

[14] Mr Leiba, on behalf of VMBS, argued that Mr Charles' complaint in this context is misplaced. Learned counsel submitted that it is plain that the learned judge considered Mr Charles' application as it had been framed, namely, as an application to restore the status of the claim. Mr Leiba submitted that in her judgment the learned judge ruled on the application using alternatively, both those provisions of the CPR. He contended that she was not plainly wrong in so doing, and that Mr Charles has failed to prove any error.

[15] It is noted that neither side has provided any affidavit evidence concerning the statements of the learned judge, either before the commencement of the hearing, or as to her orally delivered reasons for her decision. This court is therefore loath to make

any finding as to what the learned judge indicated was concerning about Mr Charles' application.

[16] What may be observed, is that since the striking-out order was made in Mr Charles' absence, the learned judge had the jurisdiction, in a proper case, to set it aside. There was no reason to rely on any appellate procedure (see **Evans v Bartlam** [1937] 2 All ER 646, **Mason v Desnoes and Geddes Limited** [1990] UKPC 15; (1990) 27 JLR 156 and **Leymon Strachan v The Gleaner Company Limited and Another** [2005] UKPC 33).

[17] What may also be observed is that Mr Charles did not specifically make the application pursuant to either rule 11.16 or 11.18. He did not apply for the re-hearing of the application to strike out and he did not apply for the striking-out order to be either set aside or varied. The setting aside of the striking-out order was, however, implicitly requested in his application for the claim to be relisted.

[18] He should not be restricted, however, to the confines of a particular rule. He was representing himself and he clearly explained his situation in his affidavit in support of his application. It was for the learned judge to assess the application and decide it on its merits. Mr Charles' failure to mention a rule number should not have been a bar to such an assessment.

[19] The respective rules state:

> "11.16 (1) A respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside

or varied and for the application to be dealt with again.

(2) A respondent must make such an application not more than 14 days after the date on which the order was served on the respondent.

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule."

"11.18 (1) A party who was not present when an order was made may apply to set aside that order.

(2) The application must be made not more than 14 days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing –

(a) a good reason for failing to attend the hearing; and
(b) that it is likely that had the applicant attended some other order might have been made."

"26.8 (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."

[20] The distinction between rules 11.16 and 11.18 was considered in **Ranique Patterson v Sharon Allen** [2017] JMCA Civ 7. In that case the appellant had not been served with notice of an application, made in the Supreme Court, for the stay of proceedings in a Parish Court. She applied for the stay order to be set aside. Her application went before another judge of the Supreme Court, but her application was refused because the judge held that he had no jurisdiction to set aside the order of a judge of concurrent jurisdiction. On appeal, this court held that the judge did have jurisdiction to set aside an order made in the absence of the party affected. This court also stated that where no notice (actual or deemed) was given of the application, the absent party was entitled, as of right, to have it set aside. The observations were made at paragraphs [22] – [25] of the judgment:

> "[22] A reading of [rules 11.16, 11.17 and 11.18] suggests that rule 11.16 applies to respondents who were not served with notice of an application or who were not deemed served with such a notice. Rule 11.18(1) is stated in broad neutral terms in that it speaks to a party (not necessarily a respondent), who was not present at the hearing. It would seem, however, that rule 11.18, coming as it does after rules 11.16 and 11.17, does not apply to respondents, to whom rule 11.16 refers. Rule 11.16 deals with a specific circumstance, while rule 11.18 applies more generally.
>
> [23] [Counsel for the applicant] is correct in his submission that a party who was not served with a notice of application, should not, in applying to set aside the order made in their absence, have to show [as is required by rule 11.18] that it is likely that some other order might have been made if they were present at the hearing. Such a requirement could be considered a fetter or an abridgment of the constitutional right to be heard.
>
> [24] The difference between rules 11.16 and 11.18 would seem to be analogous to the difference between rules 13.2 and 13.3 of the CPR. Whereas 13.2 stipulates that the court must set aside a default judgment that was wrongly entered in certain circumstances (which circumstances undoubtedly include non-service of the claim form), rule 13.3 requires the defendant, who is applying to set aside a default judgment that was not wrongly entered, to justify that result.
>
> [25] It is rule 11.16(1) and (2) that applies in this case."

[21] The difference between rules 11.16 and 11.18 was also considered by Phillips JA in **Bardi Ltd v McDonald Millingen** [2018] JMCA Civ 33. The learned judge of appeal, as part of the majority in that case, said at paragraph [22] of her judgment:

> "These two rules are different in their application to the extent that rule 11.16 of the CPR speaks to circumstances where one is not served, and in certain circumstances, any action taken could be set aside [as of right] (for example rule 13.2 in respect of default judgments)…rule 11.18 of the CPR which embraces certain circumstances in which one may have been served, but was absent, and therefore had

> to explain that absence, and the fact that a different order may have been made if the party had been present."

[22] It may be said that rule 11.16 embraces cases in which the applicant is entitled as of right to have orders, made in his or her absence, set aside, as well as cases in which there is no such entitlement, although an application to set aside may be made in both categories of case. The former category would include cases where notice is required. The latter category would include cases where notice was not required.

[23] In light of the dispute between counsel as to what the learned judge said, and in the absence of the learned judge's actual reasons for her decision, it cannot be held that the learned judge took one approach or the other. It cannot be said, therefore, that the learned judge was wrong in her approach. Whether she erred in any other aspect of the matter, will emerge from the analysis of the other issues.

The service of the application to strike out

[24] In respect of the service of the application to strike out, there is no real dispute that Mr Charles did not receive the relevant documents. VMBS asserts instead, that, based on the relevant rules of the CPR, Mr Charles is deemed to have been served with them. Mr Leiba pointed out that:

> a. Mr Charles' attorneys-at-law removed their names from the record as appearing for him and therefore he ought to have given notice of an address at which he should thereafter be served (rule 63 of the CPR);

b. since Mr Charles failed to comply with rule 63, his address for service subsequent to the removal was the address that he had placed on his claim documents, or, alternatively, his last known place of residence;

c. the address that Mr Charles placed on his claim documents was No 4 Morant Avenue, and copies of VMBS's application documents were both posted to, and left at, that address although the premises seemed to be unoccupied;

d. Mr Charles' last known place of residence is the premises at 15 Portlandia Close, which were the subject of the exercise of the powers of sale, and documents were also left at premises on that road, admittedly at the wrong address, namely number 5; and

e. based on those efforts to serve being in compliance with the rules of the CPR, Mr Charles should be deemed to have been served.

Learned counsel relied on rules 6.3, 6.4 and 6.6 of the CPR in support of his submissions.

[25] Those rules, as they apply to individual litigants, allow documents, other than claim forms, to be served on them, by posting the documents to, or leaving them at, the address given by the relevant party. If, however, that party does not stipulate an address for service, then the documents may be posted to, or left at, the individual's usual residence, or last known place of residence. Service in accordance with these provisions is deemed to be service and the documents are deemed served the day after they are left at the relevant address. The relevant portions of the rules state:

> "6.3 (1) Documents must be delivered, posted or sent by courier delivery to a party at any address for service within the jurisdiction given by that party.
>
> (2) …
>
> (3) Where a party to be served has not given an address within the jurisdiction at which documents for that party may be served, documents must be served at the address indicated in Rule 6.4.
>
> 6.4 (1) Where no address is given for service, the document may be served by leaving it, posting it or by courier delivery at or to –
>
> (a) the business address of any attorney-at-law who purports to act for the party in the proceedings;
> (b) in the case of an individual, that person's usual or last known place of residence;
> …
>
> (2) The provisions of Part 5 may be applied to such a document as if it were a claim form.
>
> …

6.6 (1) A document which is served within the jurisdiction in accordance with these Rules shall be deemed to be served on the day shown in the following table –

…

Leaving document at a permitted address	the business day after leaving the document

…"

The provisions of Part 5 of the CPR, in part, stress the importance of the documents, which are to be served, being brought to the attention of the intended recipient.

[26] The difficulty with VMBS' stance in this regard, is that it has not served Mr Charles at his last known place of residence. It is true that it left documents at the address that he stipulated on his particulars of claim, but it was patent to VMBS (and it candidly brought the information to the attention of the court), that Mr Charles would have been unlikely to have received the documents either left at or posted to that address. The next option would have been to leave the documents at his usual or last known place of residence. This VMBS did not do. It left the documents at number 5 Portlandia Close instead of at number 15. VMBS cannot therefore, properly claim the benefit of rule 6.6, namely, that Mr Charles should be deemed to have been served with the documents.

[27] Mr Charles in his notice of appeal, among other challenges to the findings of fact, challenged a finding of fact that he was served with the notice of application to strike out his claim. If the learned judge did make such a finding, she would have been in

error. If she found, however that he had not been served, she should have assessed his application in the context of the provisions of rule 11.16 of the CPR.

[28] An assessment in the context of rule 11.16 was allowable on the basis that he had not been given notice of the striking-out application (rule 11.16(1)).

[29] His evidence is that he only found out about the striking-out order during the proceedings in another case. There had been no service on him of either the striking-out order or of the notice containing his rights, as is required by rule 11.16(3). He could not, therefore, be penalised with having failed to file his application within any particular period stipulated in rule 11.16.

[30] The learned judge, had she done that assessment, would, therefore, have found that Mr Charles was not barred from making the application to set aside the striking out order.

[31] It is to be understood that this finding is not an assertion that the striking-out order is a nullity, or that the failure to serve the formal order rendered the order a nullity (see **Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter** [2017] JMCA Civ 3). The order remained valid until it was set aside. The finding, based on the reasoning above, is that Mr Charles is entitled to have applied to set aside the striking-out order and was entitled, as of right, because it was made without notice to him, to have it set aside or varied and for the strike-out application "to be dealt with again" (rule 11.16).

Whether Mr Charles' claim has merit

[32] Since rule 11.16 allows for the strike-out application to have been reheard by the learned judge, it is within the jurisdiction of this court to consider the relevant points and make a ruling in that regard (see rule 2.15 of the Court of Appeal Rules). One of the relevant points to be considered on a re-hearing is whether Mr Charles' claim has merit and a real prospect of success.

[33] In this regard, Mr Buchanan pointed to the obvious mis-description of the premises and states that it would have affected the sale price. He also pointed to the fact that the persons to whom VMBS sold the premises, resold them less than two years later for $41,500,000.00, which is significantly more than the $24,500,000.00 purchase price that they paid. He also relied on **Cuckmere Brick Co Ltd v Mutual Finance Ltd** [1971] 2 All ER 633, in support of his submissions.

[34] Mr Leiba contended that other factors must be taken into account. Learned counsel said it should be borne in mind that VMBS relied on the advice of an independent valuator. He said that the valuation had been hampered, as the valuator was unable to access the interior of the building. The next best thing had been done, he said, and that was to do a valuation based on a view of the exterior of the building and a previous valuation report for the premises.

[35] Learned counsel contended that the difference in values between the two valuations was not so great as to be presumptive of negligence, fraud or collusion as Mr Charles has alleged. Mr Leiba said that Wescar had ascribed a market value of

$32,000,000.00 and a forced sale value of $25,600,000.00, while the valuation report that Mr Charles had secured indicates that the premises would fetch in the region of $40,000,000.00 and that a reserved price of $33,000,000.00 should be set.

[36] Mr Leiba submitted that the learned judge was entitled to find that no sufficient basis had been established for a finding that VMBS had acted in bad faith. He said there was nothing to show that the learned judge was plainly wrong in that regard.

[37] In addressing this issue, it is noted that this court has no information from the learned judge to indicate what she considered, or decided on, in respect of the valuation of the premises. What can be said is that there is a mis-description of the premises, both in the advertisements for the auction sale and in the valuation report. It can also be said that the sale price is less than the forced sale values in both valuation reports. These matters should be considered in the context of what Salmon LJ had to say in **Cuckmere Brick Co Ltd**. He indicated the duties of a mortgagee, who seeks to sell the mortgaged property. He said, in part, at page 646:

> "…I accordingly conclude, both on principle and authority, that **a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it**. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line." (Emphasis supplied)

Those views were supported by Carberry JA in this court in **Dreckett v Rapid Vulcanizing Co Ltd** (1988) 25 JLR 130, when he opined that **Cuckmere Brick Co Ltd** ought to be adopted and followed in this jurisdiction (see page 140C). It was also

said in **Cuckmere Brick Co Ltd**, that the use of an independent valuator does not necessarily render a mortgagee, exercising a power of sale, immune from liability.

[38] Those dicta are not necessarily conclusive of any liability on VMBS' part. The burden still lies on Mr Charles to prove his case against VMBS and Wescar, but the principles do indicate that Mr Charles' case has a real prospect of success. If the learned judge had found otherwise, she would have been in error.

The exercise of the discretion

[39] In deciding whether the learned judge's decision may be set aside on the basis of an error in law or fact, or on the basis that it was otherwise so aberrant as to be plainly wrong, it is necessary to look at some other factors. These include Mr Charles' reason for failing to prosecute his case, the general effect on the administration of justice, and the effect on the respective parties.

[40] It may be said at the outset, that Mr Charles' explanations for failing to prosecute his claim are without merit. It is accepted that self-represented persons face challenges in navigating the administrative processes of civil litigation (and dealing with misplaced files, as Mr Charles alleges, is one of them), but their opponents should not be prejudiced by that situation. The protracted length of time also undermines Mr Charles' explanation about being unable to locate the court's file. That inability would not have prevented him filing an application for a case management conference.

[41] His second explanation that he was busy dealing with other litigation involving the persons to whom VMBS sold the premises, is equally untenable. His inaction resulted in the present case languishing for over seven years.

[42] It cannot be said that this case obviously created a problem for any other case in the court's portfolio. There is no indication that it caused some other case not to be listed for hearing. At best, it only caused an unnecessary swelling of the number of outstanding cases, with which the court had to contend. There was no great disadvantage to the administration of justice.

[43] The next question to be answered is what would be the effect that granting the striking-out application or not would have on each party.

[44] The prejudice to Mr Charles would be significant. If the claim were struck out, he may well have lost, by virtue of the operation of the Limitation of Actions Act, the opportunity to recoup any of the loss that he incurred from the sale of his premises, for less than they were worth.

[45] On the other hand, VMBS has had this claim lurking in the background and no doubt affecting its accounting for almost eight years. More importantly, it has said that Mr Howard West, the valuator at Wescar, who actually carried out the exercise, has died. It is significant, also, that Mr West was the principal of the company and there is also affidavit evidence from the company's attorneys-at-law that the company has not given it any instructions since Mr West's death (page 159 of bundle 1 of the record of appeal).

[46] The unavailability of Mr West would hamper not only Wescar but also VMBS, as Mr West would not be able to explain or defend his valuation report. The report is, however, in place. VMBS may call another valuator to testify as to its accuracy or credibility. If material is available, it may also rely on the provisions of the Evidence Act to adduce such evidence, as Mr West may have been able to give.

[47] In light of the fact that there seem to be errors on the part of VMBS and its valuator, the irremediable prejudice seems to be greater to Mr Charles. He should be given the opportunity to pursue his claim.

Costs and the way forward

[48] Mr Buchanan submitted that there were less draconian sanctions that were more appropriate than to strike out the claim. The learned judge, Mr Buchanan submitted, should have applied one of those sanctions instead of the striking out. Mr Buchanan is correct in this regard. The penalty to Mr Charles could be by way of an order for costs. He should also be given strict stipulations as to the way forward for this case.

[49] The stipulations for costs should be that each party should bear its own costs in respect of the application to strike out, the application to restore the claim and the appeal. VMBS, although the unsuccessful party in the appeal, is only in this court because of Mr Charles' dilatory behaviour and his failure to obey the rules of court with regard to providing an address for service.

[50] Mr Charles should also be ordered to file his application for case management within 14 days of the date of the order of this court.

Conclusion

[51] The absence of the learned judge's reasons for judgment has made this a more difficult matter than it could have been. An analysis of the affidavit evidence, however, is conclusive that Mr Charles was not actually served with the application to strike out his claim. Nor can it be properly said that he could be deemed to have been served with that application. There is no clear statement by the learned judge on that point. Based on that finding, it is open to this court to review the material to determine whether the application to strike out should have been granted in the first place.

[52] A consideration of the merits of Mr Charles' case suggests that it has a real prospect of success. The circumstances of the case also suggest that although Mr Charles has been dilatory in his approach to this case, the prejudice to him would be greater if it were not allowed to go forward to trial, than to VMBS and Wescar if it were to so proceed. Some method of compensating them for the prejudice to them may be devised.

[53] The appropriate method is to deprive him of the costs in the court below and of the appeal.

MCDONALD-BISHOP JA

[54] I too have read the draft judgment of Brooks JA. I agree with the reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The appeal is allowed.
2. The judgment of the Supreme Court handed down herein on 9 January 2018, is set aside.
3. The judgment of the Supreme Court handed down herein on 11 January 2019, is set aside.
4. The claim, which was dismissed on 9 January 2018, is restored.
5. The appellant shall file, within 14 days of the date hereof, an application for the claim to be fixed for case management conference in the Supreme Court of Jamaica.
6. No order as to costs of either of the applications leading to the orders mentioned above.
7. No order as to costs of the appeal.