[2013] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 112/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**GEORGE FRECKLETON**	**APPELLANT**
AND	**ASTON EAST**	**RESPONDENT**

Anthony Pearson for the appellant

Vernon Daley for the respondent

20 and 24 May 2013

ORAL JUDGMENT

MORRISON JA

[1] This is an appeal from an order made by Anderson J on 24 July 2012 dismissing an application by the appellant for an extension of time within which to file a defence to the respondent's claim.

[2] The matter arises in the following way. The appellant and the respondent are the registered proprietors, as joint tenants, of a dwelling house situated at 39 Rochester Avenue, Kingston 8 in the parish of St Andrew and registered at Volume 1152 Folio 25 of the Register Book of Titles ('the property').

[3] By an action commenced by fixed date claim form on 12 September 2011, the respondent seeks a declaration that he is the legal and beneficial owner of the property and that the appellant holds his interest in it on trust for the respondent.

[4] Attorneys-at-law acting for the appellant filed an acknowledgment of service of the claim form on 28 September 2011 but, up to the date fixed for the first hearing of the claim on 10 October 2011, took no steps to file any affidavit or defence to the claim. On that date, both parties appeared by counsel before Anderson J, who made several case management orders, relating to the time limited for the filing and service of (i) an affidavit by the appellant in response to the claim; (ii) lists of documents; (iii) listing questionnaires by both parties; (iv) skeleton arguments; and other matters necessary for the efficient conduct of the matter. Most importantly, the trial of the action was fixed before a judge alone in open court for 4 and 5 July 2012.

[5] None of these case management orders having been complied with up to the time the matter came on for trial on 4 July 2012, on that date the appellant's attorneys-at-law made an oral application for an extension of time within which to comply. The learned judge accordingly adjourned the matter for a further case management conference to be held on 19 July 2012 and made an order granting the appellant an extension of time "up to and inclusive of 18 July 2012, within which to comply with all the Case Management Orders". The judge further ordered as follows:

> "If the Defendant [appellant] shall fail to comply with all case management orders by or before July 18, 2012, the Defendant's statement of case (if such then exists) then it [sic] shall stand as struck out [sic]."

[6] On 18 July 2012, the appellant's attorneys-at-law filed certain of the documents required by the case management orders, not including any affidavit or other document in defence of the claim. It appears from the stamp affixed by the respondent's attorneys-at-law in acknowledgment of service of these documents that they were actually served at their offices at 4:02 pm on 18 July 2012.

[7] Through no fault of the parties, the case management conference scheduled for 19 July 2012 did not take place until the following day, 20 July 2012, at which time the appellant's counsel made another oral application for an extension of time within which to file an affidavit or defence to the claim. The application was supported by an affidavit sworn to by the appellant's attorney-at-law, Mr Anthony Pearson, to which was exhibited an unsigned affidavit of the appellant, which, Mr Pearson deponed, he had prepared on the basis of the instructions given by the appellant. The explanation given for it not having been sworn to and filed in time was that the appellant had had to leave the island for "medical reasons relating to a heart problem" on 13 July 2012.

[8] The application for extension of time was opposed by counsel for the respondent on the basis, among others, of rule 6.6(2) of the Civil Procedure Rules 2002 (CPR), which provides that "Any document served after 4 pm on a business day or at any time on a day other than a business day is treated as having been served on the next business day." The learned judge reserved his ruling to 24 July 2012, when the application was refused and the matter was fixed for trial on 30 and 31 July 2012. However, the judge having given leave to appeal on the 24th, on 30 July 2012 the trial was adjourned to allow the appellant to pursue the appeal.

[9] In his written reasons for refusing the application for extension of time, Anderson J took the view that, even if the service of the documents at 4:02 pm was a breach of a trivial nature, rule 6.6 constrained the court to treat it nevertheless as a breach. The appellant thus having failed to comply with the unless order made on 4 July 2012, the court had no discretion to extend the time for compliance with the order. In these circumstances, the correct course would be an application for relief from sanctions pursuant to rule 26.8 of the CPR, the court being powerless to grant such relief of its own motion pursuant to rule 26.9.

[10] From this order, the appellant has filed a single ground of appeal which is as follows:

> "The Learned Trial Judge erred in holding that the Court had no discretion in extending the time within which the Defendant/Appellant could comply with the Court's earlier Order having regard to all the circumstances."

[11] Before us, Mr Pearson for the appellant has advanced four submissions:

> 1. "The service of the documents at 4:02 p.m. is a trifling matter and the Court should have no regard as to the 2 minutes thus allowing the Documents to stand as properly served on the 18th July 2012.
>
> 2. Where there is an **UNLESS ORDER** of the Court the sanction of the **UNLESS ORDER** does not apply automatically.
>
> 3. The Court always has discretion to extend time.
>
> 4. His Lordship Mr. Justice K. Anderson failed to properly exercise his discretion."

[12] As regards the first submission, Mr Pearson reminds us (citing Broom's Legal Maxims, 10 edn, 1999, page 88) that the law does not concern itself about trifles: "*De minimis non curat lex*". Where there are irregularities of only slight consequence, the law may properly overlook them. And, as regards the second submission, Mr Pearson submitted that rule 26.1(2)(c) allows for the extension of time for compliance with any order, referring us to **Samuels v Linzi Dresses Ltd** [1980] 1 All ER 803 and **Pereira v Beanlands** [1996] 3 All ER 528. Anderson J had therefore erred, it was submitted, in the exercise of his discretion.

[13] In response to the first submission as to the trifling nature of the breach with respect to the service of the documents at 4:02 pm, Mr Daley for the respondent relied on rule 6.6(2) and referred us to **Godwin v Swindon Borough Council** [2001] EWCA Civ 1478.

[14] In response to the second submission as to the effect of the "Unless Order", Mr Daley relied on **Marcan Shipping (London) Ltd v Kefalas and Another** [2007] EWCA 463, for the submission that, where there is a breach of such an order, the sanction imposed on the defaulting party takes effect automatically without the need for a further court order.

[15] And finally, as regards the submission that the court always has a discretion to extend time, Mr Daley referred us to the provisions of rule 26, the effect of which, he submitted, was that Anderson J having specified the consequence of non-compliance with the unless order, the appellant ought properly to have made an application for

relief from sanctions under rule 26.8, and not an application for extension of time under rule 26.1(2)(c).

[16] The first issue is whether the service of certain documents on the respondent's attorneys-at-law at 4:02 pm on 18 July 2012, in partial compliance with Anderson J's order of 4 July 2012, can be excused on the basis that service a mere two minutes after 4:00 pm is no more than a trifle. Or put in the terms urged on us by Mr Pearson, is the law "bound to a strictness at once harsh and pedantic" in the application of the rules? (Brown's op. cit., quoting from Sir Walter Scott, at page 90).

[17] It seems to me that, as Anderson J also thought, this matter is so clearly covered by rule 6.6(2) as to admit of no further or other argument: once it is accepted, as Mr Pearson accepts, that the documents were served after 4:00 pm on 18 July 2012, (a Wednesday) then by operation of the rule they stand to be treated as though they were served on 19 July 2012 and therefore outside of the period limited by the judge for this purpose. The rationale for deemed dates of service, which is what rule 6.6 is primarily concerned with, is well explained by May LJ in **Godwin v Swindon Borough Council**, at paragraph 46:

> "Uncertainties in the postal system and considerations of this kind make it sensible that there should be a date of service which is certain and not subject to challenge on grounds of uncertain and potentially contentious fact. It seems to me that parties serving documents by these means are in a better position if the deemed date for service is certain than if it is open to challenge on factual grounds. This particularly applies to claimants wanting to serve a claim form at the very end of the period available to do so. The deemed day of service is finite and they will not be caught by a limitation defence where the last day for service is a Friday, if they post the claim form by first class post on the preceding Wednesday whenever it in fact arrives."

(As Mr Daley helpfully pointed out, May LJ was there dealing with the English rule 6.7, now 6.26, which is in identical form to our rule 6.6).

[18] The conclusion that these documents were served out of time is in my view therefore, plainly irresistible. While some semblance of discomfort at this result might actually arise from the fact that, as Mr Pearson would have it, the documents were "only" served two minutes late, it seems to me that this disappears completely in the face of what was in fact the appellant's more substantial failure in not filing an affidavit or defence to the claim in time, or at all. This is a distinction which Anderson J himself clearly recognized, observing (at para [9]) that "even though the breach of the Unless Order in respect of the service of documents other than the Defendant's Defence was, at worst, trivial in nature and hardly such as to have prejudiced the Claimant in any way whatsoever … the failure of the Defendant to file a Defence to the Claim is … egregious in nature and would, if the Defendant's present Application were to be acceded to, undoubtedly cause yet another trial delay …".

[19] The result of this conclusion on the first issue must be, it seems to me, that the unless order made on 4 July 2012 took effect. The next question that then arises is whether in these circumstances the learned judge had power to extend the time for compliance with the unless order. Mr Pearson relies heavily on **Samuels v Linzi Dresses Ltd**., where the Court of Appeal held that:

> "A court had jurisdiction to extend the time where an 'unless' order had been made and not complied with, but the power was to be exercised cautiously and with due regard to maintaining the principle that orders were made to be complied with. Whether an extension of time should be granted was in the discretion of the master or judge in chambers. It followed that the judge had jurisdiction to

> extend the time, and in all the circumstances had properly exercised his discretion in granting the extension. The appeal would therefore be dismissed."

(See also **Pereira v Beanlands**, in which Robert Walker J, as he then was, held that the court had a discretion to extend the time for compliance with an unless order).

[20] In my view, it is necessary to test this submission against the provisions of the CPR. The first applicable rule is rule 26.1(2)(c), upon which the appellant relies:

> "26.1 (1) …
>
> *(2)* Except where these Rules provide otherwise, the court may
>
> (a) …
> (b) …
> (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed."

[21] Mr Daley submits, and I agree, that this rule must be read subject to rule 26.7 (1) and (2) which is as follows:

> "(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

[22] Rule 26.9, which allows the court, of its own motion, to make an order "to put matters right", is expressly stated by rule 26.7 (2) to have no application to cases in which the consequence of non-compliance with any rule, practice direction, order or direction has been stated by the rules or the court. It therefore seems to me, again in agreement with the judge, that neither rule 26.1(2)(c) nor rule 26.9 could have availed the appellant in the instant case, in which the unless order imposed the sanction for non-compliance, which was that the appellant's statement of case should be struck out.

[23] While I cannot doubt that both **Samuels v Linzi Dresses Ltd** and **Pereira v Beanlands** were correct applications of the law as it stood under the pre 1998 Rules of the Supreme Court in relation to the effect of unless orders, I would prefer and adopt the reasoning of the Court of Appeal in the post-CPR decision of **Marcan Shipping (London) Ltd v Kefalas and Another** in which Moore-Bick LJ said this (at para 24).

> "In my view it should now be clearly recognised that the sanction embodied in an 'unless' order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect."

[24] It follows from all of the foregoing that the learned judge was, in my view, entirely correct in thinking that he had no power to grant an extension of time in these circumstances and that the appropriate course which ought to be taken by the appellant is to apply for relief from sanctions under rule 26.8. While it could well be that such an application might have, at that time, and perhaps even more so now, faced some challenges, it is nevertheless plainly a matter for the judge of the Supreme

Court who hears it to consider and I would accordingly urge the appellant's attorney-at-law to take the necessary steps to make such an application as soon as possible.

[25] Mr Pearson readily acknowledges that the application before Anderson J was an appeal to his discretion. On general principle, it therefore seems to me that this court must defer to the learned judge's exercise of his discretion, unless it can be demonstrated that he proceeded on some wrong principle or contrary to law. That not having been shown, I would dismiss the appeal, with costs to the respondent to be agreed or taxed.