[2015] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2014

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**CLAUDIA HENLON**	**APPELLANT**
AND	**SHARON MARTIN PINK**	**1ST RESPONDENT**
AND	**JEREMY DAVY**	**2ND RESPONDENT**
AND	**WENDEL ABRAHAMS**	**3RD RESPONDENT**
AND	**RICHARD WILLIAMS**	**4TH RESPONDENT**

Written submissions filed by Samuels and Samuels for the appellant

Written submissions filed by Samuda and Johnson for the 3rd and 4th respondents

6 October 2014 and 23 January 2015

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

DUKHARAN JA

[1] I have read, in draft, the reasons for judgment written by my brother Brooks JA.

I agree with his reasoning and conclusion and have nothing further to add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA and agree that this appeal should be dismissed for the reasons he has given.

BROOKS JA

[3] In this procedural appeal, Ms Claudia Henlon, complains that Batts J, when the trial of her claim came on for hearing on 3 July 2014, erred when he refused to enter judgment in default of acknowledgment of service against, Mr Richard Williams, one of the four defendants to the claim. The learned judge instead ordered, on the application of Mr Williams' counsel, that the issue of whether judgment in default should be entered against Mr Williams, should be resolved in chambers.

[4] The learned judge did so despite having, at the same hearing, ordered that default judgments should be entered against two other defendants, Ms Sharon Martin Pink and Mr Jeremy Davy. Although both Ms Pink and a fourth defendant, Mr Wendel Abrahams, had filed acknowledgments of service, only Mr Abrahams, of the four defendants, had filed a defence to the claim. At the hearing, however, Mr Abrahams' counsel said that he represented Mr Williams as well.

[5] One of the major grounds of the appeal is that counsel for Mr Abrahams had no standing on which he could have made an application for an adjournment on Mr Williams' behalf. The complaint is that the application was made without Mr Williams having entered an acknowledgment of service and without a notice of an application, as is required by part 11 of the Civil Procedure Rules (CPR).

Background

[6] Ms Henlon's claim arose from a collision that occurred on 10 March 2005 between two motor vehicles. She was a passenger in one of the vehicles and alleges that she was injured in the collision. On 13 December 2005, she filed a claim against the respective owners and drivers of both vehicles. Ms Martin Pink and Mr Davy were the owner and driver respectively of the vehicle in which Ms Henlon was a passenger, while Mr Abrahams and Mr Williams were the owner and driver respectively of the other vehicle. Ms Henlon alleged negligence against both drivers. The issue of liability does not arise for discussion in this appeal.

[7] Affidavits of service were filed in respect of all four defendants. As mentioned above, acknowledgments of service were respectively filed in respect of Ms Martin Pink and Mr Abrahams. In the defence filed on his behalf Mr Abrahams asserted that the collision was caused solely, or contributed to by Mr Davy's negligence. Mr Abrahams also asserted that Ms Henlon was either wholly or partly responsible for her injuries and loss. Curiously, although no acknowledgment of service or defence was filed in respect of Mr Williams, an ancillary claim was filed on behalf of both Mr Abrahams and Mr Williams claiming, among other things, an indemnity against both Ms Martin Pink and Mr Davy. The indemnity was claimed in the event that Messrs Abrahams and Williams were fixed with any liability arising from Ms Henlon's claim.

[8] Ms Henlon's attorneys-at-law made requests for the registry to enter judgments in default but certain requisitions by the registrar were apparently not addressed and

the judgments were not entered. The claim then went before various judges for case management.

[9] Both the claim and ancillary claim were the subject of case management conferences and a pre-trial review but the anomaly with respect to Mr Williams' position was not corrected. It was after at least two adjournments of the subsequently scheduled trial, that the matter came on for trial before Batts J. It was at that time, according to learned counsel for Ms Henlon, Mr Raymond Samuels, that counsel for Mr Williams made an application for the production and cross-examination of the person who had served Mr Williams. Before taking any evidence in respect of the claim, the learned judge adjourned the trial, again, according to Mr Samuels, in order for the issue of service to be dealt with before a judge in chambers.

The grounds of appeal

[10] Although Mr Samuels filed several grounds of appeal, the issues raised by the grounds have been aptly and helpfully condensed by him into four questions posed for this court's consideration. The questions are set out in his supplemental written submissions as follows:

> "3. Firstly, did the Learned [Trial] Judge in the absence of the 1st, 2nd and 4th Defendants exercise his discretion judicially in entering Judgment against the 1st and 2nd Defendants and not the 4th Defendant in his absence and the further absence of an Acknowledgement [sic] of Service on the part of the 4th Defendant and in the circumstances where there was no evidence to the contrary as to service other than the Affidavit of Norman Samuels to which was attached the Affidavits of the Bailiff who served the documents.

4. Secondly, did the Learned Trial Judge have jurisdiction to treat the 4th Defendant and/or his Attorney-at-Law as having standing before the Court at the material time namely 11:00 a.m. when the matter was first called up and at 2:00 p.m. when Court resumed after the lunch interval when the 4th Defendant was absent and in the circumstances where there was no Acknowledgement [sic] of Service filed for and on behalf of the 4th Defendant.

5. Thirdly, did the Learned Trial Judge exercise his discretion judicially in recalling the Claimant from the witness box and adjourning the trial when her evidence was about to begin in proof of her case (see Civil Procedure Rules [sic] 39) in the circumstances where the 1st, 2nd and 4th Defendants were absent on the basis that the 4th Defendant's Attorney-at-Law wished to cross-examine the Affiant to challenge service of the Claim Form, Acknowledgement [sic] of Service Form, Prescribed Notes for the Defendant and Defence Form and Particulars of Claim on the 4th Defendant, in the absence of the 4th Defendant and in the absence of any notice of application prior to the trial date…

6. Fourthly, was the Learned Trial Judge in error in preventing the Claimant from proving her case in the absence of the 1st, 2nd and 4th Defendants in accordance with CPR rule 39 by adjourning the trial..."

These will be dealt with in turn. Questions three and four raise the same issues and shall be dealt with together.

The refusal to enter judgment against Mr Williams

[11] It is not clear from the record of appeal how the learned judge came to be placed in the unusual position of being requested, at a time when the matter was scheduled for trial, to enter default judgments against the defendants. No attempt has been made to explain it.

[12] In the written submissions filed in support of the appeal, counsel for Ms Henlon, lamented that there "is a view among the Judges of the Supreme Court of Judicature that the entering of a Default Judgment is the sole purview of the Registrar of the Supreme Court". Whether or not that assertion is correct, it may be noted that rule 12.9(2) of the CPR gives some guidance with regard to circumstances where there is a request for default judgment against one or some of several defendants. This rule may hold the answer to the absence of judgments against the defendants who had defaulted. Rule 12.9(2) states:

> "(2) Where a claimant applies for a default judgment against one of two or more defendants –
>
> (a) if the claim can be dealt with separately from the claim against the other defendants –
>
> (i) the court may enter judgment against that defendant; and
>
> (ii) the claimant may continue the proceedings against the other defendants; or
>
> (b) **if the claim cannot be dealt with separately from the claim against the other defendants** –
>
> (i) the court may not enter judgment against that defendant; and
>
> (ii) the court must deal with the application at the same time as it disposes of the claim against the other defendants." (Emphasis supplied)

[13] As has been mentioned above, Mr Abrahams is the owner of the vehicle that Mr Williams was driving. Mr Abrahams was contesting the issue of liability. It would have

been incongruous for a judgment to have been given in Mr Abrahams' favour after a trial (assuming convincing evidence from Mr Williams or some other person), while there was a judgment in default against Mr Williams. For that reason it may properly be said that rule 12.9(2)(b) applied to this scenario and that the claim against Mr Williams could not "be dealt with separately from the claim against" Mr Abrahams, given the latter's defence. For that reason, a judgment in default, in advance of a trial, would have been inappropriate.

[14] It would also have been an unhappy situation, although not in breach of the rules, for a judgment in default of acknowledgment of service to have been entered against Mr Williams when he had filed an ancillary claim in which he acknowledged the existence of the claim and the contents of the Particulars of Claim filed therein. The ancillary claim stated in part as follows:

> "**This Claim has been brought by the Claimant against the First, Second, Third and Fourth Defendants in accordance with Claim Form and Amended Particulars of Claim dated the 9th day of December, 2005** that have been filed in these proceedings…
>
> The First and Second Ancillary Claimants claim against the First and Second Ancillary Defendants:-
>
> [the relief sought, including an indemnity was then set out]
>
> On the grounds that:-
>
> [negligence and contributory negligence were then alleged against Mr Davy]
>
> The First and Second Ancillary Claimants will ask the Court to determine the following matters not only between the Claimant and the Defendants but also between the said Ancillary Claimants and the Ancillary Defendants.

> [the issues of liability, damages and costs were then set out.]" (Emphasis supplied)

It must, however, be made clear that the filing of the ancillary claim did not obviate the filing of an acknowledgment of service or a defence. Rule 9.2(5) of the CPR only excuses the filing of an acknowledgement of service if a defence has been filed and served within the time specified for acknowledgements of service. Indeed, an ancillary claim seeking a contribution or indemnity against another defendant, may only be properly filed if the defendant seeking that relief, "has filed an acknowledgment of service or a defence" (rule 18.3(1) of the CPR). Mr Williams' purported participation in the ancillary claim was therefore of no effect as he had not complied with the requirements of rule 18.3(1).

[15] Despite Mr Williams' breaches, the learned judge, in those circumstances was not incorrect in refusing to enter a judgment against Mr Williams. The situation required a number of case management orders to regularise the untidy situation in respect of Mr Williams' position, that is, if Mr Williams was amenable to the regularisation.

[16] Mr Williams' position was very different from the position of Ms Pink and Mr Davy as not only were both of those defendants clearly in default but there was no indication that either one was attempting to oppose the claim. There was, therefore, no incongruity between those defendants' positions, as existed in the situation with Messrs Abrahams and Williams.

The standing of Mr Williams and his counsel

[17] Ms Henlon's second complaint is that the learned judge improperly allowed counsel to speak on behalf of Mr Williams when Mr Williams had filed no acknowledgment of service, so as to be heard in the claim. This complaint ignores the fact that the ancillary claim had been filed by attorneys-at-law on behalf of Mr Abrahams and Mr Williams. Those attorneys-at-law had instructed counsel who appeared before Batts J.

[18] It is true, because Mr Williams' participation in the ancillary claim was of no effect, that the situation was untidy. Nonetheless, the learned judge could have, in his discretion, allowed learned counsel who appeared before him for Mr Abrahams, to also address the court on behalf of Mr Williams. Properly speaking, learned counsel should have given an undertaking that an acknowledgment of service would have been filed. Given the circumstances of the case, this is such a minor procedural error that this court will not give support to this complaint.

The adjournment and the basis of counsel's application for the adjournment

[19] The third and fourth questions deal with the issue of the adjournment and the basis for the adjournment. As has been opined above, it was not inappropriate for the learned judge to have refused to proceed with a trial with Mr Williams' position in the claim being in such a confused state. An adjournment was indeed the most efficient position for him to have taken. It is, however, necessary to assess the basis on which the learned judge granted the adjournment and sought to refer the matter to chambers. Ms Henlon asserts that the basis for the adjournment was for the person

who served Mr Williams to attend to be cross-examined in respect of his affidavit of service.

[20] It is to be noted, however, that the minute of order in respect of Batts J's order, does not mention the issue of cross-examination. The relevant portion of the minute of order states:

> "(3) The question as to whether Judgment in default is to be entered against the 4th defendant [is] reserved for determination by a Judge in chambers on the 7/10/14 at 11:00 am."

[21] The complaint concerning the basis of the adjournment was not contained in an affidavit but rather was confined to Mr Samuels' submissions. There is also no indication from the learned judge as to his motivation for granting the adjournment. This being a procedural appeal, no such indication is likely to have been forthcoming.

[22] In the absence of such evidence, it may be best to only speak generally to the complaint. It would have been inappropriate for an order to have been made so as to have the issue of service on Mr Williams assessed. This is not a case where Mr Williams was contesting the validity of a judgment that had been entered against him. This was not a case where Mr Williams was denying knowledge of the existence of the claim. On the contrary, as has been shown above, Mr Williams had demonstrated his knowledge of the existence of the claim and its contents and, by filing an ancillary claim thereto, had submitted to the jurisdiction of the court in respect of the claim. It would have been a waste of judicial time to have embarked on an assessment of the issue of service on Mr Williams.

[23] On the face of the documents, including his purported participation in the ancillary claim, a default judgment could have been entered against Mr Williams. It would have been more consistent with the overriding objective, however, if case management orders were made to allow him to correct the untidiness of his position in the claim.

[24] The learned judge was not wrong in adjourning the matter for the issue of a default judgment to be assessed in chambers. He could have, however, been more precise in stipulating that the referral was to have the issue of Mr Williams' standing in the case regularised.

[25] It is to be noted that Mr Samuels stressed rules 39.5 and 39.6 of the CPR in support of his assertion that the learned judge ought to have proceeded with the trial and denied any application for an adjournment. Rule 39.5 entitles the court, on a trial date, to proceed with the trial despite the absence of any party who fails to attend the trial. The rule states:

> "39.5 Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules –
>
> (a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or
>
> (b) **if one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear**." (Emphasis supplied)

It will have been noted that the judge is not obliged to proceed in the absence of parties. The word "may" implies a discretion being given to the judge. The discretion is important, especially as rule 39.6 allows the absent party to apply to set aside any judgment given in his absence. The relevant part of that rule states:

> "39.6 (1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order."

[26] If the circumstances are such that a judge would clearly be wasting judicial time by proceeding with a trial, which will result in a justifiable application to set aside the resulting judgment, why would the judge do so? That process would be in breach of the overriding objective of the CPR. Mr Samuels' reliance on rules 39.5 and 39.6 do not assist this appeal.

Conclusion

[27] The fact that Mr Williams' position was tightly bound up with Mr Abraham's defence, it would not have been efficient for a judgment in default to have been entered against him. Rule 12.9(2)(b) of the CPR applied to this situation.

[28] Mr Williams' standing was, however, irregular in that he had neither filed an acknowledgment of service nor a defence to Ms Henlon's claim. It was necessary, therefore, that the irregularity be cured and the issue of whether he was defending the claim along with Mr Abrahams, be resolved. These issues justified the learned judge

having adjourned the matter to chambers for resolution. This court should not interfere with the exercise of his discretion in those circumstances.

[29] The issues for resolution would not have included, however, the question of whether Mr Williams had been served with the claim. That issue had already been resolved with his purported filing of the ancillary claim. By so doing, he had recognised Ms Henlon's claim and had submitted himself to the jurisdiction of the court in respect of the claim.

[30] The answers to the questions raised by this appeal do not justify any interference with the orders made by the learned judge. The appeal should therefore be dismissed with costs to the respondents to be taxed if not agreed.

[31] The delay in the delivery of the judgment, and any inconvenience caused thereby, is regretted.

DUKHARAN JA

ORDER

1. The procedural appeal is dismissed.
2. Costs of the appeal to the 3rd and 4th respondents to be taxed if not agreed.