JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 50 OF 2006

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A**
THE HON. MR. JUSTICE MORRISON, J.A
THE HON. MISS JUSTICE SMITH J.A, (Ag.)

BETWEEN	**LEON HINDS**	**APPELLANT**
AND	**SANDRA K. JONES**	**RESPONDENT**

Leroy Equiano for the Appellant.
Miss Audre' Reynolds instructed by Patrick Bailey & Co. for the Respondent.

July 10, 11, 2008

HARRISON J.A

1. This is an appeal against the decision of Straw J., who on June 12, 2006 ordered inter alia, that Sandra Jones (the Respondent) is entitled to the legal and beneficial ownership of ½ acre of land known as "Jones" and part of Westland Mountain, Negril Westmoreland. Specific performance of an agreement for sale of the said property between Leon Hinds (the appellant) and herself was also ordered.

The Background

2. The Respondent, a businesswoman and travel agent resides in the United States of America. The Appellant lives at Westland Mountain, and is apparently the owner of

the parcel of land in dispute which forms part of land that the Appellant claims he bought from an uncle in 1978.

3. The Respondent deposes in her affidavit sworn to on July 12, 2005 that by an Agreement executed between the Appellant and herself on the 24th day of May 1991, it was agreed that she would purchase a motor vehicle for the Appellant, pay shipping costs from the United States of America to Jamaica and other incidentals, in exchange for the transfer of approximately ½ acre of land situate at Westland Mountain. The Respondent also deposes that a motor car was identified by the Appellant in Jamaica, and as a consequence, the sum of US$7,000.00 was lodged by her in the Appellant's National Commercial Bank account in Negril, Westmoreland.

4. The Respondent further deposes that having satisfied her obligations under the agreement she requested that the Appellant transfer the said ½ acre of land to her. In the meantime, she had constructed a dwelling house on the ½ acre plot. She states that in breach of the Agreement the Appellant refused to transfer the land to her and has evicted her from the property.

5. As a consequence of the alleged breach of contract, the Respondent filed a Fixed Date Claim Form in the Supreme Court, on July 21, 2005. She sought a declaration that she was entitled to the legal and beneficial ownership of the land in dispute. The Fixed Date Claim Form along with a Notice to the Appellant and an affidavit by the Respondent in support of her claim, were served on the Appellant. The Notice clearly indicated that the first hearing of the claim would take place on June 12,

2006 at the Supreme Court. It also advised him that if he attended the hearing the presiding judge may (a) deal with the claim, or (b) give directions for the preparation of the case for further hearing. The Appellant was further advised in the Notice that he should consider legal advice with regard to the claim.

6. An Acknowledgement of Service of the Fixed Date Claim Form was filed on his behalf by J. Vernon Ricketts, Attorney at Law, on February 6, 2006 in the Registry of the Supreme Court. The form indicated inter alia, that the Appellant did not admit any part of the claim.

7. Notice of Application for Court Orders dated May 16, 2006 was filed by Mr. Vernon Ricketts. He sought to remove his name from the records as the Attorney at Law for the Appellant. June 12, 2006 was also the date fixed for hearing of this application. The affidavit filed in support of the application by Mr. Ricketts, states inter alia:

> "4. ...I wrote the Defendant to attend my...office and to pay the balance of my retainer....
>
> 5. That the defendant attended my office on the 22nd day of March 2006 and advised me that he no longer required my services as an Attorney at Law to represent him in the matter and as a result he requested his documents and same were returned to him."

8. On June 1, 2006 the Respondent filed a Notice of Application for Court Orders seeking inter alia, to have a default judgment entered against the Appellant and for the

declaration sought in the Fixed Date Claim to be made. This application was fixed for hearing on June 12, 2006.

9. June 12, 2006 was therefore the common date in respect of the first hearing of the Fixed Date Claim, the removal of the Attorney's name from the records, and the application for the default judgment.

10. On June 12, 2006 the aforesaid applications came before Straw J. The parties were in attendance. The learned judge was advised by Miss A. Reynolds, Counsel for the Respondent, that the Respondent had travelled from the USA where she resides, for the hearing. Mr. Ricketts was absent. Straw J, in a very brief judgment stated inter alia:

> "Court states that if defendant is willing to stand the costs for claimant to return to the Island on a future date, the Court would be willing to grant time for the filing of an affidavit in response.
>
> Defendant declines to do so.
>
> No defence having been filed, Fixed Date Claim form dated July 12, 2005 granted in terms of paragraph 1 as amended, paragraph 2 as amended, paragraph 3 as amended.
>
> Claimant's attorney advised to withdraw Notice of Application for Court Orders dated June 5, (sic) 2006 as Court dealt with the matter under Rule 27.2(8) of the Civil Procedure Rules 2002 ("the CPR").
>
> Notice of Application to remove attorney's name from records filed June 12, (sic) 2006 adjourned for date to be fixed by Registrar".

The Grounds of Appeal

11. The following grounds were filed:

(a) The appellant was not allowed reasonable opportunity to secure legal assistance;

(b) The Respondent (sic) had a good defence and should have been allowed the opportunity to propose a defence; and

(c) The evidence presented in Court was insufficient and does not support the learned judge's decision.

Ground (b) was not pursued so we are really concerned with grounds (a) and (c).

The Issues

12. Three issues arise for determination in this appeal. For convenience they are designated: (i) the costs for the return airfare (ii) the adjournment of the first hearing and; (iii) the procedure adopted by the learned trial judge in disposing of the matter.

The Discussion

13. Issues (i) and (ii) are somewhat intertwined and can be conveniently dealt with together.

14. Rule 39.7(1) provides that a judge may adjourn a trial on such terms as the judge thinks just. It is quite trite that a judge may also adjourn any hearing on such terms as the judge thinks fit.

15. In exercising the discretion to adjourn a matter, a judge is required to be cognizant of and apply the rules as a "new procedural code" to enable the court to

achieve the overriding objective to deal with cases justly (rules 1.1 and 1.2). In **Donald Panton and Others v Financial Institutions Services Limited** SCCA 6 of 2006 delivered April 7, 2006 Harrison P., said inter alia:

> "The proper exercise of the discretion involves not only the interests of the parties (See **Hinckley v South Leicestershire PBS v Freeman** E1942] Ch. 232), by maintaining a balance between the said parties by adopting a broader view avoiding prejudice to such parties and considering the public interest in the administration of justice. The interest of justice in the exercise of a judge's discretion was considered in the Court of Appeal case of **Hytec Information Systems Ltd v Conventry City Council** [1997] 1 WLR 1666. Lord Woolf, MR and Auld LJ concurred with the judgment of Ward, LJ. The latter dealing with the effect of an unless order, said:
>
> "A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

In the **Panton** case (supra) I also said:

> "The authorities have made it abundantly clear that an appellate court, although reluctant to interfere with the exercise of the discretion by a trial judge on a matter such as an adjournment, will do so if the court is satisfied

> that the result of the order made below is to defeat the rights of the parties and to effect an injustice. See **Maxwell v Keum** [1927] All ER Rep 335.

16. In my view, the learned judge in the instant case, would have been empowered under the rules of the CPR to adjourn the hearing on terms which she thinks are just. However, she did not go that route. It would seem from the documents which comprise the record of appeal that the Appellant was desirous to obtain the services of another Attorney at Law. The Appellant was not prepared to go along with the suggestion made by the learned judge and in the end the hearing continued. The learned judge decided to proceed to deal with the fixed date claim since no defence was filed.

The Procedure Adopted

17. The learned judge having stated that no Defence was filed in response to the Fixed Date Claim, decided at this hearing that the matter should proceed under the provisions of Rule 27.2(8) of the CPR which state as follows:

> "(8) The court may, however, treat the first hearing as the trial of the claim if it is not defended or the court considers that the claim can be dealt with summarily".

18. The judge then invited Counsel for the Respondent to withdraw the Notice of Application for default judgment.

19. The claim was dealt with "summarily" and the learned judge made the order contained in Formal Order of June 12, 2006 which is set out at the commencement of this judgment.

20. There is absolutely no doubt that the Appellant would have been quite aware prior to him attending the Fixed Date Claim hearing, that the judge could deal with the claim there and then, or give directions for preparation of the case for further hearing.

21. The fact of the matter is that the Appellant was without legal representation on the 12th, but he would have had no one to blame but himself since he had taken his documents from Mr. Ricketts and had told him that he no longer required his services.

22. The question to be decided now, is what should the learned judge have done, in view of the dilemma which she faced? The Respondent had travelled all the way from the U.S.A to attend the hearing; the Appellant was present in obedience to the Notice served on him, and he was without legal representation.

23. In my judgment, once the learned judge decided to proceed with the matter "summarily", she could only do so justly, if she had considered all the evidence surrounding the agreement made by the parties. No affidavit had been filed by the Appellant in response to the Respondent's affidavit. He had indicated nevertheless in the Acknowledgement of Service that he did not admit any part of the Claim. In my view, issue was somewhat joined with regards to the Respondent's claim. Mr. Equiano, Counsel for the Appellant, submitted in this Court that since no affidavit had been filed on his behalf, the learned judge should have sworn him so that he could give evidence. However, I am not aware of any such procedure where this could have been done.

25. The learned judge, it would seem, placed greater emphasis on the fact that the Respondent had travelled from the U.S.A to attend the hearing. Certainly, in the interest of justice she could have granted an adjournment since this was the first hearing of the Fixed Date Claim. The Appellant could have been condemned in costs for having the matter adjourned. Such an order for costs would no doubt have included the expense for the Respondent's air travel which in the absence of agreement, would be subject to taxation by the Registrar of the Supreme Court. This Court would not necessarily interfere with any order made for costs since it would be after all, a matter of discretion. In our view, on the face of it, the condition which the judge seemed minded to impose which is that the appellant pays the Respondent's costs thrown away (which would include the return airfare) was not an unreasonable condition.

Conclusion

26. One must recognize that case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it must be borne in mind, even in these changing times, that, the ultimate aim of a court is the attainment of justice.

27. I am of the view, that the Appellant ought to have his day in Court and for the reasons stated above I would allow the appeal.

Morrison J.A.

I agree.

Smith J.A. (Ag.)

I agree.

Order:

1. Appeal allowed and order of Straw J. set aside;
2. Matter remitted to the Supreme Court for a hearing of the Fixed Date Claim before a different judge;
3. The Appellant is ordered to file a response to the Respondent's affidavit in support of the Fixed Date Claim within fourteen (14) days of the date hereof;
4. The Registrar of the Supreme Court to fix an early date for hearing;
5. No order as to costs.