[2011] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 110/2009

BEFORE: THE HON MR JUSTICE COOKE JA
THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**JAMALCO**	**APPELLANT**
AND	**THE OWNERS AND PERSONS INTERESTED IN THE SHIP M/V ASPHALT LEADER OF THE PORT OF PIRAEUS GREECE AND HER CARGO**	**RESPONDENT**

John Vassell, QC, Mrs Julianne Mais Cox and Miss Teri-Ann Lawson instructed by DunnCox for the appellant

Andre Earle and Miss Anna Gracie instructed by Rattray Patterson Rattray for the respondent

26 January 2010 and 20 December 2011

COOKE JA

[1] By suit No 7 of 2000, subsequently amended, the appellant sought damages as a consequence of the negligent navigation of the respondent's ship, M/V Asphalt Leader, resulting in the ship colliding into a pier owned by the said appellant. This claim

was stated to be an "Admiralty action in rem against the Ship M/V Asphalt Leader … ." It was on 17 November 2000 that the ship collided with the pier.

[2] The appellant on 25 June 2004 by notice of application for court order sought the following orders:

> "(i) Judgment be entered for the Claimant in Default of Defence.
>
> (ii) Damages to be assessed on a date to be fixed by the Registrar."

The ground on which the orders were sought was that:

> "The Defendant has failed to file Defence and the time for doing so pursuant to Part 70.6(5) of the CPR has elapsed."

Clearly Part 70.6(5) is not the appropriate section which is Rule 70.12 of the Civil Procedure Rules 2002. This appeal was conducted as if the correct Rule had been employed.

Significantly, as will appear in due course, the application for court orders also stated:

> "The Claimant is in a position to prove damages."

[3] On 11 October 2006 this application was heard by Brooks J and it was ordered as follows:

> "1. By consent Judgment be entered for the Claimant in default of Defence with damages to be assessed.
>
> 2. Damages to be assessed on December 13, 2006 for half day for a [sic] Judge sitting alone.
>
> 3. Liberty to apply."

[4] Damages were not assessed on 13 December 2006 as there were various adjournments. Then, by notice of application for court order filed on 24 June 2009 the respondent sought:

> "1. That there be Standard Disclosure of Documents within fourteen days of the date of the hearing;
>
> 2. That there be inspection of documents within twenty one days of the date of the hearing;
>
> 3. That an expert/assessor be appointed pursuant to CPR 27.9(1)(c) and 70.17(2); and
>
> 4. That the Claimant herein files and serves its Witness Statements within fourteen (14) days of the date of the hearing hereof."

The grounds relied on in support of the application were listed as:

> "1. There is documentation and information in the possession of both parties that is material to the issues that are in dispute in these proceedings;
>
> II. The granting of these orders will ensure that all the relevant information and issues are before the court;
>
> III. The main issue before the Court is the quantum of damages which the Claimant ought to recover and as this matter is complex the court will benefit from the assistance of an expert/assessor in arriving at a reasonable sum to award;
>
> IV. There is a dispute between the Claimant's expert and the Defendant's expert as to the quantum and the Court will benefit from an impartial third party;
>
> V. The granting of these orders will ensure that the Defendant will not be prejudiced in its closing at the Assessment of Damages;
>
> VI. These orders will not unduly prejudice the Claimant nor will the same affect the Trial date of the 27th July 2009; and

VII. The balance of justice lies in the granting of these orders."

It is to be noted that none of the grounds make any reference to the Civil Procedure Rules 2002 (the Rules).

[5] This application was heard by Anderson J who on 23 July 2009 made the following orders:

"a) The assessment date of July 27, 2009 is vacated.

b) Disclosure to be effected within forty-two (42) days of the date of this hearing;

c) Witness Statements on the issue of damages only to be filed and exchanged within eighty-four (84) days of the date of this hearing;

d) No order as to costs;

e) Leave to appeal is granted to both parties."

[6] The appellant now challenges the correctness of these orders. I will set out paragraphs 2, 3 and 4 of the notice of appeal:

"2. The following findings of fact and/or law and/or mixed fact and law are challenged:

(a) The learned Judge's finding that the Defendant is entitled to cross examine the Claimant and/or its witnesses and make submissions at an assessment of damages following the entry of a default judgment.

(b) The learned Judge's finding that the provisions of Part 12 of the Civil Procedure Rules, 2002 as amended do not apply, in particular that Part 12.13 would have no application.

(c) The learned Judge's finding that Rules 16(2) and 16(4) are applicable in favour of the Respondent's application for discovery and service of Witness Statements.

3. The Grounds of Appeal are:

1. The learned Judge erred in determining that the Respondent was entitled to disclosure of documents and to serve and be served, Witness Statements for or in respect of the assessment of damages herein.

2. The learned Judge erred in determining that the Respondent had a right to cross-examine the Appellant's witnesses on the assessment and to make submissions on quantum.

3. Orders being sought:

(1) That the order for disclosure of documents and service of Witness Statements be set aside.

(2) That the Order that the Respondent is entitled to cross examine the Appellant and/or its witnesses and make submissions at the assessment of damages be set aside.

(3) That the costs below and the costs of the appeal be the Appellants to be taxed or agreed."

[7] The order of Brooks J on 11 October 2006 has not been challenged. Anderson J stated in paragraph 4 of his judgment:

"The issues therefore turn upon whether the provisions of the Civil Procedure Rules applicable herein, are

those contained in CPR 12 or CPR 16, and if so, the relevant parts of those rules."

[8] The learned judge resolved the "issues" as expressed in paragraphs 21 and 22 of his judgment:

> "21. It seems to me that at the very least here, the Defendant would be able to cross examine the Claimant and/or its witnesses and make submissions, as Harris J.A. suggested. But I would go further and hold that the applicable provision is in fact, CPR 16.2 which deals with 'Assessment of damages after default judgment'. In particular, CPR1 16.2(2), the Rule states that 'Unless the application (that is the application for the default judgment) states that the Claimant is not in a position to prove the amount of damages, the registry ***must fix a date for the assessment of damages*** and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing. In Rule 16.2(4) it is also provided that: 'The registry must then fix: (a) the date for the hearing of the assessment; (b) a date by which ***standard disclosure and inspection must take place.***
>
> 22. In the absence of any authority to the contrary, I would also hold that at the time the direction was given to proceed to assessment by Brooks J, the learned judge should have considered the provisions of CPR 16.4 which I have set out above in its entirety. In particular, Rule 16.4(3) makes it mandatory that the court, on making such a direction, ***must*** exercise its case management powers and in particular, may give directions about disclosure and witness statements under Parts 28 and 29 respectively."

[9] How should the order of Brooks J be properly construed? Was it a judgment on admission? This was clearly not a judgment on admission and the words "by consent" in the order are not germane to deciding if that order was one which merited such

classification. Rule 14.1 sets out the regime pertaining to the making of an admission and the procedure to be followed according to the nature of the admission.

> "14.1. (1) A party may admit the truth of the whole or any part of any other party's case.
>
> (2) A party may do this by giving notice in writing (such as in a statement of case or by letter) before or after the issue of proceedings.
>
> (3) A defendant may admit the whole or part of a claim for money by filing an acknowledgment of service containing the admission.
>
> (4) The defendant may do this in accordance with the following rules –
>
> (a) rule 14.6 (admission of whole of claim for specified sum of money);
>
> (b) rule 14.7 (admission of part of claim for money only); or
>
> (c) rule 14.8 (admission of liability to pay whole of claim for unspecified sum of money).
>
> (5) A defendant may file an admission under paragraph (4) at any time before a default judgment is entered, but the claimant may apply for assessed costs if the admission is filed after the time for filing an acknowledgment of service has expired.
>
> (Rule 9.3 specifies the time for filing an acknowledgment of service, rule 65.8 deals with assessed costs.)
>
> (6) The court may allow a party to amend or withdraw an admission."

No notice in writing was communicated by the respondent in accordance with 14.1(2) (supra). The consent order was obtained because of a failure to file a defence within

the prescribed time. The default judgment was based on a procedural failing on the part of the respondent.

[10] So now the question arises as to the procedure to be adhered to when there is a default judgment in admiralty claims. A convenient starting point is section 70.1(1) and (2) of the Rules which are now reproduced hereunder:

> "70.1 (1) This Part applies to Admiralty proceedings including those proceedings listed in rule 70.2 and any other Admiralty jurisdiction of the court.
>
> (2) The other provisions of these Rules apply to Admiralty proceedings subject to the provisions of this Part."

[11] Part 70 of the Rules is concerned with admiralty claims. Essentially this part prescribes a procedure regime pertinent to the pursuit of such claims. However, this part is silent as to how damages are to be assessed when there is a judgment in default. Accordingly, in accordance with 70.1(2), the other provisions of these Rules apply to the pursuit of admiralty proceedings.

[12] Part 12 of the Rules is headed "Default Judgments". Rule 12.13 is preceded by the designation in bold lettering.

> "**Defendant's rights following default judgment**
>
> 12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are:
>
> (a) costs;
>
> (b) the time of payment of any judgment debt;

(c) enforcement of the judgment; and

(d) an application under rule 12.10(2)."

The provisions in this rule (12.13) do not suffer for want of clarity. The defendant will not be allowed audience except in those areas stipulated by that rule. It would seem to me that this rule (12.13) precluded any prospect of success as regards the application of the respondent filed on 24 June 2009 (see paragraph [4] supra).

[13] Part 16 of the rules is headed "Assessment of Damages**"**. Rule 16.2 on which the learned judge partly founded his ruling is preceded by the heading of "Assessment of damages **after default judgment**". The rule is now set out –

"16.2 (1) An application for a default judgment to be entered under rule 12.10(1)(b), must state –

(a) whether or not the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing.

(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The registry must then fix:

(a) The date for the hearing of the assessment;

(b) A date by which standard disclosure and inspection must take place;

(c) A date by which witness statements must be filed and exchanged; and

(d) A date by which a listing questionnaire must be filed."

Although there is no specific reference to rule 12.10(1)(b) as regards the instant default judgment there can be no question that in substance that judgment is in harmony with the said rule which reads:

"12.10(1) Default judgment –

(a) …

(b) on a claim for an unspecified sum of money, shall be judgment for the payment of an amount to be decided by the court."

The order of Brooks J on 11 October 2006 (paragraph [3] supra) gave effect to this rule I cannot agree with the learned judge as to his interpretation and utilization of rule 16.4 as expressed in paragraph 21 of his judgment (paragraph [8] supra). In the application for default judgment it was stated that –

"The claimant is in a position to prove the damages."

Accordingly, the next step was that –

"The registry must then fix the date … for the hearing of the assessment." (Rule 16.2)"

It therefore follows that since the claimant (appellant) was in a position to prove the amount of damages" rule 16.2(4) is not relevant.

[14] I now deal with whether or not Brooks J should have considered the provisions of CPR 16.4 (paragraph 22 of the judgment of Anderson J, paragraph [8] supra). Rule 16.4 is set out below. The heading, it is to be observed, proclaimed:

"Assessment of damages after direction for trial of issue of quantum

16. 4 (1) This rule applies where the court makes a direction for the trial of an issue of quantum.

(2) The direction may be given at –

(a) a case management conference;

(b) the hearing of an application for summary judgment; or

(c) the trial of the claim or of an issue, including the issue of liability.

(3) On making such a direction the court must exercise the powers of a case management conference and in particular may give directions about -

(a) disclosure under Part 28;

(b) service of witness statements under Part 29; and

(c) service of expert reports under Part 32.

(4) The court must also fix –

(a) a date by which the claimant is to file the listing questionnaire at the registry; and

(b) a period within which the assessment of damages is to commence."

I fail to appreciate the relevance of this rule. There was no direction for the trial of an issue of quantum. Rule 16.4 is not relevant as to the assessment of damages consequent on a judgment in default of defence.

[15] Further I cannot agree that "at the very least here, the Defendant would be able to cross-examine the Claimant's and/or witnesses and make submissions, as Harris JA. suggested". The learned judge was relying on a passage from the judgment of Harris JA in ***Blagrove v Metropolitan Management Transport Holdings Limited*** **(**SCCA No 11/2005). This reliance is beside the mark as ***Blagrove*** was about the assessment of damages where there is an admission of liability. As earlier demonstrated, this is not a case of judgment on admissions. It was a judgment in default of defence.

[16] In conclusion, I would allow the appeal and set aside the order for the disclosure of documents and service of witness statements. Finally, the appellant should have the costs of this appeal.

HARRISON JA

[17] I have read in draft the judgment of my brother Cooke JA and agree with his reasoning and conclusion. There is nothing further that I wish to add.

DUKHARAN JA

[18] I too agree with the reasoning and conclusion of Cooke JA and have nothing to add.

COOKE JA

ORDER

1. Appeal allowed.

2. Orders for disclosure of documents and service of witness statements made by Anderson J set aside.

3. Costs of the appeal to the appellant to be taxed if not agreed.