[2012] JMCA Civ 56.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 102/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JOSCELYN MASSOP**	**APPELLANT**
AND	**TEMAR MORRISON (By his mother and next friend AUDREY WHITE)**	**RESPONDENT**

Lord Anthony Gifford QC and Rudolph Francis instructed by Keith A Jarrett & Co for the appellant

Carlton Williams instructed by Williams McKoy & Palmer for the respondent

26, 27 and 30 November 2012

BROOKS JA

[1] On 19 January 2006, 12 year-old Temar Morrison was a passenger in a minibus when it collided with a motor truck along the Mavis Bank Road in the parish of Saint Andrew. Unfortunately, young Temar was seriously injured and lost his right arm as a result of the crash.

[2] Through his mother and next friend, Temar filed a claim against the drivers of both vehicles. The driver of the minibus was Mr Relva Sylvester and the driver of the truck was Mr Joscelyn Massop. The drivers were also the owners of their respective vehicles. Both filed defences to the claim but Mr Massop failed to attend a case management conference on 14 January 2008. As a result of his failure to attend, judgement was entered against him with damages to be assessed.

[3] When the claim came on for assessment of damages on 18 June 2009, Mr Massop's application to set aside the judgment was refused and P. Williams J assessed the damages. The damages totalled over $7,000,000.00. Mr Massop asserts that the learned judge was wrong to have refused the application. He has, therefore, appealed to this court to set aside that judgment.

[4] Lord Gifford QC, on his behalf, submitted that the learned judge wrongly exercised the discretion given to her under rule 26.8 of the Civil Procedure Rules 2002 (the CPR). All the evidence, Lord Gifford argued, demonstrated that Mr Massop, at all times, had a good defence and was interested in prosecuting that defence. Learned Queen's Counsel submitted that it was solely the fault of Mr Massop's attorney-at-law that resulted in the judgment against Mr Massop. In the circumstances, Lord Gifford concluded, it was wrong to allow the judgment against him to stand.

[5] Mr Williams on behalf of Temar argued that the appropriate rule, in these circumstances, is not rule 26.8 but rules 27.8 and 39.6 of the CPR. He submitted that

as the application was made outside of the time prescribed by rule 39.6, the learned trial judge was correct in refusing it.

[6] A number of cases were cited in support of the submissions made by each of these experienced counsel, but in our view, Mr Williams is correct. It would be inappropriate to consider the general provisions of rule 26.8, which deals with relief from sanctions, when rule 27.8 gives specific guidance to the circumstances of the instant case. An examination of rules 27.8 and 39.6 demonstrates that position. Rule 27.8 states the possible consequences of failing to attend a case management conference. The rule states, in part:

> "(5) Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then
>
> (a) if the claimant does not attend, the court may strike out the claim; and
> (b) if any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.
>
> (6) **The provisions of rule 39.6 (application to set aside judgment given in party's absence) apply to an order made under paragraph (5) as they do to failure to attend a trial**." (Emphasis supplied)

[7] Rule 39.6 states:

> "(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.

(2) **The application must be made within 14 days after the date on which the judgment or order was served on the applicant**.

(3) The application to set aside the judgment or 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 judgment or order might have been given or made. (Emphasis supplied)

These provisions show that once it is proved that the absent party was served with notice of the hearing of the case management conference the court may order that judgment is to be entered against it. That party, if it seeks to set aside that judgment, must apply to do so within 14 days of being served with the judgment.

Application to the instant case

[8] Lord Gifford submitted that the provisions of rule 27.8 (5) do not apply to the instant case because there was no proof of service of a notice of hearing on either Mr Massop or his attorney-at-law. Learned Queen's Counsel argued that the learned Master who made the order on 14 January 2008 could not have been satisfied that Mr Massop had been served in accordance with the rules. In the circumstances, he continued, the learned Master made her order for judgment under rule 26.3 rather than under rule 27.8 (5).

[9] The flaw in those submissions is that rule 26.3 speaks to the striking out of a statement of case, where, among other things, a party fails to comply with a rule,

practice direction or order. When asked what was the failure in this case, Lord Gifford said it was the failure to attend the case management conference. It would be plain from that answer and from the fact that the learned Master did not strike out the defence, but ordered judgment against Mr Massop, that it was not rule 26.3 which was utilised, but rule 27.8 (5).

[10] In the instant case, although there was no proof of service of a notice of hearing on Mr Massop's attorney-at-law, Mr Massop was represented by counsel on 4 November 2007. Counsel who appeared did so at the request of Mr Massop's attorney-at-law. All the parties were represented by counsel on that date when the matter came on before the Master. Counsel for all parties were, therefore, aware that the Master had adjourned the case management conference to 14 January 2008. It would, therefore, be pedantic to say that notice of the adjourned date for the case management conference had not been served. Service of notice of a date for hearing is required in order to make the served party aware of that date. If the court is convinced that that party was otherwise made aware of the date, such as his presence when the date was set, the court may dispense with actual service of a notice (see rule 6.8 (1) of the CPR). Certainly, when the matter came back before the Master on 14 January 2008, she would have been cognizant that counsel was present, representing Mr Massop, on 4 November 2007. Would the Master not, therefore, be convinced that Mr Massop, at least through his legal representative, was aware of the date and time of the hearing? The answer must be a resounding yes.

[11] The principle of practicality is evident in even the extreme case of committal proceedings. An order for committal may be made despite non-service of the judgment or order that was disobeyed. Rule 53.5 (2) (a) of the CPR allows such an order, where the defaulter had notice of the original judgment or order, because he was present when it was made.

[12] It may also be observed that rule 27.10, which speaks to the adjournment of a case management conference, does not require service of notice of the date, time and place for the adjourned hearing. This is so despite the fact that rule 27.10 (1) stipulates that a case management conference may not be adjourned without the court "fixing a new date, time and place for the adjourned case management conference".

[13] A copy of the formal order for the judgment was served on Mr Massop's attorney-at-law on 23 January 2008. Despite that fact, and despite the fact that rule 39.6 requires an application to be made within 14 days, no application was made. Counsel representing Mr Massop was, on 19 March 2009, at a pre-trial review, made aware of the judgment. Mr Massop deposed, at paragraph 7 of his affidavit sworn to on 16 June 2009, that he learnt of the existence of the judgment on 19 March 2009. Despite that knowledge, no application was made within 14 days of that date.

[14] Mr Massop did not file an application to set aside the judgment until 17 June 2009, which was the date of the hearing of the assessment of damages. He also applied for permission to amend his defence and for relief from sanctions for failure to comply with the orders made at the case management conference. The application was

filed one year and five months after the service of the order for the judgment. Despite that, it did not include and was not accompanied by any application to extend time in which to apply to set aside the judgment

[15] In those circumstances, Williams J had no jurisdiction to grant the application to set aside the judgment. There was no proper application before her so to do. Authority for that proposition may be found in the judgment of Langrin JA in **Thelma Edwards v Robinson's Car Mart Ltd and Another** SCCA No 81/2000 (delivered 19 March 2001). His Lordship said at page 6 of the judgment:

> "Since the defendant did not apply to set aside the judgment within the ten day period then there was no discretion on the part of the judge to set aside the judgment. On that basis alone the appeal should be allowed.
>
> The predominant consideration for the court in setting aside a judgment given after a trial in the absence of the applicant is not whether there is a defence on the merits but the reason why the applicant had absented himself at the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation." (Emphasis as in original)

[16] That reasoning was endorsed by Forte P who also presided at the appeal. Walker JA, in that case gave a similar opinion. He said at page 2 of the judgment:

> "So...when the respondent's summons came on for hearing, unless there was an application to extend time, and as to that there was none, the respondent was clearly left high and dry and without an arguable case for setting aside the

[final judgment] (see **Mills v Lawson and Skyers** [1990] 27 JLR 196)."

[17] Those opinions are respectfully adopted as applicable to the instant case, where the application was not only out of time, but did not comply with the provisions of rule 39.6. The learned judge quite correctly refused it. We would not disturb her decision.

[18] As a post-script, we cannot leave this judgment without stating our alarm at the manner in which Mr Massop's attorney-at-law conducted, or rather, failed to conduct, this matter. His conduct was a litany of inadvertence, inactivity and absence.

Conclusion

[19] The appropriate rule for applying to set aside a judgment given at a case management conference as a result of a party's failure to attend, is rule 39.6 of the CPR. The application must be made within 14 days of the order being served on the absent party. In the instant case, although Mr Massop was served promptly with the order, he did not make his application until approximately 17 months later. Not only was the application late but it was not accompanied by any application to extend the time in which to apply. In the circumstances, the learned judge was correct in having refused the application. The orders, therefore, are:

1. appeal dismissed;
2. order of P. Williams J made on 18 June 2009, affirmed; and
3. costs to the respondent to be taxed if not agreed.