

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 80/04

**BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)**

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1st CLAIMANT/ APPELLANT
AND	JAMAICA REDEVELOPMENT FOUNDATION INC.	2nd CLAIMANT/ APPELLANT
AND	SCOTIABANK JAMAICA TRUST AND MERCHANT BANK LIMITED	DEFENDANT/ RESPONDENT

**Mrs. Georgia Gibson-Henlin & Ms. Tavia Dunn
instructed by Ms. Taneisha Brown
of Nunes, Scholefield, DeLeon & Co for the Appellants**

**Dr. Lloyd Barnett & Mr. David Batts, instructed
by Livingston Alexander & Levy for Respondent**

1st, 2nd, 3rd February & 7th April, 2006

HARRISON, P.

RULING MADE ON PRELIMINARY OBJECTION

This is a preliminary objection by the respondent, Scotia Jamaica Trust and Merchant Bank Ltd, to the appeal of the appellants to set aside the order of Dukharan, J on 23rd July 2004 refusing an application by the appellants for summary judgment on its claim.

The respondent maintains that the effect of the order of Dukharan, J refusing the application for summary judgment, without imposing conditions, was to grant to the respondent unconditional leave to defend and by the provisions of section 11(1)(b) of the Judicature (Appellate Jurisdiction) Act, there is no right of appeal from such an order.

Under the former Title 13 of the Judicature (Civil Procedure Code), ("the Code"), section 79, a plaintiff could apply for and obtain summary judgment on his claim:

"unless the defendant satisfies the judge that he has a good defence."

Because of the nature of the application, if successful, it would deny the defendant the benefit of a trial. The judge had the optional power, alternatively, to permit the defendant to defend the claim, if he has a good defence. Section 81 contemplates circumstances where " the defendant may be allowed to defend" a portion of the plaintiff's claim, while section 82 refers to the defendant with a good defence who "ought to be permitted to defend the action."

Section 83 specifically defines the nature of the leave that may be allowed to the defendant, by the judge. It reads:

" Leave to defend may be given unconditionally, or subject to such terms as to giving security, or time or mode of trial or otherwise, as the Judge may think fit." (Emphasis added)

Consequently, where an unconditional order to defend is given no right of appeal arises, as prohibited, specifically, by section 11(1)(b) of the Judicature (Appellate Jurisdiction) Act ("the Act"). It reads:

"11(1) No appeal shall lie

(b) from an order of a Judge giving unconditional leave to defend an action"

Part 15 of the Civil Procedure Rules 2002 dealing with summary judgment describes its scope in rule 15.1 as:

"... a procedure by which the court may decide a claim or a particular issue without a trial."

The grounds on which a court may grant summary judgment are set out in rule 15.2. It reads:

"15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -

- (a) the claimant has no real prospect of succeeding on the claim or the issue; or
- (b) the defendant has no real prospect of successfully defending the claim or the issue."

The new feature introduced by this rule is that in addition, a defendant may now apply for summary judgment.

The powers of the court, revealing the options available to a judge considering an application for summary judgment is contained in rule 15.6(1) which reads:

"15.6 (1) On hearing an application for summary judgment the court may -

- (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
- (b) strike out or dismiss the claim in whole or in part;
- (c) dismiss the application;
- (d) make a conditional order; or
- (e) make such other order as may seem fit."

By these options, a judge may "make a conditional order," i.e. section (d) and under paragraph (e) by implication, make an unconditional order "as may seem fit."

The concept of the defendant being "allowed to defend" or being granted "leave to defend" in considering the application for summary judgment has been omitted from the Rules.

Dukharan, J exercising his option under rule 15.6(1)(c) dismissed the application without imposing conditions. This order, in essence, could also be construed as an unconditional leave to defend the action. This rule does not require the judge hearing the application to give leave to defend the action, nor specifically does it require him to give unconditional leave to defend as he was expected to do under the Code previously.

Significantly, a provision similar to section 83 of the Code has been expressly omitted from the current Civil Procedure Rules.

The Civil Procedure Rules (U.K.), rule 24.6.2, recites the orders that a court may make in considering an application for summary judgment. The orders listed at (a)(b)(c) & (d) are similar to those orders in rule 15.6(1) of the Civil Procedure Rules of Jamaica. Order 24.6.2 (e) permits an order dealing with

costs. The English rules have dispensed with the unconditional leave to defend order. As a definitive direction for the removal of doubt, a note to a practice direction supplementing Part 24, namely paragraph 24 pd.5, specifically dispenses with the conditional or unconditional designation. It reads:

“The court will not follow its former practice of granting leave to a defendant to defend a claim whether conditionally or unconditionally.”

The Civil Procedure Rules (Jamaica) are modeled on the UK Rules.

In the case of ***R. B. Manderson-Jones v Societe Internationale De Telecommunications Aeronantiques (SITA)*** Privy Council Appeal No. 69/1997 dated 27th July 1998, their Lordships of the Privy Council allowed an appeal against an order of this Court. The latter Court upheld a preliminary objection that by virtue of section 11(1)(b) of the Judicature (Appellate Jurisdiction) Act, it had no jurisdiction to hear an appeal from an order of Cooke, J (as he then was) setting aside a default judgment.

Their Lordships, inter alia said:

“... section 11(1)(b) as to the granting of ‘unconditional leave to defend’ applies only to a case where leave to defend has been given under section 83 of the consolidated Judicature (Civil Procedure Code) Law.

Section 83 deals, and deals only, with cases which have been brought before the court for summary judgment under the procedure which is set out in title 13 of the Code, which is derived from R.S.C. Ord. 14 (UK).”

Their Lordships in that case looked at section 83 as relevant to the application for summary judgment in our Law. Section 11(1)(b), as to the granting of unconditional leave to defend, applies only to a case where leave to defend has been given under section 83 of the Judicature Code. Section 83 deals and deals only with cases which have been brought before the Court for summary judgment under the procedures set out in section 13 of the Code which is derived from the Rules of the Supreme Court Order 14 (UK.)

In our view, unconditional leave to defend, in the context of an application for summary judgment, is a term of art. It has not been retained in the new scheme of the Civil Procedure Rules. No such provision is therefore permitted to be construed within the powers of the judge under rule 15.1. No longer therefore, do the rules permit a judge below to determine when he would permit or withhold appellate jurisdiction to a party's case within the context of rule 15.1. To hold otherwise would create uncertainty and doubt in the minds of all. It would be a failure to give effect to the overriding objective mandated by rule 1.1.

We are of the view that as far as section 11(1)(b) of the Act, is referable to the summary judgment provisions of rule 15.1 of the Civil Procedure Rules prohibiting the jurisdiction to appeal to the Court of Appeal, it is now otiose and inapplicable.

Accordingly the preliminary objection is dismissed with costs to the appellants.

COOKE, J. A.

1. On the 23rd July 2004 the court below dismissed an application for summary judgment brought by National Commercial Bank against Scotiabank Jamaica Trust and Merchant Bank Ltd. At this stage it is unnecessary to be concerned with the issues involved in that hearing as the question before this court is whether the unsuccessful claimant has a right of appeal to this court.

2. The respondent seeks to stop the appellants in their tracks. It contends that on a preliminary objection, the appellants cannot appeal the decision of the learned trial judge because section 11(1)(b) of the ***Judicature (Appellate Jurisdiction) Act*** ("the Act") prohibits such an appeal. This section is as follows:

"11. – (1) No appeal shall lie–

- (a) from an order allowing an extension of time for appealing from a judgment or order;
- (b) from an order of a Judge giving unconditional leave to defend an action; "

3. It was submitted that the dismissal of the application for summary judgment without more must be construed as meaning that the respondent had unconditional leave to defend the action. Therefore there was no right of appeal.

4. In ***R. B. Manderson-Jones v Société Internationale de Télécommunications Aéronautiques (SITA)*** Privy Council Appeal No. 69 of 1997 (unreported) their Lordships' Board advised that:

"Section 11(1)(b) (*supra*) as to the granting of 'unconditional leave to defend' applies only to a case where leave to defend has been given under section 83 of the consolidated Judicature (Civil Procedure Code) Law."

5. The Judicature (Civil Procedure Code) Law ("the Code") has been revoked (save for specified exceptions which are now not relevant) and replaced as of January 1, 2003, by the Civil Procedure Rules 2002 ("the Rules"). Accordingly, section 83 of the Code no longer exists. It was in these terms:

"83. Leave to defend may be given unconditionally, or subject to such terms as to giving security, or time or mode of trial or otherwise, as the Judge may think fit."

6. The appellants submitted that section 83 of the Code no longer existed. Furthermore, in ***Manderson-Jones*** (*supra*) it was stated by their Lordships' Board that section 11(1)(b) of the Act was pertinent only to section 83 of the Code. Consequently, it was argued that section 11(1)(b) no longer had any effect. I do not agree with this. Their Lordships' Board was stating the relevance of 11(1)(b) of the Act to the provisions of the Code.

7. It was further submitted that the Rules were silent on the issue of "conditional" or "unconditional" leave. Consequently, it was argued, since there is no mention of "conditional" or "unconditional" leave, those designations were

no longer relevant and thus section 11(1)(b) of the Act was inapplicable. The relevant section of the Rules is reproduced hereunder:

"Powers of the court on application for summary judgment -

- 15.6 (1) On hearing an application for summary judgment the court may-
- (a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
 - (b) strike out or dismiss the claim in whole or in part;
 - (c) dismiss the application;
 - (d) make a conditional order; or
 - (e) make such other order as may seem fit.
- (2) Where summary judgment is given on a claim, the court may stay execution of that judgment until after the trial of any ancillary claim made by the defendant against whom summary judgment is given.
(‘Ancillary claim’ is defined in rule 18.1)
- (3) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference."

8. Counsel for the appellants endeavoured to demonstrate that the absence of any reference to the issue of leave to defend (whether conditional or unconditional) was consistent with the different approach to summary judgment as set out in the Rules in contrast to that of the Code. She sought to analyze the differences between the two regimes. The most significant difference is that whereas under the Rules a defendant can, pursuant to rule 15.2 (a), make an

application for summary judgment, no such provision was provided by the Code. The “illogical” result would be that if the concepts of “unconditional leave” and “conditional leave” were to remain then whereas there would be no procedural bar to an unsuccessful defendant appealing, the right of a claimant would rest on the type of leave granted to the defendant.

9. This question before the court is not without difficulty. Section 11(1)(b) of the Act has not been repealed. The Rules cannot in any way derogate from a statutory enactment. At the same time the enactment 11(1)(b) derives its effect from the Rules. Thus in *Manderson-Jones* it was section 83 of the Code which made 11(1)(b) of the Act relevant. If therefore the Rules do not provide for the exercise of 11(1)(b) then that statutory enactment would not be relevant. It is my view that not least taking into consideration the overriding objective of dealing with cases justly, the preliminary objection should be rejected. I hold that the erstwhile concepts of “unconditional” and/or “conditional leave” are no longer part of the procedural regime pertaining to summary judgments. In rule 15.6 (1)(d) of the Rules the court is entitled to make a “conditional order”. However, this provision has nothing to do with “leave”. It is merely an order which the court may make in its adjudication on an application for summary judgment before it.

10. As indicated earlier, the preliminary objection fails.

HARRIS, J.A. (Ag):

On April 7, 1999, the appellant commenced an action, by way of a Writ of Summons, in which its claim against the respondent was for damages for breaches of an undertaking. A defence was filed by the respondent on May 28, 1999.

A notice of application for summary judgment was made by the appellant on February 2, 2004. The application subsequently came on for hearing before Dukharan, J and was dismissed. On dismissal, he proceeded to make orders on case management conference. He thereafter granted the appellant leave to appeal.

The appeal came on for hearing on February 1, 2006. Dr Lloyd Barnett, on behalf of the respondent, by way of a preliminary objection, submitted that this court has no jurisdiction to entertain the appeal in light of the provisions of S. 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act, on the ground that the dismissal is tantamount to an unconditional order granting leave to defend. In support of his submission he cited the case of ***Manderson Jones v Societe Internationale de Telecommunication Aeronautiques*** Privy Council Appeal No. 69/1997 (unreported), delivered on July 27, 1998.

In that case, judgment in default of defence entered in favour of the plaintiff was subsequently set aside by Cooke, J, as he then was, by reason of an irregularity.

The Privy Council found that the issue of which Cooke, J was seized, was whether the default judgment should be set aside on the ground of an irregularity, as the question was whether the claim was with reference to a debt or an unliquidated demand and not one as to whether the defendant had a meritorious defence.

It was also their finding that in relation to the "granting of unconditional leave to defend," S. 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act is applicable only to cases where leave to defend has been granted under S. 83 of the Judicature (Civil Procedure Code) Law hereafter referred to as the 'Code' which dealt with cases for summary judgment brought under Title 13.

In order to determine whether the order of dismissal by Dukharan, J falls within the ambit of S. 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act it is necessary to examine S. 11 (1)(b) of the Act in addition to certain provisions of the Code and the Civil Procedure Rules 2002.

Section 11 (1)(b) of the Judicature (Appellate Jurisdiction)) Act provides:

- "(1) No appeal shall lie –
- (a) ...
- (b) from an order of a Judge giving unconditional leave to defend an action;"

Title 13 of the Code governed the procedure with respect to the entry of summary judgment and the defence of an action brought by a specially endorsed Writ of Summons. Sections 81, 82 and 83 of the Code fall within the purview of Title 13.

Section 81 states:

"If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms (if any) as to suspending execution, or the payment of the amount levied or any part thereof into Court by the Bailiff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."

Section 82 provides:

"If it appears to the Judge that any defendant has a good defence to, or ought to be permitted to defend the action and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter and may issue execution upon such judgment, without prejudice to his right ot (sic) proceed with his action against the former."

Section 83 is couched as follows:

"Leave to defend may be given unconditionally, or subject to such terms as to giving security, or time or mode of trial or otherwise, as the Judge may think fit."

A Judge therefore, was, by virtue of the foregoing sections under Title 13 of the Code authorized to do any of the following:

- (i) Enter judgment in default of defence.
- (ii) Grant leave to defend conditionally or unconditionally.
- (iii) Dismiss the claim.

In the court below, the application for summary judgment was brought under the Civil Procedure Rules 2002, the Code having been repealed. Section 15 of the Rules specifies the procedure by which the court is empowered to adjudicate on a claim or an issue without the necessity of a trial.

Under Rule 15(2) the court may grant a claimant or defendant summary judgment if it is shown that the claim or issue has no real prospect of success, or that the defence shows that there is no real prospect of successfully defending the claim or issue. Unlike S. 83 of the Code, Rule 15 (2) (b) grants a defendant a right to apply for Summary Judgment.

Rule 15(4) of the Rules requires notice of application for summary judgment to identify the issues. The contents of the Notice of Application were in compliance with this rule.

Rule 15(6) bestows on the court wide powers in dealing with summary judgment applications. Under the Rule, on the hearing of an application for summary judgment, the Court may make any of the following orders:

- “(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;
- (b) strike out or dismiss the claim in whole or in part;
- (c) dismiss the application;
- (d) make a conditional order; or
- (e) make such other order as may seem fit.”

This Rule is silent as to the granting of an order for “unconditional leave to defend.” It appears to me that this would not have operated as a bar to the imposition of such an order under Rule 15. The framers of the Rules, would

have intended and contemplated that such an order could be made. However, any such order would have to be expressly stated.

Orders made under Rule 15 (6)(a) to (e) are separate and distinct. Each stands in isolation. The order of dismissal made under Rule 15 (6)(c) cannot be construed as implicitly granting "unconditional leave to defend." In my view, an order granting "unconditional leave to defend" could have been made under Rule 15 (6)(e).

However, the making of such an order would create a lacuna in the rules in relation to section 11 (1)(b) of the Judicature (Appellate Jurisdiction) Act. ***Manderson Jones v Societe Internationale de Telecommunication Aeronatiques*** (supra) dictates that unconditional leave to defend within the context of section 11 (1)(b) of the Act relates only to cases under s 83 of the Code. A defendant can now apply for summary judgment. An order granting leave for unconditional defence of an action would give an unsuccessful defendant an unlimited right to appeal while a claimant's right of appeal would be restrictive. It follows that the invocation of section 11 (1)(b) would lead to an absurdity.

Further, the fact that the Judge embarked on a case management exercise and made orders pursuant thereto, demonstrates that a trial was contemplated. It is manifest that an appeal from the order of Dukharan, J would lie.

The preliminary objection fails.

HARRISON, P.

ORDER:

- (1) Preliminary objection dismissed. One day's costs of this application to be paid to the appellant to be agreed or taxed.

- (2) Case Management Order dated 5th December 2005, is amended to read in paragraph (2): "Time allotted four (4) days, two (2) days to each party."

- (3) Matter part heard.