[2015] JMCA Civ 60

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 80/2015

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**APPELLANT**
AND	**RYAN ANSLIP**	**RESPONDENT**

Written submissions filed by The Director of State Proceedings for the appellant

Written submissions filed by Andrew Irving, attorney-at-law for the respondent

27 November 2015

PROCEDURAL APPEAL

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

BROOKS JA

[1] This is an appeal against the order of G Fraser J (Ag) (as she then was) striking out the North East Regional Health Authority's (NERHA) defence to a claim filed against it by Mr Ryan Anslip. The learned judge held that NERHA had failed to obey an "unless"

order previously made in the claim. NERHA contends that it had obeyed the order and that the learned judge erred in finding otherwise.

Background

[2] Mr Anslip had filed his claim on 23 August 2011. In it, he sought damages for breach of contract. This claim resulted from NERHA's decision to terminate his employment, as its Director of Finance. D Fraser J, at a case management conference (CMC) held on 9 October 2014, made a number of orders, including orders for the standard disclosure and inspection of documents. For the purposes of this appeal the relevant orders are:

> "3. There shall be standard disclosure by each party on or before October 31, 2014.
>
> 4. There shall be inspection of documents so disclosed on or before November 3, 2014.
>
> …
>
> 10. The date and time for the Pre-Trial Review, December 4, 2014 at 11a.m. for one-half hour are hereby affirmed.
>
> 11. The trial date of January 7, 2015 is hereby affirmed."

[3] NERHA did not comply with the orders for disclosure. As a result of that failure, when the claim came on for the pre-trial review on 4 December 2014, an "unless" order was made as a sanction. The orders made by Master Bertram – Linton were:

> "1. The claimant's notice of Application for Court Order dated the 20th day of November, 2014 is adjourned for a date to be fixed by the Registrar.

2. **Unless the Defendant complies with the Case Management Conference orders made on the 9th day of October, 2014 on or before the 19th day of December, 2014, the Statement of Case of the defendant is struck out.**

3. Costs for today to the Claimant in any event to be agreed or taxed.

4. The Claimant is permitted to file and serve Witness Statement on or before the 19th day of December, 2014.

5. The Claimant's Attorney-at-Law to prepare file and serve the Formal Order." (Emphasis supplied)

[4] Again, NERHA failed to act in a timely fashion. It was not until Friday, 19 December 2014, sometime between 1:54 and 1:56 pm, that NERHA served a number of documents, including its "Lists of documents", on the offices of Mr Anslip's attorney-at-law, Mr Andrew Irving. This service was approximately two hours before the deadline set by Master Bertram-Linton.

[5] Attempts by Mr Irving to secure inspection of the documents listed in NERHA's list of documents proved futile. On 22 December 2014, he wrote to the Attorney General's Chambers requesting copies of some of the documents in the list of documents. His letter was sent for the attention of Miss Lisa White, the attorney-at-law having conduct of NERHA's case. There was no response. Mr Irving said that he went to Miss White's office on 29 December 2014 but he was not allowed to inspect and copy the documents mentioned in his letter dated 22 December 2014. In addition he did not receive a response to his letter. He said that he called Miss White's office for that purpose on several occasions but to no avail. More will be said about those attempts.

The striking out

[6] On 6 January 2015, as a result of NERHA's unresponsiveness, Mr Anslip filed a notice of application for court orders, pursuant to rule 28.17 of the Civil Procedure Rules (CPR), for NERHA's statement of case to be struck out. This order was sought on the basis that NERHA had, in breach of the orders made at the CMC and pre - trial review, failed to allow him to inspect and copy the documents mentioned in the list of documents.

[7] The application was set for hearing on the following day, 7 January 2015, which was the date previously set for the trial of the claim. G Fraser J heard and granted Mr Anslip's application. The orders made were:

> "1. Pursuant to Rule 28.17 of the Civil Procedure Rules and pursuant to order number 2 of the Order made by Master Mrs. S Bertram-Linton on the 4th day of December, 2014 filed on the 11th day of December, 2014 the Defendant's Statement of Case is struck out;
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> 2. Judgment is hereby entered for the Claimant;
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> 3. Date to be fixed for Assessment of Damages;
>
> 4. Costs to be cost in the claim;
>
> 5. The Claimant's Attorney-at-Law to prepare file and serve Order herein."

Permission to appeal

[8] On 9 June 2015, NERHA filed a notice of application for court orders seeking an extension of the time within which to apply for permission to appeal the order of G

Fraser J. It also asked for leave to appeal to be granted and that the order for the matter to proceed to assessment of damages be stayed.

[9] On 30 June 2015 the application was heard by G Fraser J, who granted the orders sought for extension of time to apply for leave to appeal. The appeal came before this court as a procedural appeal and was considered by the court on paper. Each party submitted written submissions concerning the issues involved.

The grounds of appeal

[10] NERHA challenged the learned judge's orders on three grounds:

> "(a) The learned judge erred in law in finding that rule 28.17 of the Civil Procedure Rules had not been complied with;
>
> (b) The learned judge erred in determining that the appellant's statement of case had been struck out as a result of non-compliance with the Unless Order of Master Bertram–Linton made on 4 December 2014;
>
> (c) The learned judge erred in entering judgment for the respondent in circumstances where the appellant had complied with the Unless Order of Master Bertram Linton [sic]."

Counter – Notice of Appeal

[11] Mr Anslip filed a counter notice of appeal on the basis that the learned judge's decision was supported by rule 28.12. He also asserted that the decision of the learned judge was correct in the light of the admission by NERHA's attorney–at-law that NERHA had breached the "unless" order.

Evidence by Mr Andrew Irving

[12] Mr Irving, in an effort to resist NERHA's application for permission to appeal, filed an affidavit on 24 June 2015. In that affidavit he said that upon receiving the documents on Friday 19 December 2014, he contacted the Attorney General's Chambers by telephone in order to advise Ms White of the copies that he needed. However, Miss White was not in office, and he waited until the following Monday, 22 December 2014 to send his formal letter communicating his request for the copies.

NERHA's submissions

[13] NERHA's submissions considered all three grounds of appeal together. This was done on the basis that all the grounds touched and concerned the judge's finding that NERHA had failed to comply with the order to allow inspection of the documents contained in its list of documents.

[14] It was submitted that, to the extent that the judge relied on rule 28.17, in determining whether NERHA had complied with the "unless" order of Master Bertram-Linton in relation to its duty to disclose, she fell into error. It was submitted that rule 28.17 was inapplicable to the circumstances of this case. The applicable rule, it was submitted, is rule 28.12, which provides for the inspection and copying of listed documents.

[15] NERHA contended that, based on rule 28.12(2), there is a duty on the party to whom disclosure is made, to indicate in writing whether he or she wishes to inspect the documents disclosed, and a corresponding duty on the party giving the disclosure to

make the relevant documents available for inspection. It argued that where there is no request for inspection, there arises no obligation on the party giving the disclosure to make the relevant documents available for inspection. As such, the disclosing party would have complied with his or her obligations under rule 28.12.

[16] NERHA also submitted that there is no dispute that the list of documents was served on Mr Irving on 19 December 2014. In addition, it was submitted, the time at which the documents were served gave Mr Irving sufficient time to communicate in writing his intention to inspect the documents listed and for NERHA to respond to that indication.

[17] Mr Anslip, it was submitted, was obliged to indicate in writing within the time frame set by the court for complying with the orders, in order for NERHA to make the documents available to him. When Mr Irving wrote on the 22 December indicating that he wished to inspect the documents, the time for compliance had already expired on 19 December 2014.

[18] As a result, it was contended, NERHA had complied with rule 28.12 when the service of the documents was effected and had thereby fulfilled its obligation under the rule. It was, therefore, submitted that based on the evidence before G Fraser J, it could not be properly said that NERHA had failed to comply with the "unless" order of the learned Master.

[19] NERHA argued that it complied with the "unless" order of Master Bertram–Linton and therefore the sanction of its defence being struck out did not take effect. The consequence of this is that the defence is still in place.

[20] NERHA also submitted that this court should not consider Mr Irving's affidavit evidence regarding the telephone call to the Attorney General's Chambers on 19 December 2014, as that was not before the learned judge when she struck out NERHA's claim.

Mr Anslip's submissions

[21] Mr Irving submitted, on behalf of Mr Anslip, that NERHA had failed to comply with any of the CMC orders made on 9 October 2014 and that it had a history of failing to comply with orders of the court. Learned counsel submitted that Master Bertram-Linton made the "unless" order as a result of NERHA's previous non-compliance.

[22] Mr Irving also argued that the failure to comply with the order for inspection was deliberate since he had, on a number of occasions, by telephone, letters and a visit to Miss White's office tried to have inspection of the documents. In addition, Mr Irving argued that NERHA's attorney admitted that she had breached the "unless" order and even applied orally for relief from sanction. G Fraser J, he said, rejected that application at the time that she made the order striking out NERHA's claim.

[23] Mr Irving also submitted that the learned judge's decision to strike out NERHA's statement of case was supported by rule 28.12. He submitted that Mr Anslip gave written notice in accordance with the rule 28.12(2) of his wish to inspect the

documents. This was done by letter dated 22 December 2014. Further, he argued, NERHA had failed to permit inspection pursuant to rule 28.12(3) of the CPR within the seven days prescribed, or at all, and therefore had acted in breach of the "unless" order. He relied on the case of **Norma McNaughty v Clifton Wright et al** SCCA No 20/2005 (delivered 11 February 2005) in support of his submissions that the rules of the CPR are to be obeyed.

[24] In addition, it was argued that there must be disclosure before there can be inspection and so the "unless" order cannot be construed to require that disclosure and inspection are to be done on the same day. Mr Irving further argued that the pre-trial order by Master Bertram-Linton should be interpreted in the manner which the CMC orders contemplated, in that inspection was required to be done three days after disclosure.

[25] He also submitted that the appeal should be dismissed in light of the above and the fact that he made a reasonable attempt to obtain inspection. His submissions covered the point made in the counter notice of appeal.

Analysis

[26] In considering this appeal, it is first necessary to clarify the learned judge's approach to the striking out. The order seemed to be intended to have had twin bases. It, firstly, adverted to rule 28.17, which was the rule to which Mr Anslip's application to strike out, referred. Secondly, the order spoke to the "unless" order made by Master Bertram-Linton. The two aspects have to be separately assessed.

[27] Part 28 of the CPR provides for the disclosure and inspection of documents. Rules 28.12 and 28.17 deal with the parties' right to inspection. Under rule 28.12 the right to inspection is in relation to documents contained in a list of documents. The rule states:

> "(1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents –
>
> (a) which are no longer in the physical possession of the party who served the list; or
>
> (b) for which a right to withhold from disclosure is claimed.
>
> (2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.
>
> (3) The party who is to give inspection must permit inspection not more than 7 days after the date on which the notice is received.
>
> (4) Where the party giving the notice undertakes to pay the reasonable cost of copying, the party who served the list must supply the other with a copy of each document requested not more than 7 days after the date on which the notice was received."

[28] Rule 28.17 concerns documents which are mentioned in five specific documents, including the claim form and a statement of case. It is not relevant to these proceedings and it is unnecessary to quote it here.

[29] The documents involved in this case were documents contained in the list of documents. Therefore the applicable rule is rule 28.12 and not rule 28.17. That point is, however, not fatal to the learned judge's order. It is patent, however, that rule

28.12 does not include any sanction for a party's failure to provide inspection. If the learned judge were relying solely on NERHA's breach of rule 28.12, she would have been acting precipitously in applying the sanction of striking out, rather than a less drastic order.

[30] The other aspect of G Fraser J's order is its reliance on the "unless" order of Master Bertram-Linton. It must first be observed that the orders made by D Fraser J obliged NERHA to allow Mr Anslip to inspect those documents that he indicated that he wished to inspect. A party on whom a list of documents is served has a right to inspect any document on the list, except those that were no longer in the possession of the party who has disclosed them, or those for which a right to withhold, is claimed. According to rule 28.12(2), however, the notice requiring inspection must have been given in writing.

[31] In the present case, Master Bertram-Linton made an order that the CMC orders should have been complied with, by NERHA, by 19 December 2014, or its statement of case would have been struck out. Unfortunately, the learned Master did not stipulate that the inspection of documents should be allowed by a date subsequent to the date stated for their disclosure. As the order stood, both disclosure and inspection should have been completed by 19 December 2014. That unfortunate situation allowed for NERHA to adopt the unreasonable stance that it has taken.

[32] The CPR stipulates that the business day, for the purposes of the service of most documents, which would include a list of documents and any request for inspection,

ends at 4:00 pm. Rule 6.6(2) of the CPR stipulates that any document served after 4:00 pm is to be treated as having been served on the next business day. Having served the documents on 19 December 2014, only some two hours before the business day ended, for the purposes of service, NERHA gave Mr Anslip's attorney-at-law only a very small time window within which to make the request for inspection. He did not make that request in writing before 4:00 pm on 19 December and, therefore, based on Master Bertram-Linton's order, could not have obliged NERHA to provide inspection thereafter.

[33] Had he made the request in writing on 19 December, NERHA would have been obliged to provide inspection before 4:00 pm that day, if it were to comply with Master Bertram-Linton's order. NERHA may, perhaps, have been able to argue that rule 28.12(3) applied and it was allowed to provide inspection within seven days after 19 December. That, however, is merely speculative because Mr Irving did not put his request in writing on 19 December, as a combination of Master Bertram-Linton's order and rule 28.12 required. Instead, he wrote to NERHA's attorneys-at-law on the next business day, which was 22 December, 2014. The time stipulated for compliance with the inspection aspect of Master Bertram-Linton's order had, by then, passed.

[34] At the end of the business day on 19 December 2014, there was no lack of compliance with Master Bertram-Linton's order by NERHA. It had done all that it was obliged to do up to that point.

[35] It must be pointed out, however, that NERHA's submission that the time allowed, was sufficient time for Mr Anslip's attorney to assess and determine the documents he would need to have inspected and then indicate this in writing, is untenable. In the light of all the orders previously made, in particular the order for inspection and disclosure, the time allowed by NERHA, that is two hours before the end of the business day, to inspect the list of documents and to decide what inspection was necessary, was unreasonable. This is particularly so since the disclosure should have originally been made on or before 31 October 2014.

[36] In recognition of that small time-window allowed for inspection, NERHA should have allowed inspection of the said documents within seven days of Mr Irving's written request. It was, no doubt, NERHA's unreasonable refusal so to do that prompted G Fraser J to use a stringent approach to it. NERHA was, however, not in breach of Master Bertram-Linton's order. The learned judge was therefore wrong to have ruled that the "unless" order should have taken effect.

Conclusion

[37] In the light of the above analysis, NERHA had done all that it had been required by rule 28.12 in compliance with the order of Master Bertram-Linton. It had not received a request in writing on 19 December 2014, for it to provide inspection of the documents that it had disclosed that day. G Fraser J, therefore, erred in finding that NERHA had failed to comply with the "unless" order. Her order that its statement of case should be struck out should, as a result, be set aside.

[38] It must be said, despite its success in this appeal, that the appellant acted unreasonably and in breach of the spirit of the overriding objective, in refusing to comply with Mr Irving's request for inspection. As a result of that unreasonable approach, Mr Anslip was at an unfair disadvantage when the case came on for hearing on 7 January 2015.

Costs

[39] NERHA's conduct in this matter has been so unreasonable that this is an appropriate case in which to deviate from the general rule that costs should be awarded to the successful party. As a result, each party should bear its own costs of the appeal. NERHA should, however, stand the costs of the day for the trial date.

McDONALD-BISHOP JA

[40] I have read, in draft, the judgment written by my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA (AG)

[41] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal is allowed.
2. The counter-notice of appeal is dismissed.

3. The orders of G Fraser J (Ag) made herein on 7 January 2015 are hereby set aside.

4. It is hereby declared that the appellant's statement of case remains in force.

5. The appellant shall, at its own cost, provide to the respondent's attorney-at-law, on or before 4 December 2015, copies of all the documents requested of it in that attorney-at-law's letter dated 22 December 2014. Should the appellant fail to comply with this order, its statement of case shall stand as struck out without the need of any further application.

6. The registrar of the Supreme Court shall fix a new date for the trial of the claim.

7. Each party shall bear its own costs of the appeal. The appellant shall pay to the respondent the respondent's costs thrown away, in the court below, including the costs of 7 January 2015.