[2023] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTCE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR GREEN JA

PARISH COURT CIVIL APPEAL COA2021PCCV00040

APPLICATION NO COA 2022APP00282

BETWEEN	**RUPERT ANKLE**	**APPELLANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**RESPONDENT**

Mark-Paul Cowan instructed by Ms Kristina Exell of the Norman Manley Legal Law School Legal Aid Clinic for the appellant

Miss Monique McLeod and Miss Kimberlee Dobson instructed by Lightbourne and Hamilton for the respondent

25, 26 January and 10 March 2023

BROOKS P

[1] I have read, in draft, and totally agree with, the reasoning and conclusion in the judgment of my learned sister, Dunbar-Green JA.

FOSTER-PUSEY JA

[2] I have read, in draft, and fully agree with the reasoning and conclusion in the judgment of my learned sister, Dunbar Green JA.

DUNBAR GREEN JA

[3] This is an appeal from the refusal by a judge of the Parish Court ('the learned judge') for the Corporate Area ('the Parish Court') to restore to the hearing list the

plaintiff's action which had been struck out on account of the plaintiff's failure (and that of his legal representative) to appear in the matter. The orders sought were:

> "(a) That the decision of the Learned Parish Court Judge made on March 19, 2020 be set aside
>
> (b) That the application to restore or relist the Appellant's action be granted.
>
> (c) That costs of the appeal be awarded to the Appellant."

[4] In support of the order sought at (b) above, the appellant, on 30 December 2022, filed an application, with supporting affidavits, for this court to adduce fresh evidence.

[5] On 25 and 26 January 2023 this court heard oral submissions on the appellant's notice of appeal filed on 31 March 2020. These were further to the written submissions filed by the respective parties.

[6] On 26 January 2023 this court made the following orders:

> "1) The appeal from the decision of the learned Parish Court Judge made on 19 March 2020 is allowed in part.
>
> 2) The decision of the learned Parish Court Judge is set aside.
>
> 3) The application to restore the plaint is remitted to the Parish Court for the Corporate Area to be speedily heard before another judge of the Parish Court.
>
> 4) In light of the orders made above, there is no need to consider the application to adduce fresh evidence.
>
> 5) No order as to costs of the appeal."

[7] These are the reasons for making the above orders.

[8] The action in the Parish Court commenced by plaint note filed on 11 May 2017. It resulted from an injury the appellant suffered which was allegedly caused by the agent and/or servant of the respondent while operating the respondent's bus on 2 December

2011. The primary allegation is that the appellant was struck by the bus after he disembarked and was walking towards the luggage compartment to retrieve an item.

[9] Consequent on the filing of the plaint, a summons was issued for the respondent to attend court on 8 June 2017. On that date, the respondent's attorney-at-law ('attorney') was present but neither the appellant nor his attorney appeared in court. The matter was adjourned to 19 July 2017 when, again, the respondent was present but there was no appearance by the appellant or any one on his behalf. The court struck out the plaint pursuant to section 185 of the Judicature (Parish Court) Act ('the Act') which provides, in part:

> "If upon the day of the return of any summons, or at any continuation or adjournment of the said Court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be put down to the bottom of the list of causes for trial at that Court; and, if on being reached, the plaintiff shall not appear, the cause shall be struck out…"

[10] On 17 October 2019, by which date the cause of action would have been statute-barred, the appellant filed an application, along with an affidavit in support, to have the plaint restored to the court's hearing list. This was done pursuant to Order XIX Rule 2 of the Parish Court Rules ('the Rules') which permits the court to restore an action or matter that has been struck from the list of causes for trial. That order provides:

> "…**Restoring case struck out for non-appearance of plaintiff**.
>
> 2. Where an action or matter has been struck out the Court may order such action or matter to be restored to the list for hearing on the same day or any subsequent day, and may set aside any order awarding costs to the opposite party, upon such terms as to payment of costs of the day, adjournment of the hearing, notice to the opposite party, and otherwise, as may be just." (Emphasis as in the original)

[11] The application was heard on 7 January 2020, subsequent to which the learned judge ordered as follows:

> "(1) Application to relist/restore plaint numbered 2040/2017 is refused.
>
> (2) Costs to the Defendant [respondent] in the sum of Fifteen Thousand Dollars ($15,000.00)."

[12] At para. 50 of her written decision, the learned judge concluded her reasons for the decision, thus:

> "Having considered all the circumstances of the plaintiff's [appellant's] application I would decline to exercise my jurisdiction to relist the plaint as the application was made after the limitation on the plaintiff's [appellant's] claim had expired."

[13] Aggrieved by this decision the appellant filed his notice of appeal. Grounds (a) to (e) challenged the learned judge's findings of law that: the limitation period was relevant and/or determinative of the application to relist; the exercise of her discretion to relist the appellant's plaint would deprive the respondent of the limitation defence; and, having regard to the limitation period, the court did not have the jurisdiction to grant the application to relist. Grounds (f) and (g) posited, among other things, that the learned judge unduly fettered her discretion and/or erred and/or misdirected herself, in failing to consider the merits of the application. The application to adduce fresh evidence pertained to the latter two grounds.

[14] At the commencement of the hearing of the appeal, counsel agreed that the court should first dispose of the jurisdiction issue. Accordingly, we only heard submissions in relation to grounds (a) to (e).

Submissions on behalf of the appellant

[15] Several arguments were advanced in the written and oral submissions of counsel for the appellant in support of grounds (a) to (e). In summary, counsel submitted that there is no textual or linguistic ambiguity as to what Order XIX Rule 2 permits a judge of the Parish Court to do. The action having been struck out, for non-appearance of the plaintiff in court, the court has the jurisdiction to restore it to the hearing list thereby

"putting back" the appellant in his position prior to the action being struck out, without any engagement of the limitation period. In other words, Order XIX Rule 2 simply permits a continuation of the action which had already been properly commenced within the limitation period. It was, therefore, incorrect for the learned judge to rely on the expiration of the limitation period, at the time of the application for restoration, as determinative of the court's jurisdiction. Doing so would gift a defendant with the "gratuitous windfall" of a limitation defence. Further, the Parish Court is given the power under section 185 of the Act to regulate its own procedure, and Order XIX Rule 2 is an expression of that "power to regulate its own coercive powers and processes". Even in the absence of this order, the court retains an inherent power under section 185 to regulate its powers.

[16] Counsel submitted that, in these matters, the correct propositions of law are as follows:

> "(i) An order by which a matter having been placed at the bottom of the hearing list is struck out for non-appearance pursuant to section 185 of the Parish Court Act, may be restored to the list pursuant to Order XIX Rule 2, is an interlocutory order.
>
> (ii) The matter to be so restored is struck out at a point where the Parish Court has not commenced a trial or heard any evidence. The issues joined between the parties since the commencement of the action remain unresolved and no rights have been determined.
>
> (iii) The matter that is struck out for non-appearance but which may be restored to the list is pending, in that further action may still be taken in the same matter, to resume its continuance. While such a matter may remain struck out indefinitely, it has not left the court absolutely, as there is still some recourse to another step being taken in it, by way of the said application to restore. If the matter is restored, it continues before the court for the parties' respective rights to be determined.

> (iv) The Parish Court has the authority to revisit the matter for the purpose of restoring it, having struck it out with reference only to the absence of the plaintiff.
>
> (v) A matter so restored retains the same plaint number assigned to it on commencement, and is placed back on the same court's list it once occupied, with the status it had immediately before it was struck out."

[17] Counsel relied on a number of authorities, the most compelling and persuasive ones being those summarised below.

[18] In **Alhaji Haruna Kassim v Herman Ebert** (1966) 1 ANLR 54 the question for the appellate court was whether the claims that were brought within the limitation period but were struck out for failure of the claimants to abide a court order could properly be relisted, in circumstances where the statute of limitations had run against those claims. The order was in these terms: "claim struck out with liberty to apply for relisting without payment of further summons fee". The application to relist was brought under Order 40. Ademola CJN, delivering the judgment of the court, observed:

> "…It appears to us that the true meaning of the order was that the case be discontinued as from the date of the order, but to be kept on the general list of the court and could be brought back to the hearing list after an application to the court had been made and granted accordingly… It is our view therefore that it is a pending cause which has been relisted in this case."

[19] **Nigeria Airways Ltd v Nuru Hajaj Company Ltd** (1971) ALL NLR 546 dealt with the point that an order to restore a matter which has been struck out is an interlocutory order. In that case the Nigerian High Court considered an application for permission to relist an action that was struck out for the non-appearance of the plaintiffs. The application was brought under Order 40 Rule 6 of the Nigerian Civil Procedure Rules ('Order 40') (an order comparable to Order XIX Rule 2 of the Parish Court Rules) which reads:

> "any cause struck out may, by leave of the court be **replaced** on the cause list on such terms as the court may seem fit." (Emphasis supplied)

[20] In support of its decision to restore the case to the cause list Wheeler J opined:

> "Mr Akanbi has argued that I cannot relist this case because, unlike Bello J in Ebet's [sic] case [**Alhaji Haruna Kassim v Herman Ebert (Trading as Cash Stores)** (1966) 1 ANLR 54], I did not reserve the right to the plaintiffs for liberty to apply to relist. I am unable to agree. It was unnecessary to reserve such a right to the plaintiffs having regard to Order 40, Rule 6 which expressly confers that right on any party whose case has been struck out under Order 40 to apply to have his case relisted. In my view an order striking out a case under Order 40 having regard to Rule 6 is not a final order but an interlocutory order…"

[21] **Sifax (Nig) Ltd v Migfo (Nig) Ltd** (2015) JLP 57282 was a decision of the Court of Appeal of Nigeria on the question of whether a fresh action to replace a suit that was previously struck out for want of prosecution was statute-barred having been filed outside the limitation period. Having found that the fresh action was not caught by the statute of limitation, the court stated:

> "…Where an aggrieved person commences an action without the periods prescribed by the statute and such action is subsequently struck out for one reason or the other without being heard on the merit or subjected to an outright dismissal, such action is still open to be re-commenced at the instance of the claimant and the limitation period shall not count during the pendency of the earlier suit. In other words, computation of time during the pendency of an action shall remain frozen from the filing of the action from it is determined or abates."

[22] **Norda Williams v CMK Bakery Limited** [2020] JMCA Civ 26 was cited for the principle that when the court is seeking to regulate its coercive powers to grant relief from sanction and restore an applicant to a prior position, the limitation period is an irrelevant consideration. That case concerned an appeal challenging the refusal by a judge in the Supreme Court to grant relief from sanction. The claimant's case had been

struck out when she failed to attend a case management conference as required by an "unless order". In assessing whether to grant relief from sanction, the judge considered whether granting the claimant relief from sanction would have deprived the respondent of a defence under the statute of limitations. This court found that the limitation period was an irrelevant consideration. In delivering the written judgment of the court, Foster-Pusey JA said at para. [72]:

> "…I agree with the submissions of the appellant that the question as to whether the respondent would be deprived of a limitation defence, were the application for relief from sanctions to have been granted, did not arise in the context of this matter and the application before this court…[The appellant] filed a claim…well within the limitation period. If the application for relief from sanctions had been granted, the claim would have continued with the defence filed by the respondent…No issue of the respondent being deprived of a limitation defence arose in the circumstances of the claim to which the respondent had already filed its defence and so the judge took into account an irrelevant consideration."

[23] The case of **Urban Development Corporation of Trinidad and Tobago v John Calder Hart and others** (unreported), High Court, Trinidad and Tobago, CV2012-01753, judgment delivered 31 January 2020, dealt with a similar point. It concerned an application for relief from sanction by the claimant whose case had been struck out because of her failure to apply for a case management date. The court granted the claimant's application for an extension of time to file an application for relief from sanction. In addressing the limitation point raised by the defendant, the court, at para. 80, stated:

> "…At the time of filing, such a defence was not available to the Defendants. At the time of this decision, that defence is not available to them (the Defendants) unless the extension of time and/or relief from sanction is not granted. It is not for the court to create a limitation defence for the Defendants that did not exist at the time of commencement."

[24] In **R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd** [1976] 1 ALL ER 897, an order for judgment was made in favour of the landlord in the tenant's absence. That order was set aside conditional on the tenant paying certain sums into court by a particular date, failing which the original order would stand. The tenant did not comply with the order but made an application to vary the order by extending the time for compliance. The application was granted but quashed by the Divisional Court on grounds that the original order was final and conclusive between the parties, and the rules of the court had no provision whereby the time limit in the order could be extended. Upon appeal, the Court of Appeal held that the County Court had a wide inherent jurisdiction to control its own procedure. Lord Denning MR expounded on the court's jurisdiction in this way, at page 900:

> "Equally I say that it is inconceivable that the county court should be hampered in the way that is suggested here. The court obviously has power to enlarge the time when the application is made within the time originally fixed. So also when it is made after the time has elapsed...Every court has inherent power to control its own procedure, even though there is nothing in the rules about it."

[25] Later in the judgment, he remarked:

> "I have one further observation to make. It is about *Whistler v Hancock*. It seems there to be suggested that if a condition is not fulfilled the action ceases to exist, as though no extension of a time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again by extending the time."

Submission on behalf of the respondent

[26] At the close of the appellant's submissions, counsel for the respondent conceded that the learned judge had erred, as a matter of law, in deciding that she had no jurisdiction to restore the plaint because the limitation period had run.

Discussion and analysis

[27] It is clear from paras. 43, 49 and 50 of the written judgment that the learned judge had, in fact, decided the application to restore the plaint on the limitation point, that is to say, that since the limitation period had expired by the time of the application to relist she could not restore the plaint to the hearing list. Paras. 43 and 49 of her decision are now reproduced.

> "43. The Statute of Limitations must also be relevant where, as occurred in this case the plaint is struck out and the plaintiff seeks to relist his plaint after the limitation period has expired. The striking out order, even where the plaint is not struck out on its merits brings the plaint to an end. If it is so revived, the plaintiff, in my view must make this application before limitation expires on the plaint as the court has no discretion to extend the limitation period.
>
> …
>
> 49. There is no discretion to extend the limitation period and the Parish Court rules must be interpreted in light of this limitation."

[28] I have already made reference to para. 50 above so I will not repeat it.

[29] As indicated earlier, the sole issue undertaken in this appeal is whether the learned judge erred in her determination that she had no jurisdiction to restore the plaint for the reasons given.

[30] It is not necessary to look beyond the framework that has been set out in section 185 of the Act and Order XIX Rule 2 of the Rules, both of which have been reproduced above. Under section 185 of the Act, a plaintiff who fails to appear will have the plaint put to the end of the list of causes for trial, and if, when the time comes for it to be dealt with the plaintiff has still not appeared, it is struck out. This is where Order XIX Rule 2 comes into play and gives that plaintiff a possible remedy. He can apply to have the plaint relisted and the court "may order such action or matter to be restored to the list…".

[31] The plain meaning and effect of these provisions is that when a plaint is struck out, for reason that the plaintiff did not appear in the matter, it does not become extinct but is only put in abeyance with the possibility of being revived if the court is satisfied that, in all the circumstances, the matter should be restored to the list of causes. It becomes a pending matter in the sense that steps may be taken, by the plaintiff, to continue it. Order XIX Rule 2 permits the continuation of such an action. This is substantially the meaning and effect of Order 40 which uses the word "replace", interpreted by the courts to mean "relist" (see **Nigeria Airways Ltd v Nuru Hajaj Company Ltd,** at page 166).

[32] Given that Order XIX Rule 2 does not give the plaintiff an automatic right to have the plaint restored or relisted, the defendant would still have the opportunity to establish reasons why this should not be permitted by the court. In this sense, Order XIX Rule 2 permits a judicial action for the proper administration of justice. It is an expression of the court regulating its own coercive powers and processes, as counsel for the appellant aptly puts it. As we have seen from the authorities considered above, in such a case, the limitation point would not arise.

[33] The learned judge accepted that the plaint was filed seven months before the statute of limitations would run against the plaintiff. It having been struck out, for non-attendance of the plaintiff, the statute of limitations was inapplicable to the decision whether to restore it to the hearing list. The learned judge, therefore, fell into error when she wrongly put the application to restore the plaint into the category of cases where a plaintiff, after the expiry of the limitation period, wishes to join a new defendant to a plaint or wishes to amend the claim in relation to damages which were not pleaded previously or wishes to add a new cause of action to his claim.

[34] Unlike in the latter examples, the limitation point is irrelevant to the exercise of the court's discretion under Order XIX Rule 2. It is my view that the exercise of the court's discretion under that provision must, instead, depend significantly, if not wholly, on the

reasons advanced for the non-attendance, the merits of the case, the question of delay and the degree of prejudice to the defendant.

Conclusion

[35] Having carefully considered the comprehensive written and oral submissions made on the appellant's behalf as well as the helpful authorities relied on by counsel, it is my view that the learned judge erred in coming to a determination that she had no jurisdiction to restore the plaint to the hearing list on account of the limitation period having expired; and that to restore it to the list would have had the effect of extending the limitation period. The learned judge was plainly wrong when she treated the "striking out" of the plaint as having brought "the plaint to an end". The effect of the relevant provisions of section 185 of the Act is not an automatic end to the action. The act of "striking out" is only to remove the plaint from the list of causes for trial, with the possibility of being restored, in accordance with Order XIX Rule 2, if the court is so satisfied.

[36] For these reasons I agreed with the decision to allow the appeal in terms of the orders at para. [6] above.