[2012] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**BUSINESS VENTURES AND SOLUTIONS INC**	**1ST APPELLANT**
AND	**ANTHONY DENNIS THARPE**	**2ND APPELLANT**
AND	**CAPITAL ONE NA (Trustee of the estate of Alexander Burnham)**	**RESPONDENT**

Miss Judith Clarke instructed by Judith M Clarke and Co for the appellants

Miss Veronica Morris instructed by Ho Lyn, Ho Lyn and Morris for the respondent

26 June and 5 November 2012

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA and agree with the reasoning contained therein.

PHILLIPS JA

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

BROOKS JA

[3] On 3 January 2006, Mr David Rubin, the executor of the estate of the late Alexander Burnham, entered into an agreement to sell to the 1st appellant, Business Ventures and Solutions Inc (Business Ventures), all the interest of the estate in real property situated at Montego Bay in the parish of Saint James. Despite the fact that the registered title for the property was transferred into Business Ventures' name, it has failed to pay the balance of the purchase price of US$410,000.00. A claim was, therefore, filed in the Supreme Court against Business Ventures, as well as two of its officers, Mr Anthony Dennis Tharpe and Ms Jacqueline Buchanan, seeking an order that the contract for sale be rescinded and that the property be re-transferred to the estate. The claim was, however, filed, not by Mr Rubin, but by Capital One NA (Capital One), ostensibly in the capacity of "Trustee of the estate of Alexander Burnham".

[4] Mr Tharpe filed an acknowledgement of service of the claim form. He did so in a personal capacity but purportedly on behalf of all three defendants. He also, again purportedly on behalf of all three defendants, filed a document entitled "Defence and Counterclaim". The closest that the document came to complying with the relevant provisions of the Civil Procedure Rules (CPR) was that its heading was correct and the certificate of truth at the end, was correctly worded and signed. What came in

between the beginning and the end of the document were 13 pages of, what can only be described as, a contemptuous disregard of the requirements for statements of defence, as set out in rule 10.5 of the CPR.

[5] When the document came before Beckford J during a case management conference on 29 February 2012, the learned judge ordered that the "[d]efence as filed is struck out". The learned judge also gave "[j]udgment for the Claimant with costs to be agreed or taxed". Business Ventures and Mr Tharpe have appealed against those orders.

[6] On 26 June 2012 when we heard this matter, we made the following orders:

> "1. The appeal is allowed.
>
> 2. The judgment is set aside.
>
> 3. The defence shall stand struck out unless the defendant files and serves an amended defence within 14 days of the date hereof.
>
> 4. There shall be no order as to costs."

[7] These orders were made, not so much because of any intrinsic value that the appellants' document possessed, but mainly because of two critical flaws in the claim. The first flaw concerned the status of the entity that had filed the claim. The second was in connection with the claim against Mr Tharpe and Ms Buchanan.

[8] In order to appreciate the first flaw a few more details of the background to the claim must be disclosed.

The background to the claim

[9] In its particulars of claim, Capital One stated that Mr Rubin died in 2007. Before he died, however, North Fork Bank was appointed, in 2006, as a co-trustee, along with him for the estate of Alexander Burnham. This appointment was done by the Surrogate Court of Queens County, New York, in the United States of America. Capital One further states in its particulars of claim, that North Fork Bank was merged into Capital One as of 1 August 2007. Capital One seemed to justify its status as claimant by reason of those developments.

The flaws in the claim

[10] What the particulars of claim do not state, and it does not appear that this ever occurred, is that North Fork Bank was ever appointed by the Supreme Court of Jamaica as a personal representative for Mr Burnham's estate. So when Mr Rubin died intestate in 2007, he left North Fork Bank as the sole trustee of the estate as far as the Surrogate Court of Queens County was concerned, but without a legal representative in the eyes of the Supreme Court of Jamaica. The merger of North Fork Bank into Capital One, even if it had been recognised by the Surrogate Court of Queens County, would not, without further steps being taken, have entitled Capital One to be recognised by the Supreme Court of Jamaica.

[11] Capital One, therefore, had no standing which allowed it to bring any claim on behalf of the estate. That would have been the first and major obstacle to Capital One being entitled to judgment in this claim.

[12] The second difficulty with the claim was that Capital One included Mr Tharpe and Ms Buchanan as defendants, on the basis that they were, respectively, the director and secretary of Business Ventures and were the persons who had signed the document on behalf of Business Ventures. Capital One also stated in its particulars of claim that Mr Tharpe, at some stage, "agreed to pay the balance of the purchase price together with interest but requested time to make the necessary arrangements". He also, according to Capital One, "has repeatedly given assurances of completing the [purchase] by paying the outstanding amounts but has repeatedly failed to do so". It did not state, however, the capacity in which Mr Tharpe acted. There was no other averment that placed any personal liability on either of these two officers of Business Ventures. This situation could be another obstacle to Capital One succeeding on this claim.

[13] Based on the abovementioned flaws, Capital One was not entitled to judgment on the claim. The learned judge was entitled, by virtue of rule 26.1(2)(j), to give judgment on a claim after a decision on a preliminary issue but should have considered those matters in deciding whether to grant judgment for Capital One. There remains, also, the question of whether the learned judge was correct in striking out the document filed by Mr Tharpe.

The exercise of the judge's discretion to strike out the defence

[14] A careful reading of the document filed by Mr Tharpe is, and would have been for the learned judge, a daunting, distasteful exercise, from both a legal and a moral standpoint. Such a reading would have, however, revealed the seeds of a defence to the claim. The ones that had some legal credibility included:

a. The standing of Capital One is questioned.

b. The purchaser has not repudiated the contract and therefore the vendor is not entitled to rescind it.

c. The property had been legally transferred and an oral agreement existed between the vendor and the purchaser that amended the terms of the sale contract in respect of the time for payment of the outstanding balance of the purchase price. Both parties have made amendments and compromises that were mutually accepted. These arrangements were effected by David Rubin and have been acted on for approximately five years.

d. It was agreed between the parties that the outstanding balance would have been converted into an unsecured loan with interest payable thereon. The capacity of each of the parties had therefore been transformed from vendor and purchaser respectively, to creditor and debtor.

It is unnecessary at this stage, to embark on an analysis as to whether Mr Tharpe, not being an attorney-at-law, was entitled to file a defence on behalf of any person, other than himself.

[15] When the matter came on before the learned judge, she was entitled, pursuant to rule 26.3(1), to strike out the document or any part thereof, at least because it was "prolix [and] does not comply with the requirements of [Part 10]" (rule 26.3(1)(d). Miss Clarke, appearing for Business Ventures, submitted that before taking such a step, however, the learned judge was obliged to ensure that Business Ventures had warning of the impending fate of the document.

[16] Learned counsel argued that the decision to strike out may be triggered either by the court acting on its own initiative or on the application of another party to the claim. Miss Clarke submitted that, if, as occurred in the instant case, the court was minded, of its own initiative, to order the document to be struck out, it was obliged to have given Business Ventures "a reasonable opportunity to make representations" pursuant to rule 26.2(2). Seven days notice of the court's intention to take such a step must be given (see rule 26.2(4)).

[17] No such notice was given, submitted Ms Clarke, and therefore the striking out was improper. In addition to the breach of rule 26.2, Miss Clarke continued, the striking out was against the spirit of allowing a defendant the opportunity to "put his house in order". She argued that the learned judge should have, in the circumstances, especially taking into account the fact that the defence had been prepared and filed by

a layman, allowed a fresh statement of defence to have been filed. This would have been the appropriate exercise of her discretion under rule 26.3 of the CPR.

[18] Support for the latter submission may be found in **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934. In that case, Lord Woolf MR, in explaining the sanction of striking out of a statement of case in the regime of the CPR, said at page 940b:

> "Under r 3.4(2)(c) [the English CPR equivalent of rule 26.3(1)(a)] a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. **In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out**." (Emphasis supplied)

Lord Woolf went on to state that there were alternative powers available to the court to make it clear that it would not tolerate breaches of its rules. He opined that in many circumstances, the alternative powers should be utilised, "because they produce a more just result" (page 940e).

[19] There is merit in the submissions by Miss Clarke. The learned judge in the instant case, having seen the distressing state of Business Ventures' case, ought to have given it an opportunity to cure the defects. Despite the offensive character of the document filed by Mr Tharpe, the learned judge ought to have given Business Ventures time to file an amended defence, rather than pre-emptorily striking out its statement of

case. The alternative power of an "unless order" could have been exercised to ensure that the matter progressed quickly.

Conclusion

[20] It is for the reasons stated above that we made the orders that have been set out in paragraph [6] of this judgment.