[2011] JMC A Civ 43

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**CAPITAL AND CREDIT MERCHANT BANK LTD**	**APPELLANT**
AND	**ISAAC GORDON**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the appellant

Brian Moodie instructed by Samuda and Johnson for the respondent

5 October and 2 December 2011

HARRIS JA

[1] I have read in draft the judgment of my brother Hibbert JA (Ag). I agree with his reasoning and conclusion and have nothing further to add.

DUKHARAN JA

[2] I too agree with the reasoning and conclusion of Hibbert JA (Ag.).

HIBBERT JA (Ag)

[3] On 25 July 2008, the appellant loaned to the respondent the sum of $3,000,000.00 to assist with the purchase of equipment for use in his motor vehicle repair business. The repayment of the loan was secured by a promissory note executed by the respondent as well as a bill of sale also duly executed by the respondent in respect of equipment owned by the respondent and listed in the Second Schedule thereto. A term of this bill of sale stated:

> "1) In consideration of the Bank making or continuing advances or otherwise giving credit or affording banking facilities for so long as the Bank may think fit to the Borrower, the Borrower as BENEFICIAL OWNER free from encumbrances HEREBY ASSIGNS, TRANSFERS and SETS OVER UNTO the Bank all and singular the said chattels TO HOLD the same UNTO the Bank absolutely subject to the proviso for entry of satisfaction hereafter contained."

[4] The respondent defaulted on the loan and the appellant consequently filed a claim on 18 March 2010 to recover the sum of $4,059,741.54 being the sum due under the loan as at 5 February 2010. The appellant also claimed interest on the outstanding principal of $2,730,151.10 from 5 February 2010 to the date of repayment of the debt.

[5] The respondent filed an acknowledgement of service in which he denied liability. The respondent, however, on 11 June 2010, filed a defence out of time containing the following:

> "1. The Defendant disputes the claim on the following grounds:
>
> 2. The Defendant does not deny liability but disputes the principal amount and interest claimed on the basis that the said amounts are not owed.
>
> 3. The Defendant seeks to cross examine the Claimant on the issue of quantum and to make submissions to the Court at the Assessment."

[6] On 3 November 2010 the appellant filed a notice in the court seeking among others, the following order:

> "1. That summary judgment be entered in favour of the Claimant against the Defendant on the Claim in the sum of $4,059,741.54 with interest on the sum of $2,730,151.10 at the rate of 28% per annum or $2,123.45 per diem from the 6th February 2010 until the date of payment."

[7] This application was supported by the affidavit of Olive Callender, the Debt Recovery Manager of the respondent. Paragraph 12 of this affidavit stated:

> "12. That the Claimant repossessed items used to secure the loan on June 3, 2009 but returned it in order to mitigate its loss, for any alleged wrongful seizure, when allegations arose between the partners of the business for which the loan was borrowed that the Defendant was not authorised to pledge the security."

[8] On 17 January 2011 the respondent filed an application to pay by instalments. This was supported by an affidavit sworn to by him. In this affidavit he denied owing the sum claimed. He further asserted that the appellant retained possession of some of

the items which were seized and had not provided, despite requests, a valuation of the items which were seized. Paragraph 15 of that affidavit stated:

> "15. That I am also advised by my Attorneys-at-Law that in keeping with my instructions, by letter dated January 12, 2011 in furtherance of meetings and discussions with the Bank's Attorney-at-Law, they indicated a proposal reflective of my best position that the debt be capped at $2,000,000 inclusive of interest, a lump sum of $300,000.00 be paid and that the balance be liquidated by monthly installments [sic] of $48,000.00. I exhibit herewith a copy of the said letter marked "IG-1" for identification."

[9] On 19 January 2011 the appellant filed an affidavit sworn to by Miss Callender. Paragraphs 6 and 8 of that affidavit stated:

> "6. That this affidavit is further to the Claimant's Affidavit in Support of Application for Summary Judgment filed on November 4, 2010 and in response to the Affidavit of Isaac Gordon in Support of Application to Pay By Instalments which was filed on January 17, 2011 (hereinafter, "the Affidavit)
>
> 7. …
>
> 8. That the Claimant repossessed items used to secure the loan on June 3, 2009 but returned some of it in order to mitigate its loss, for any alleged wrongful seizure, when a dispute arose between the Defendant and Mr. Tomlinson as to whether he was authorised to pledge the goods as security."

In paragraph 15 she stated that the respondent's balance as at 18 January 2011 stood at $3,598,566.85.

[10] Both the application for summary judgment and the application to pay by instalments were heard by Brooks J, who on 25 May 2011 made the following orders:

> "1. The application for summary judgment is refused;
>
> 2. The application to pay by instalments is refused;
>
> 3. The defendant is at liberty to file and serve an amended defence on or before 8 June 2011, failing which the Claimant shall be at liberty to enter judgment in default of defence."

The learned judge thereafter on 17 June 2011 made case management orders in keeping with rule 15.6(3) of the Civil Procedure Rules (CPR).

[11] In arriving at his decision as it related to the application for summary judgment, Brooks J stated:

> "There are issues raised by the parties concerning the seizure, partial return, partial retention and partial sale of equipment, which should have been security for the loan made to Mr Gordon. It is my view that the interests of justice require that those issues be dealt with at an assessment of the sum due by Mr Gordon. Mr Gordon must, however, file a defence which complies with rules 10.2 (4), 10.5 and 14.7 of the CPR. There does not seem to be any rule which prevents me from allowing Mr Gordon time to amend his defence so as to comply with these rules. I am, therefore, inclined to afford him that time despite the fact that there has been no application to amend his defence."

[12] It is from this refusal to grant summary judgment that the appellant has appealed. The grounds relied on are as follows:

"a. The learned judge erred as a matter of fact and/or law in refusing the application for summary judgment:

i. The Respondent admitted liability in his Defence but failed to specify the portion that he admitted.

ii. There was no affidavit evidence on behalf of the Respondent within the meaning of r. 15.5(2) of the CPR.

iii. The Affidavit in Support of the Application to Pay by instalments filed on the 17th January 2011 filed on behalf of the Respondent and on which the learned judge relied to support his findings that there were issues to be tried contained an admission at paragraph 15 for the sum of $2,000,000.

iv. The Respondent accepted on the basis of submissions made on his behalf that the Appellant was entitled to judgment on admission for part of the money owed and to refer the disputed amount for damages to be assessed-(**Page 9 - Paragraph 3 of the Reasons for Judgment).**

v. The learned judge having found that the Respondent did not make a proper admission within the rule [sic] should, on the basis of the admission then made, have found that he had no prospect of successfully

defending the Claim as to the quantum in relation to the $2,000,000.00 and enter summary judgment for that portion of the Claim at the very least.

b. The learned judge erred as a matter of fact and/or law in allowing the Respondent to amend to meet an objection to the Respondent's Defence.

c. The said amendment to meet the objection is such as to amount to a miscarriage of justice:

1. The Respondent has since amended and is still non compliant with rules 10.2(4) and 14.7.

ii. The Appellant is in no position to enter a default judgment as ordered by the judge as there is a Defence even if it is defective taking into account that a default judgment is a special creation under Part 12 of the rules."

[13] Before this court, Mrs Gibson Henlin submitted that paragraph 15 of the affidavit of the respondent, which was filed in support of his application to make payments by instalments, contained an admission that he was indebted to the appellant in the sum of $2,000,000.00. This, however, was not sufficient to allow the appellant to obtain judgment on admission as this admission was not in compliance with the provisions of part 14 of the CPR which governs the entry of judgment on admission.

[14] Mrs Gibson Henlin further submitted that, as the affidavit of the respondent was not filed for the purpose of providing evidence at a summary judgment hearing in accordance with rule 15.5(2) of the CPR, the learned judge could not properly use it in

determining whether or not summary judgment should be granted. Additionally, she submitted, the learned judge ought to have ignored the portions of Miss Callender's affidavit responding to the respondent's affidavit in respect of the application to pay by instalments.

[15] Mrs Gibson Henlin closed by submitting that, based on the admission contained in the affidavit of the respondent, which she asserted was improperly relied on, the respondent had no real prospect of defending the claim and as a consequence the application for summary judgment should have been granted. She further contended that summary judgment could have been given for an amount to be assessed.

[16] Mr Moodie, on the other hand, argued that Brooks J properly considered both affidavits of Miss Callender as well as that of the respondent as the two applications were heard together without any objection from the parties. He submitted that the affidavits of Miss Callender conflicted with each other and that the second affidavit was at variance with the sum for which summary judgment was requested.

[17] While acknowledging deficiencies in the defence filed, he further submitted that when the affidavits of Miss Callender and the respondent are examined along with the amount claimed and for which summary judgment was requested, it is clearly shown that there are issues to be tried. Consequently, he submitted, Brooks J was correct in refusing to grant the request for summary judgment.

[18] Mrs Gibson Henlin has accepted that the appellant could not have obtained a judgment on admission against the respondent in accordance with part 14 of the CPR as the wording of the defence did not allow for it. Judgment on admission may be obtained by a claimant under rule 14.6 where the defendant admits in his acknowledgement of service the whole of the claim seeking the payment of a specified sum of money. By rule 14.7 judgment on admission may be obtained where the defendant, on a claim seeking payment of money only, admits a specified sum of money or a specified proportion of a claim for an unspecified sum of money in the acknowledgement of service or defence. Rule 14.8 allows judgment on admission in a claim where the only remedy sought is the payment of an unspecified sum of money and the defendant in his acknowledgment of service admits liability to pay the whole of the claim.

[19] It is obvious that neither the respondent's acknowledgment of service nor his defence would allow for the entry of a judgment on admission. It is for this reason that the application for payment by instalments was refused. Rule 14.9(1) state:

> "A defendant who -
>
> (a) makes an admission under rules 14.6, 14.7 or 14.8 and
> (b) is an individual,
> may make a request for time to pay."

[20] This inability of the appellant to obtain judgment on admission, although the respondent has admitted that he is indebted to the appellant, prompted the appellant to seek summary judgment. Rule 15.2 of the CPR states:

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

[21] Rule 15.5 states:

> "(1) The applicant must –
>
> (a) file affidavit evidence in support with the application; and
> (b) serve copies on each party against whom summary judgment is sought, not less than 14 days before the date fixed for hearing the application.
>
> (2) A respondent who wishes to rely on evidence must -
>
> (a) file affidavit evidence; and
> (b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

[22] Bearing in mind that the applications to pay by instalments and for summary judgment were heard together, Brooks J was obliged to consider the contents of the two affidavits of Miss Callender and that of the respondent and, in my view, was entitled to use them insofar as they were relevant to the issues in each application. No

doubt, the object of rule 15.5 is to ensure that each party is aware of what is asserted, and an interpretation of that rule in order to achieve the overriding objective to ensure that cases are dealt with justly would, in my view, facilitate the use of any affidavit evidence relevant to the issues in the applications.

[23] The judgments of their Lordships in **Swain v Hillman** [2001] 1 All ER 91 clearly indicate that the consideration of an application for summary judgment should not involve the conduct of a mini trial. At page 95 Lord Woolf MR (as he then was) stated:

> "Useful though the power is under Part 24 [the equivalent of Part 15 of our CPR] it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial."

This passage was cited with approval by Panton JA (as he then was) at paragraph 11 of his judgment in **Stewart and Others v Samuels** SCCA No. 2/2005, delivered on 18 November 2005.

[24] It is to be noted that although the hearing of the applications by Brooks J commenced on 21 January 2011 and the second affidavit of Miss Callender stated that as of 18 January 2011 the respondent was indebted in the sum of $3,598,566.85, no attempt was apparently made to amend the application for summary judgment to reflect this. The learned judge, in light of the contents of the second affidavit of Miss Callender, could not properly have made the order for summary judgment in the sum of $4,059,741.54.

[25] I cannot agree with Mrs Gibson Henlin that paragraph 15 of the affidavit of the respondent contained an admission of an indebtedness of $2,000,000.00. In order for the learned judge to determine what was owed by the respondent, he would have to conduct a trial of all the unresolved issues in the case. It seems obvious that in granting leave to the respondent to amend his defence, the learned judge was seeking to facilitate the entry of judgment on admission and perhaps a proper application for payment by instalments. This would be in keeping with the overriding objective to ensure that cases are dealt with expeditiously and fairly. Consequently, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

HARRIS JA

ORDER

Appeal dismissed. Costs to the respondent to be agreed or taxed.