

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 76/2011

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

**BETWEEN NORMAN HARLEY APPELLANT
AND DOREEN HARLEY RESPONDENT**

**Dr Lloyd Barnett and Raoul Lindo instructed by Bishop & Partners for the
appellant**

Ms Carol Davis for the respondent

6 and 10 May 2013

ORAL JUDGMENT

PANTON P

[1] This appeal is from the decision of Mr Justice Marsh delivered on 27 May 2011. He had before him what he described as an amended notice of application for court orders (page 27 of the record). In that notice of application for court orders the respondent in this appeal sought an order for the defence of the appellant to be struck out for failing to obey the order of the Court of Appeal dated 26 March 2010 as also for failing to obey the order of the Supreme Court dated 7 February 2011. The learned judge made the order sought and it is from that decision that this appeal has been filed.

[2] The parties are husband and wife and the matter arose as a result of a statement of claim which was filed on Christmas Eve, 2002. That statement of claim was filed by the respondent. A defence and counterclaim was filed as well as a defence to the counterclaim.

[3] A case management conference was held as long ago as 12 July 2005 and the trial was fixed for 4, 5 and 6 July 2007. On 24 May 2007 the appellant made an application to strike out the respondent's claim on the ground that it disclosed no reasonable cause of action.

[4] The application was heard by Mr Justice Bertram Morrison in the Supreme Court on 28 June 2007, when he dismissed the application with costs to the respondent. Subsequent to that decision there was a procedural appeal and the matter came before Harris JA. She made an order on 23 March 2010, allowing the appeal in part, and ordered that:

- i) the claims for an interest in the properties owned by Harley Corp Guarantee Trust and Hargal Ltd are struck from the statement of claim;
- ii) the order of Mr Justice Morrison refusing to grant the appellant relief from sanction is set aside;
- iii) the appellant is to file a statement of account prepared by a certified accountant and pay into court one half of the net balance of the proceeds of sale of the Miami property within seven days of the date hereof, failing which the defence shall stand struck out;

and

- iv) costs be awarded to the respondent to be agreed or taxed. That order was made on 26 March 2010.

[5] The order of Harris JA in respect of filing of a statement of account prepared by a certified accountant has not been complied with and indeed subsequent to the expiration of the time for the compliance with that order, an application was made before Mr Justice Williams in the Supreme Court for an extension of time and Mr Justice Williams purported on 10 February 2011 to extend the time, giving the appellant seven days from that date to file a detailed statement of account prepared by a certified accountant. To date, that too has not been complied with, in that, the documents that have been placed before the court do not fall into the category of a statement of account prepared by a certified accountant.

[6] Before us, Dr Lloyd Barnett appearing for the appellant has submitted that Mr Justice Marsh erred in his ruling that what was filed was not a statement of account. He further submitted that striking out the defence deprives the appellant of the ability to put forward any claim to the property and that the courts have been hesitant to visit such consequences on a litigant. He submitted that what was needed was for the court to issue fresh directions with a view to ascertaining the necessary information.

[7] Ms Carol Davis in response, on behalf of the respondent, has pointed out that by the order of Harris JA, the defence has been struck out and that there has been no appeal against that order. She questioned the authority of Mr Justice Williams to extend the time to allow the appellant to comply with the order of the Court of Appeal

and submitted that Mr Justice Williams had no jurisdiction. However, she submitted that even if he had the jurisdiction, the court should view what has been filed has not been in compliance.

[8] Incidentally, the order of Harris JA is dated 26 March 2010 while the judgment is actually dated 23 March. That is important in terms of the seven days to be calculated. It seems as if that order that is on page 21 of the record is not in harmony with the actual judgment which has 23 March 2010.

[9] We are of the view that the non-compliance with the order of Harris JA meant that the defence had been struck out and that by the time efforts at resurrection were being made before Mr Justice Williams, the defence was already dead beyond redemption and that all that had transpired before Mr Justice Williams was an exercise in futility and, with the greatest of respect, a waste of time. The order of Harris JA not having been appealed, the defence remains struck out.

[10] In the circumstances, the appeal is dismissed and the order of Mr Justice Marsh is affirmed. Costs of the appeal to the respondent to be agreed or taxed.