[2017] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 9/2016

BEFORE: **THE HON MISS JUSTICE PHILLIPS JA**
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SYLVESTER KETTLE**	**APPELLANT**
AND	**DONALD FORBES**	**RESPONDENT**

Wilwood Adams instructed by Robertson, Smith, Ledgister & Co for the appellant

Maurice A Smith for the respondent

28 March, 4 April and 22 November 2017

PHILLIPS JA

[1] This is an appeal from the decision of a judge in the Parish Court for the parish of Manchester who struck out the appellant's case with costs to the respondent, pursuant to section 185 of the Judicature (Parish Courts) Act (the Act), on the basis that the appellant was overseas without any reasonable explanation and had therefore been absent from court on the trial date.

[2] I have had the opportunity of reading the draft reasons for judgment of my learned brother F Williams JA. While I agree with his ultimate conclusions, I wish to add a few words of my own.

[3] I accept that the procedural history; the conduct of the litigation; the parish judge's reasons for his ruling; the grounds of appeal; the summary of the affidavits filed (at the request of the court); and the submissions on appeal by counsel have all been accurately set out by my learned colleague on the bench, so there is no need to repeat them here. I only wish to state that, in my opinion, this matter really concerns an interpretation of sections 185 and 188 of the Act. These sections are as follows:

> "185. 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 its being reached, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear but shall not make proof of his demand to the satisfaction of the Court, it shall be lawful for the [Parish Judge] to nonsuit the plaintiff, or to give judgment for the defendant, and in either case, where the defendant shall appear and shall not admit the demand to award to the defendant, by way of costs and satisfaction or his trouble and attendance, such sum as the [Parish Judge] in his discretion shall think fit, and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same Court can be recovered:
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> Provided always, that if the plaintiff shall not appear when called upon, and the defendant shall appear and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the Court, if it shall think fit, may proceed to give judgment as if the plaintiff had appeared; or, if the defendant shall not pay such fees as aforesaid, but shall admit the cause of action to

> the full amount claimed, or any part thereof, the Clerk shall take a note of such admission on the back of the summons, and at any time within twelve months thereafter on the application of the plaintiff to the Clerk and on payment by the plaintiff of the necessary fees, the Clerk shall enter up a judgment for the plaintiff for the amount admitted and costs, and the judgment so entered shall have the same force and effect as a judgment of the Court.
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> ...
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> 188. It shall not be lawful for any person, except the party to a suit or other proceeding, or a member of his family, or his clerk or servant, or his master, or any officer or clerk of a company or corporation duly authorized under the seal of such company or corporation, or an admitted solicitor, being the solicitor generally in the action for such party, or a barrister or advocate retained by or on behalf of such party, to appear and act for such party in such suit or proceeding; but an appearance by any such person shall be deemed to be an appearance of the party for whom he acts:
>
> Provided always, that in any suit or proceeding in a Court, or in any Court of Petty Sessions, to which the Crown, the Governor-General, the Attorney-General, or a Commissioner as defined in section 2 of the Revenue Administration Act, is a party, any Government officer may appear and act for the Crown, the Governor-General, the Attorney- General, or a Commissioner as defined in section 2 of the Revenue Administration Act (as the case may be); and in any suit or proceeding to which the Chief Technical Director shall be a party, any officer of his Department may: appear and act for him in like manner."

[4] The learned judge of the Parish Court indicated that he had struck out the appellant's case pursuant to section 185 of the Act. But it is obvious to me that section 188 of the Act makes it clear that an appearance by Mr Adams as the attorney-at-law who was generally acting on behalf of the appellant in this matter was deemed to be an appearance of the appellant, the party who he had been representing in the case right up to and on the said 3 November 2015. However, the case was struck out on the basis

that the appellant had not appeared before the court. The parish judge was in my view wrong, having stood down the case, to strike out the same, when the attorney for the appellant appeared in court before the court had adjourned for the day. This was quite properly conceded by counsel for the respondent when submissions were requested from the court as to the proper interpretation to be accorded provisions, 185 and 188 of the Act, as the interplay of these sections had not originally been argued by counsel on the appeal.

[5] I am therefore satisfied that the appearance of Mr Adams in court on 3 November 2015, triggered section 188 of the Act, the appellant had not therefore failed to appear, the learned parish judge was wrong to strike out the case, and the appeal must therefore be allowed, and the matter remitted to the Parish Court for trial before another judge of the Parish Court.

[6] I would make no order as to costs.

F WILLIAMS JA

[7] This is an appeal from a decision of a judge of the Parish Court for the parish of Manchester striking out the appellant's action pursuant to section 185 of the Judicature (Parish Courts) Act, (the Act) on the basis of the appellant's repeated failure to appear in court.

[8] Notice of appeal and grounds of appeal were filed on 13 November 2015 and 18 February 2016, respectively, in the Resident Magistrate's Court for the parish of Manchester (such courts now - since 24 February 2016 - known as Parish Courts). The

respondent, on 26 January 2017, filed a notice of application to strike out the notice of appeal or, alternatively, for it to be dismissed without a hearing.

[9] When this appeal first came on for hearing, counsel for the respondent withdrew the application to strike out and consented to proceeding with the hearing of the substantive appeal only. During preliminary questioning by the court of counsel on both sides, it became clear to the court that there was a lack of evidence (affidavit or otherwise) to address several pertinent issues which arose in the appeal. As such, counsel for the parties sought (and were granted) the court's indulgence to have the matter adjourned to 28 March 2017, for the filing of affidavit evidence to recount the history of the matter as it had unfolded in the Parish Court.

[10] Two affidavits were subsequently filed: that of Mr Wilwood Adams, attorney-at-law for the appellant, filed on 30 March 2017, and that of Mr Maurice A Smith, attorney-at-law for the respondent, filed on 3 April 2017.

Procedural history

[11] On 5 September 2007, the appellant herein (the plaintiff below), lodged with the clerk of the Parish Court for Manchester plaint no 696 of 2007, by which he sought damages against the respondent for trespass and nuisance. In his particulars of claim, the appellant averred that he was the registered proprietor of land situate at Hatfield in the parish of Manchester registered at Volume 1296, Folio 256 of the Register Book of Titles and that the respondent was the owner of adjoining land. It was claimed that the

respondent had personally and by his servants wrongfully entered onto the appellant's property and constructed a concrete wall thereon.

[12] On 16 April 2013, the respondent by his then attorney-at-law, Mr Keith Smith (now deceased), filed in the Parish Court a notice of special defence pursuant to section 45 of the Limitation of Actions Act.

[13] The matter was assigned several mention dates and trial dates. One such date of significance for the purpose of this appeal was 3 November 2015. On that day, when the matter was called up in the Parish Court, the appellant and his counsel were absent. An oral application was made by Mr M Smith to strike out the action. Having heard the submissions of Mr M Smith, the learned judge of the Parish Court stood the matter down. On the late arrival of Mr Adams, the judge of the Parish Court enquired about the whereabouts of the appellant who, he was told, was overseas. The judge of the Parish Court thereafter refused Mr Adams' request for an adjournment and acceded to Mr M Smith's request to strike out the matter.

The appeal

[14] Stemming from the striking out of the action, the appellant filed three grounds of appeal. They are set out as follows:

> "1. The striking out of the Plaint was unreasonable as it cannot be justified on the facts and circumstances of the case. The Plaintiff is a resident of the United States of America but at all material times he was represented by Mr. Dunbar Wilson, now deceased, in the matter who was his duly appointed Attorney.

Apparently this fact was overlooked by the Honourable Magistrate.

2. The refusal of the adjournment was unjustified because the said judge had asked the parties to make a second attempt at mediation subsequent to the first attempt which was inconclusive. It was during this very period when the second attempt at mediation was being pursued that the Defendant's Attorney urged the Court to strike out the plaint.

3. That notwithstanding the power vested in him under Section 185 of the Judicature (Resident Magistrate's Court) Act, the Honourable Judge did not act prudently in striking out the matter given the circumstances extant when the proposition for striking out was posited by the Defendant's Attorney."

Affidavit of Mr Adams

[15] In his affidavit, Mr Adams deposed that on 4 December 2009, his name was entered on the record of the court as the attorney-at-law with conduct of the matter on behalf of the appellant. He stated that the appellant, who is a Jamaican citizen, resides overseas in Florida in the United States of America, but was at all material times represented in the court proceedings by Mr Dunbar Wilson to whom he had granted a power of attorney dated 7 January 2008.

[16] He further deposed that, during the course of the proceedings, the parties failed to arrive at a settlement at any of the two court-referred mediation sessions held in May 2012 and May 2015. Whilst acknowledging that the matter had been before the court for a long time, Mr Adams deposed that, subsequent to the first mediation date, three events occurred that affected the progress of the matter: (i) Mr Dunbar Wilson (the appellant's agent) died; (ii) Mr Keith Smith, the attorney-at-law initially on the

record for the respondent, died; and (iii) His Honour Mr Oswald Burchenson (before whom the parties had appeared over the years), retired from the bench and the matter was set before another judge of the Parish Court.

[17] Counsel also deposed that on 23 February 2015, when the matter was set for trial, all the parties were present. However, at that time the court encouraged the parties to make a final attempt at resolving the matter through mediation. Pursuant to that, shortly thereafter the respondent referred to the appellant's attorney-at-law a prospective purchaser of the said property in response to the appellant's indication of his willingness to discontinue the action if the property could have been sold.

[18] Counsel highlighted four court dates on which the learned judge of the Parish Court had placed emphasis and taken a position regarding the non-appearance of the appellant. These dates were: 23 March, 21 April, 6 October and 3 November 2015.

[19] On 23 March 2015 (the first of these dates), none of the parties attended court, due (counsel deposed) to pending settlement negotiations. Mr Adams sent a letter to Mr M Smith dated the same date as that court hearing, enquiring into aspects of the settlement negotiations.

[20] On the subsequent court date, 21 April 2015, Mr Adams was absent. This, he deposed, was due to his having been engaged in another matter in another courtroom on the same building. Mr Adams also deposed that, around that date, negotiations were still ongoing between the parties. Exhibited to his affidavit were letters to him dated 24 April 2015 and 21 July 2015, from Mr M Smith, and letter dated 16 July 2015,

from him to Mr M Smith. As it turns out, Mr Adams stated that he did not respond to Mr Smith's last letter as he perceived certain parts of the letter to be discourteous.

[21] The matter was put on the trial list for 6 October 2015. Mr Adams stated that at that time he was still in discussions with the potential purchaser to have the property sold. However, he missed that court date as he was appearing in another court matter elsewhere. His efforts to have another counsel hold in the matter proved futile. Mr Adams deposed that a letter was received from Mr Smith which indicated that another court date was set for 3 November 2015.

[22] Counsel deposed that on 3 November 2015, he was involved in a matter in another court and had sent communication to the clerk of court asking to have the appellant's matter stood down until his arrival. Upon his late arrival the events as stated at paragraph [13] hereof unfolded.

Affidavit of Mr M Smith

[23] Mr M Smith deposed that between 2007 and 2015, the matter was called up in court on about 37 occasions and had last been referred to mediation on 15 April 2014. Mediation failed and a report confirming this dated 9 January 2015 was prepared and submitted by the mediator, Reverend Barrington Soares. The matter was then put back on the trial list as of 21 October 2014.

[24] There had been ongoing efforts by the parties to have the matter settled in 2014, however, those efforts having failed, the matter was placed on the priority trial list and there it remained at the time of striking out.

[25] Between November 2014 and 23 February 2015, no settlement was reached. On 23 February 2015, the date set for the matter to be heard, the parties were present but the matter was not reached as there was a part-heard matter which took precedence.

[26] There were further negotiations with a view to settlement between 23 February 2015 and 23 March 2015; however, no agreement was reached. Counsel deposed that on the subsequent trial date of 21 April 2015, Mr Adams was absent and that he had received no communication from him. The matter was adjourned to 6 October 2015. Between those dates he responded to Mr Adams' letter dated 16 July 2015, by letter dated 21 July 2015, refusing the settlement offers made. (This letter, he deposed, marked the last correspondence geared towards settlement.)

[27] Mr M Smith further averred that on 6 October 2015, the appellant and his counsel were absent from court; that he had received no correspondence from Mr Adams explaining his absence and that efforts to contact him had proven futile. Another priority trial date was set for 3 November 2015. Mr Adams was advised of that date by letter; however, no correspondence was received from him.

[28] Mr M Smith further deposed that on 3 November 2015, he was present at court, however the appellant and his counsel were again absent with no explanation proffered for their absence. Having been invited by the court to make whatever application he saw fit, he made an application pursuant to section 185 of the Act to strike out the plaint on the basis that the respondent was ready for trial and that the appellant's last appearance had been on 23 February 2015. Counsel stated that he thereafter acted on

the instructions of his client to recover costs and as such a bill of costs was laid and subsequently taxed.

Submissions for the appellant

[29] On behalf of the appellant, Mr Adams submitted that in striking out the plaint, the learned judge of the Parish Court failed to take into consideration the entire circumstances of the case which in effect rendered his exercise of discretion unreasonable. In addition, counsel contended, the sanction of striking out should be used sparingly. In any event, Mr Adams deposed and submitted that, at the material time when the application to strike out was made, counsel for the respondent had been aware of the ongoing settlement negotiations and should not have made such an application. Further, the situation was worsened by the fact that Mr M Smith's submissions to the bench regarding the striking out were made in his absence. Mr Adams admitted that the decision to appeal was greatly influenced by the service of the respondent's bill of costs and that the costs to the respondent were later taxed in the sum of $637,637.80.

[30] In his affidavit and through his submissions, counsel outlined the circumstances of the case which, he sought to demonstrate, meant that the learned judge of the Parish Court had acted unreasonably in striking out the action.

Submissions for the respondent

[31] Mr Smith, in his skeleton arguments filed on 27 February 2017, contended that the appeal was premature as the appellant was required first to apply to have the

matter relisted if he could show good cause for his absence. He relied for this submission on the case of **Wilbert Christopher v Helene Coley Nicholson** [2011] JMCA App 23, and argued that the appeal ought to be dismissed as it was lacking in merit. Further, counsel submitted that the learned judge of the Parish Court had correctly exercised his discretion under section 185 of the Act as it was clear that the appellant and his agent had failed to appear and that it was apparent to the learned judge of the Parish Court that the appellant would not appear. Counsel submitted that, importantly for his case, there had been four consecutive absences by the appellant and his counsel. Further, there was no good reason given for the appellant's absence. In respect of the claims by Mr Adams of ongoing settlement discussions, counsel submitted that all attempts at mediation had already been concluded by the time the matter was struck out.

Reasons for the ruling

[32] In written reasons for the ruling, the learned judge of the Parish Court observed that the plaint had been filed from 2007 but was not served until 2009. Further, he noted that there had been several mention and trial dates up to 3 November 2015. The learned judge of the Parish Court stated that there had been at least 20 trial dates set between 2009 and the time of striking out and that, in respect of 2015, the appellant had failed to appear on four occasions: 23 March; 21 April; 6 October and 3 November 2015.

[33] The court having been informed that the appellant was overseas, when the matter was set down for trial as a priority, concluded that no reasonable explanation

was presented for the appellant's absence and that the appellant had been given ample opportunity to appear and prosecute his claim. The request for an adjournment was therefore refused and the judge of the Parish Court proceeded, pursuant to section 185 of the Act, to strike out the action for the appellant's absence on that day against the background of repeated non-attendance. In doing so, the judge of the Parish Court noted that the act of striking out did not necessarily bring the matter to an end, as the appellant could apply to relist his plaint if he could show to the court good cause for his absence.

Discussion

[34] It is evident from a reading of paragraph 8 of the reasons for his ruling that the learned judge of the Parish Court considered the last four instances of non-attendance on the part of the appellant and his counsel as decisive, against the background of the long history of the claim. As pointed out by the learned judge of the Parish Court, section 185 of the Act allows a judge of the Parish Court to strike out a matter where the plaintiff has failed to appear. The relevant parts of the section are as follows:

> "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 its being reached, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear but shall not make proof of his demand to the satisfaction of the Court, it shall be lawful for the Magistrate to nonsuit the plaintiff, or to give judgment for the defendant..."

[35] On the basis of the above-mentioned provision, it is clear that the learned judge of the Parish Court had a statutory power to strike out a plaint for non-appearance of a plaintiff. The statute outlines the procedure to be followed where a judge of the Parish Court is minded to exercise that discretion, in that, the matter must be placed at the bottom of the cause list and if, when the matter is reached, the plaintiff still does not appear "the cause shall be struck out".

[36] The court below exercised the statutory power pursuant to section 185 in circumstances in which it took the view that there had been inordinate delay on the part of the plaintiff in having the matter tried. In other words, the use of the court's power in the circumstances in which it was exercised, might be viewed as being analogous to the dismissal of a matter for want of prosecution. If this analogy is correct, then a good starting point in considering the jurisdiction of a court to dismiss proceedings for want of prosecution is to be found in the decision of **Rainsford v Limerick Corporation** [1995] 2 ILRM 561, wherein Finlay P set out several principles of general application. These principles may be summarised to be that: (i) the party seeking the dismissal must show that the delay complained of has been inexcusable and inordinate; and (ii) the court should further consider whether the balance of justice favours the matter continuing.

[37] The case of **HA v CB** [2015] IEHC 154 further sets out the relevant principles regarding dismissal of an action for want of prosecution (per McDermott J at paragraph 26):

> "26. ...The questions to be determined are whether the delay on the part of the person seeking to proceed has been inordinate and if inordinate, whether it has been inexcusable. The onus of establishing that delay has been both inordinate and inexcusable lies upon the party seeking to dismiss the claim. If the court concludes that the delay has been inordinate and inexcusable, the court must then proceed to exercise judgment on whether in its discretion on the facts of the case, the balance of justice is in favour of or against, allowing the case to proceed".

[38] It is evident that the judge of the Parish Court upon calling up the matter initially, thereafter stood it down, by which time counsel for the appellant had arrived. From that narrow perspective, the learned judge of the Parish Court would have at least partially followed the procedure outlined in the statute. However, in light of Mr Adams' attendance and the existence of section 188 of the Act, could it fairly be said that the appellant had not appeared? This answer to this question and the interaction between sections 185 and 188 will be explored later on in this judgment. For the time being, however, we will continue to discuss the matter along the lines on which it was fully argued before the court.

[39] In relation to Mr Adams' complaint that the striking out was unreasonable in light of the circumstances of the case, a number of questions arise. A question arises, for example, as to whether the learned judge of the Parish Court had had sufficient regard to the broader history of the matter. A perusal of the endorsements on the back of the plaint, for example, discloses that, over the years, the matter had been adjourned on numerous occasions on at least one of which either the respondent or his attorney-at-law or both of them were absent (see, for example, the endorsements for 17 July 2012

and 21 January 2014). So that the blame for the fact that the matter was not resolved over an extended period of time could not fairly be laid solely at the feet of the appellant.

[40] Another question arises in respect of what occurred in the matter up to (at least) July of 2015. In his affidavit, Mr Adams gives the impression that negotiations or attempts at settlement were ongoing at the time of the striking out in November 2015. In this regard Mr Adams' evidence differs from that of Mr Smith. Mr Smith deposes that all attempts at settlement had ceased by July 2015. However, even accepting what Mr Smith deposed to in his affidavit, it would have to be further accepted that there was an attempt being made at settlement up to 21 July 2015, which ended with his letter of that date. Thereafter, there would only have been two other court dates - that in October and that in November – on the latter of which the action was struck out.

[41] On the other hand, a question also arises as to whether counsel for the appellant's reason for his non-attendance on at least three consecutive dates could in effect be attributed at least in part to administrative inefficiencies in managing his cases. Also, although Mr Adams had deposed that Mr Wilson, the representative of the appellant, was present in court on the majority of occasions before his death, it emerged during the hearing of the appeal that Mr Wilson died before the later four instances of absence which led the learned judge of the Parish Court to strike out the claim. On the death of Mr Wilson, no one appears to have been granted power of attorney to represent the appellant (then plaintiff), Mr Kettle, in court. In fact, the endorsements on the plaint in the record of proceedings indicate that Mr Wilson's last

appearance in court was 21 October 2008. Furthermore, counsel, even if he had indeed been making efforts at settlement on behalf of his client after July of 2015, would have had the responsibility of ensuring that the interest of his client was protected by communicating the same to the court and counsel on the opposing side and to have attempted to have the matter removed from the priority trial list.

[42] However, even taking into account those aspects of the matter that are not in favour of counsel for the appellant, one still has to bear in mind that the act of striking out a litigant's claim is generally viewed as a draconian step and as a last resort. In the case of **Villa Mora Cottages Limited and Monica Cummings v Adele Shtern** (unreported) Court of Appeal Jamaica, Supreme Court Civil Appeal No 49/2006, judgment delivered 14 December 2007, Harris JA, although dealing with different circumstances (specifically, non-compliance with a rule or order), at page 10 of the judgment admirably summed up the type of balancing act called for in a matter such as the learned judge of the Parish Court had to deal with. Harris JA opined as follows:

> "It cannot be disputed that orders and rules of the Court must be obeyed. A party's non-compliance with a rule or an order of the Court may preclude him from continuing litigation. This, however, must be balanced against the principle that a litigant is entitled to have his case heard on the merits. As a consequence, a litigant ought not to be deprived of the right to pursue his case.
>
> The function of the Court is to do justice." (Emphasis added)

(This quotation is still relevant although the case itself had been departed from in **University Hospital Board of Management v Hyacinth Matthews** [2015] JMCA Civ 49, per Phillips JA.)

[43] Taking a broad view of the matter, and considering especially that attempts to settle the matter were in fact being made up to 21 July 2015 at the least, it appears to be a fair conclusion that the court below regrettably took a somewhat blinkered view of the matter by focusing on the last four court dates without bearing in mind the wider background and history. It is fair to say that the court below acted somewhat hastily in striking the action out. This is illustrated, for example, in the letter of 21 July 2015 from Mr M Smith, which shows: (i) that there had been discussions between counsel concerning the possibility of mortgage financing for the purchase of the property; and (ii) that Mr M Smith had in the said letter proposed engaging another land surveyor for a third opinion. (It must be said that it is not known if the letter of 21 July 2015 was made available to the learned parish judge of the Parish Court.)

The principles that guide this court

[44] In outlining the circumstances in which this court will set aside orders and judgments of lower courts, Morrison JA (as he then was), in the case of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, relied on the dictum of Lord Diplock in **Hadmor Productions Limited and Others v Hamilton and Others** [1982] 1 All ER 1042. At paragraph [20] of **The Attorney General v John Mackay** Morrison JA stated that:

> "This court will therefore only set aside the exercise of a discretion by a judge ... on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no

judge regardful of his duty to act judicially could have reached it'."

[45] In applying these principles to the instant appeal, I have considered the circumstances prevailing before the learned judge of the Parish Court when the matter came on for hearing before him. These include the important fact that the parties were pursuing a settlement up to at least 21 July 2015 and possibly beyond that. In these circumstances, it can reasonably be concluded that the act of the learned judge of the Parish Court in striking the matter out was an incorrect exercise of his discretion. Whilst understanding fully well that the learned judge of the Parish Court might have wanted to have brought the matter to an end, a broader and more-comprehensive view of the matter with an acknowledgement of the efforts at settlement would have militated against the court below viewing the delay in the instant case as inordinate and inexcusable.

Relisting the plaint

[46] In relation to Mr M Smith's submission that the appellant ought first to have attempted to relist the plaint, it is important to consider Order XIX, rule 2 of the Parish Court Rules (the Rules). That rule provides an option to a plaintiff whose matter has been struck out for non-appearance to apply to have the matter relisted. It states as follows:

"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."

[47] In relation to Mr Smith's contention that the appeal should be dismissed as premature, I find the case of **Wilbert Christopher v Helene Coley Nicholson**, cited by him, to be somewhat different and therefore distinguishable from the instant appeal.

[48] In that case, the applicant had appeared before the Parish Court in person. The judge of the Parish Court dismissed his claim for want of prosecution, the applicant having arrived at court half-an-hour late and after court had already adjourned for the day. In an application for extension of time in which to file a notice of appeal, which was heard in chambers by Cooke JA, the learned judge of appeal dismissed the application, apparently on the ground that it was premature, in that an application ought first to have been made in the Parish Court to set aside the order which had been made in his absence.

[49] The application for extension of time to file notice of appeal was renewed before the court. Morrison JA (as he then was) observed that the affidavit in support of the application was devoid of any factual basis on which the extension of time was being sought. Further, the court found that in the absence of reasons being advanced to suggest that the learned judge had exceeded her authority or misused her discretion in striking out the claim, the appeal would be bound to fail as, in order to succeed on the application for an extension of time, the applicant had to show a good reason for the failure to file within time and that the appeal had some chance of success.

[50] In **Wilbert Christopher v Helene Coley Nicholson**, therefore, the court applied principles relevant to applications for an extension of time which, in order for such applications to succeed, ought to demonstrate some prospect of success and good reason for the delay. Those key ingredients were absent from that case, which resulted in the dismissal of the application. In the case at bar, on the other hand, this appeal challenging the parish court judge's exercise of discretion to strike out the action, is properly before the court. As such, the applicable guidelines would be those expressed in **Hadmor Productions Limited and Others v Hamilton and Others** and **The Attorney General v John Mackay**, that is, whether the learned judge was demonstrably wrong in his decision.

[51] In my view the appellant would not be restricted from exercising either of his dual rights of (i) filing an appeal; or (ii) applying in the Parish Court to have the matter relisted. It seems to me that Order XIX, rule 2 of the Rules provides an option and does not constitute a prerequisite course to be pursued before a litigant might approach this court. However, considerations of good administration would seem to suggest that where similar recourses exist both at the Parish Court level and in this court, it would be easier, less costly and more conducive to a saving of time to first apply to the Parish Court for the result being sought.

The balance of justice

[52] Apart from the difficulty that the respondent has faced in having the case in the court below fairly classified as one illustrating inordinate and inexcusable delay, it

should also be remembered that the cases of **Rainsford v Limerick Corporation** and **HA v CB** seem to call for a consideration of a matter such as this along broader, more general lines, having regard to the "balance of justice". Although on the authority of those cases one would have to first convince the court that delay in a matter was inordinate and inexcusable before going on to consider the "balance of justice" and, in my view, the respondent would not have been successful in crossing that first hurdle, it may still be useful to consider the question of the balance of justice. Approaching the matter thus, an important consideration would be the fact that, where possible, a court always prefers to have a matter disposed of on its merits, rather than on technical or procedural grounds (see, for example, **Evans v Bartlam** [1937] 2 All ER 646, 650 D, per Lord Atkin and **Villa Mora Cottages Limited and another v Adele Shtern**).

[53] Another consideration is the fact that the appellant appears to be in possession of a surveyor's report that confirms the encroachment that is complained of. On the other hand, the respondent seems to be in possession of one that, whilst it confirms the encroachment, it regards it as falling within an acceptable margin of error. Another troubling concern is the fact that there is no affidavit evidence from the appellant himself, so we do not know the reason for his absence on the last four dates when the matter was set for trial as a matter of priority. Would it be just for his matter to be struck out without his input when he may very well have a good reason for his absence? What evidence is there, for example, that he knew about these dates at all? Certainly there is none on the affidavits – apart from Mr Adams' deposing that the appellant was not informed of the date of 6 October 2015 because of the ongoing

settlement efforts. In these circumstances, although there is a justifiable and great concern about the delay in having the matter tried, it seems that a fair assessment of the various considerations tips the balance of justice in the appellant's favour. Taking this approach, it is inevitable that the appeal be allowed, and that the order of the lower court be set aside.

Sections 185 and 188 of the Act

[54] After the matter had been argued along the foregoing lines, and although this point was not argued at the hearing of the appeal, it appeared that a question would clearly arise as to whether the learned judge of the Parish Court was correct in striking the matter out for non-appearance when, on the last date on which the action was struck out the appellant had been represented by Mr Adams. This question arises from a consideration of section 188 of the Act, which reads as follows:

> "It shall not be lawful for any person, except the party to a suit or other proceeding, or a member of his family, or his clerk or servant, or his master, or any officer or clerk of a company or corporation duly authorized under the seal of such company or corporation, or an admitted solicitor, being the solicitor generally in the action for such party, or a barrister or advocate retained by or on behalf of such party, to appear and act for such party in such suit or proceeding; but an appearance by any such person shall be deemed to be an appearance of the party for whom he acts..." (Emphasis added)

[55] In light of the existence of this section and its obvious interaction with section 185, pursuant to which the learned judge of the Parish Court purported to have acted, counsel on both sides were invited by the court to file written submissions in respect of

this aspect of the matter. In a nutshell, Mr Adams' position on behalf of his client was to the effect that, in light of his appearance on behalf of his client on 3 November 2015 and in light of the wording of section 188, the learned judge of the Parish Court would have acted without jurisdiction in purporting to have acted pursuant to section 185 of the Act in striking out the matter. Mr M Smith, in his written submissions on behalf of the respondent, conceded the point, accepting that the learned judge of the Parish Court would have had no jurisdiction to have struck the matter out for non-appearance pursuant to section 185 when Mr Adams had appeared for the appellant. Of course, this concession is significant, as such an act of striking out without jurisdiction by a judge of a Parish Court provides, without more, a basis for allowing the appeal.

[56] A question could also arise, based on section 185, as to whether, even if it could properly have been said that the claimant in the case below had not appeared on 3 November 2015, the appellant ought not to have been non-suited or had his case adjourned, instead of having the claim struck out. This point also did not arise for consideration at all during the hearing of the appeal and so the parties did not have the opportunity of addressing or submitting on it. As such it will be treated with only briefly. It seems to me that this would be, at best, a moot point. My reason for saying so is that an argument could be advanced that the words in section 185 "...but shall not make proof of his demand to the satisfaction of the Court", triggering the power to non-suit, would come into play only in circumstances in which evidence is given which does not satisfy the court. No evidence was given in this case. In any event, a definitive

pronouncement on this issue is not necessary for the resolution of the particular issues in this case.

[57] Based on a consideration of all these matters, it is clear that the appeal must be allowed and the order striking out the matter be set aside. The matter ought to be remitted to the Parish Court for the parish of Manchester, holden at Mandeville for trial at the earliest possible date, before another judge of the Parish Court. I would also make no order for costs.

EDWARDS JA (AG)

[58] I have read in draft the judgment of Phillips JA and F Williams JA and I agree with their conclusion that the appeal should be allowed, the order striking out the plaint must be set aside and the matter remitted to the Parish Court for trial before a different judge of the Parish Court.

[59] I wish only to add, merely as a reminder, that parish court judges are creatures of statute and have no inherent jurisdiction. Therefore, as both counsel have conceded, whilst section 185 of the Judicature (Parish Court) Act, (the Act), gives a parish judge the power to strike out a plaint, this can only validly be done in clearly defined circumstances. One such circumstance is if the plaintiff is absent from the trial. However, by virtue of section 188 of the Act, a plaintiff may appear by his counsel. Therefore, in this case, His Honour Mr Dale Staple, parish judge, had no discretion under section 185 to strike out the plaint in the presence of the plaintiff's counsel Mr

Adams, whose appearance is deemed to be the appearance of the plaintiff, by virtue of section 188. When the parish judge struck out the plaint in those circumstances, he had no power to do so and was therefore plainly wrong.

[60] On the question of costs, I agree that there should be no order as to costs.

PHILLIPS JA

ORDER

(i) Appeal allowed.

(ii) The order of the judge of the Parish Court for the parish of Manchester, striking out the appellant's claim is set aside.

(iii) The matter is remitted to the Parish Court for the parish of Manchester, holden at Mandeville for mention on 1 December 2017, the next civil return day, for it to be set for trial at the earliest possible date before another judge of the Parish Court.

(iv) No order as to costs.