[2013] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 137/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**LYNDEL LAING**	**1ST APPELLANT**
	DAWN LLEWELYN MCNEIL	**2ND APPELLANT**
A N D	**LUCILLE RODNEY (Executor of estate Sandra McLeod deceased)**	**1ST RESPONDENT**
AN D	**SANDI SAND BEACH HOTEL LIMITED**	**2ND RESPONDENT**

Debayo Adedipe for the appellants

Andre Earle instructed by Earle and Wilson for the respondents

16 May and 15 July 2013

HARRIS JA

[1] In this appeal, the appellants seek to set aside an order of Campbell J, in which he dismissed an application made by them to correct a judgment signed by him on 13 April 2012 and to stay execution of that judgment.

[2] On 1 June 2011, the 1st respondent, entered into an agreement with the appellants for the lease of a property at Norman Manley Boulevard in the parish of Westmoreland. The appellants being in breach of the covenant to pay rent, a notice to quit was duly served on them. They failed to vacate the property.

[3] On 14 February 2012, the respondents brought an action against the appellants claiming the recovery of possession of the property as well as a sum of US$22,000.00 due and owing for rent. On the same date, the respondents, by way of a notice of application for court orders, also sought the following orders:

> "1. That the 1st and 2nd respondents [the 1st and 2nd defendants] be removed from the property registered at Volume 1035 and Folio 296 of the Register Book of Titles known as Sandi San [sic] Beach Hotel now operating as Relax Resorts.
>
> 2. That the respondents pay to the Applicants the sum of twenty two thousand United States dollars being the sum due and owing for rent.
>
> 3. Costs to be cost [sic] in the Claim."

[4] This application was supported by an affidavit of Mr Kenric Davis, the 2nd respondent's property manager, sworn on 12 March 2012 and filed on 14 March 2012, in which he averred at paragraphs 7 to 18 as follows:

> "...
> 7. That on June 1, 2011 I entered into a rental agreement with the Respondents for the sum of Eight thousand United States dollars per month for six (6) months, the period of June 1, 2011 to December 31, 2011.
>
> Attached hereto and marked as 'Exhibit KD 1' is a true copy of the lease Agreement.

8. The clause 3, Sub-section B refers to the deposit: 'the Tenant will deposit with the Landlord in trust the sum of Eight Thousand United States Dollars as a security for performance of the Tenant's Obligations.'

9. The Lease Agreement, Clause 5 subsection (g) states: 'If the Tenant shall hold over after the expiration of the leased period with the landlord's consent but without a new contract in writing, then the tenant shall be deemed a monthly tenant whose monthly lease shall be in the amount of Twelve Thousand United States Dollars until a formal contract is provided by the Landlord.'

10. That on or about April 21, 2011 the Respondent paid a deposit of Six Hundred and Seventy Thousand, Four Hundred Dollars as the deposit on the lease.

11. That on or about May 10, 2011 the Respondent paid J$337,000.00 plus US$500.00.

12. That on July 18, 2011 the Respondent paid J$292,000.00 in cash.

13. That on September the Respondent paid J$300,000.00

14. On November 28, 2011 the Respondent [sic] J$672,000.00

15. On December 22, 2011 the Respondent paid US$6,000.00

16. On January 13, 2012 the Respondent paid US$8000.00

17. That the Respondents have failed to make rental payments as stipulated by the Lease Agreement.

18. That at the date of this my affidavit (March 12, 2012) the Respondent [sic] are owing the sum of Fifty Eight Thousand, Four Hundred and Forty (US$58,440.00) United States Dollars for rent.

Attached hereto and Marked as 'Exhibit KD 2' is a true copy of my statement of account to [sic] dated March 12, 2012".

[5] On 5 March 2012, Lawrence Beswick J ordered that an agreed statement of account be filed, failing which, each party should file a statement of account within 14 days. An agreed statement of account was not filed but the respondents filed their statement of account. The application came on for hearing before Campbell J on 11 April 2012. On that date, the minute of order was endorsed "file not located CAV". It appears that submissions were made by the parties on 11 April and the learned judge took time to consider the application. On 13 April 2012, he executed two orders, namely, a minute of order and a formal order. The terms, as reflected on the minute of order, are recorded thus:

> "Order in terms of paragraphs 1 and 2 as per amended notice of application for court orders dated the [sic] 14 February 2012.
>
> Respondent granted 14 days from the date hereof to vacate the property.
>
> Cost to [sic] application to be agreed or taxed."

The formal order reads as follows:

> "1. The 1st and 2nd Respondents be removed from the property registered at Volume 1035 and Folio 296 of the Register book of titles known as Sandi Sand Beach Hotel now operating as Relax Resorts;
>
> 2. The Respondents are granted fourteen (14) days to vacate the premises from the date hereof;
>
> 3. The Respondents pay to the Applicants the sum of fifty–six thousand eight hundred and forty united states dollars (US$56,840.00) being the sum owed; and
>
> 4. Costs to the applicant [sic] to be agreed or taxed."

[6] By way of an application on 14 August 2012, the following orders were sought by the appellants:

> "i) that the Formal Order herein be corrected so that it shows a sum of US$22,000.00 instead of US$56,840.00;
>
> ii) that the Court recall and/or correct the Order for Possession that incorrectly shows the sum of US[sic] 56,840.00 instead of US$22,000.00 and/or stay its further execution
>
> iii) that the Court order that the bailiff for the Resident Magistrate's Court, Westmoreland release to us our goods seized pursuant to the said order for possession.
>
> iv) that the time for serving this notice be abridged."

[7] This application came on for hearing before Campbell J on 30 August 2012 when it was dismissed by him.

[8] Three grounds of appeal were filed. They are:

> "1. The learned Judge erred in law [sic] deciding that his signing a judgment/order for a sum more than two and a half times greater than that referred to in the minute of order (which was signed by him) is not a slip or error within the contemplation of the slip rule as set out in rule 42 of the Civil Procedure Rules.
>
> 2. The learned Judge erred in law in refusing to correct his manifest clerical mistake [sic] his judgment or order or error arising in his judgment or order from an accidental slip or omission.
>
> 3. The learned Judge erred in law in refusing to stay the further execution of the judgment/order signed by him because it was erroneous in the first instance and, in any event, on the evidence before him the Applicants had already paid to the Claimants/Respondents sums that would have satisfied the judgment debt."

[9] It was Mr Adedipe's submission that there is a radical difference in the factual context in which the minute of order was made a formal order, and this would have occurred as a result of a clerical error or by an omission. The orders took effect on the same date and by the minute of order, he argued, the learned judge's pronouncement signing judgment for US$22,000.00 is clear and unambiguous but the pronouncement in the formal order for a greater sum is an error devoid of any explanation. The learned judge, he submitted, awarded no more than US$22,000.00 and when he signed judgment, he had done so in error. The power of the learned judge to invoke the slip rule as contemplated by rule 42.10 of the Civil Procedure Rules (CPR) is clear**,** he argued. He cited ***Smith v Harris*** [1939] 3 All ER 960 in support of his submissions. The learned judge, he contended, made a pronouncement in the minute of order then administratively signed something different in the formal order. The formal order, he argued, when perfected should have stated the limit, but this escaped the intention of the judge when he signed it for perfection. He would not have intended to award more than what was claimed and even if he had intended to do so, this, he could not have accomplished, in the absence of the consent of the parties to amend the claim, he submitted.

[10] It was further submitted by him that the claim was for arrears of rent, which, if unpaid, constitutes a separate cause of action and the learned judge could not in February, have added rental which had not accrued.

[11] It was Mr Earle's submission that this case does not fall within the contemplation of rule 42.10 of the CPR as there was no accidental slip or error on the

part of the learned judge when he signed judgment and perfected the order on 13 April 2012. The order, he submitted, reflected the true intention of the learned judge as he intended to order the sum of US$56,840.00. After hearing the claim and the issues presented, he argued, it was not the intention of the learned judge to award the lesser sum of US$22,000.00. Admitting the inconsistency between the minute of order and the perfected judgment, he argued that the affidavits of the respondents disclose the circumstances under which the award of the larger sum was made and the learned judge being fully seized of all the matter, his intention was clear. He cited the cases of ***Smith v Harris*** (supra); ***Preston Banking Company v William Allsup & Sons*** [1895] 1 Ch 141; ***Tak Ming Co Ltd v Yee Sang Metal Supplies*** [1973] 1 All ER 569; ***Re Inchcape*** [1942] 2 All ER 157; ***Gupta and Another v Union Bank of India and Ors*** [2012] EWHC 4075 (Ch); ***Leo Pharma A/S and Another v Sandoz Ltd*** [2010] EWHC 1911; and ***R v Cripps, Ex parte Muldoon and Others*** [1984] 3 WLR 53; [1984] QB 686 in support of his submissions.

[12] It is a well established principle that a court or a judge is devoid of the power to amend or correct any defect in its judgment or order after it has been perfected. In ***R v Cripps, Ex parte Muldoon and Others***, Sir John Donaldson MR, speaking to the rule, at page 695, said:

> " ….once the order has been perfected, the trial judge is functus officio and, in his capacity as the trial judge, has no further power to reconsider or vary his decisions whether under the authority of the slip rule or otherwise. The slip rule power is not a power granted to the trial judge as such. It is one of the powers of the court, exercisable by a judge of the court who may or may not be the judge who was in fact the trial judge."

[13] However, a judge may, at any time prior to the perfection of an order reconsider and vary his decision - see ***In re Suffield and Watts Ex parte Brown*** [1888] 20 QBD 693. It is only permissible for the judge to correct a mistake or an error in a perfected judgment or an order in circumstances where rule 42.10 of the CPR applies. The rule reads:

> "42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
>
> (2) A party may apply for a correction without notice."

[14] This rule only comes into operation where, in a judgment or an order a clerical mistake, or an error emanating from an accidental slip or omission, is manifested. The purport and spirit of the rule is to bring a judgment or an order in which an error, omission or mistake arises in harmony with that which a judge intended to pronounce. Therefore, a judge is not competent to alter a judgment or an order once it has been drawn up and perfected, if it accurately expresses the intention of the court or the judge. To qualify under the rule, an applicant must show that the error, omission or mistake is one in expressing the manifest intention or the judge.

[15] In ***R v Cripps Ex parte Muldoon and Others***, an order for costs was made by the commissioner. Subsequent to the order being formally drawn up, he revisited it and issued further directions in respect of the costs. On appeal, the Divisional Court quashed the commissioner's further direction for the reason that he was functus officio at the time he issued the further directions.

[16] Sir John Donaldson MR, speaking to the ambit of the slip rule, at page 695, said:

> "It is surprisingly wide in its scope. Its primary purpose is akin to rectification, namely to allow the court to amend a formal order which by accident or error does not reflect the actual decision of the judge: *Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141.* But it also authorises the court to make an order which it failed to make as a result of the accidental omission of counsel to ask for it: *In re Earl of Inchcape [1942] Ch. 394,* approved by the Judicial Committee of the Privy Council in *Tak Ming Co. v. Yee Sang Metal Supplies Co. [1973] 1 W.L.R. 300*, 304. It even authorises the court to vary an order which accurately reflects the oral decision of the court, if it is clear that the court inadvertently failed to express the decision which it intended: *Adam & Harvey Ltd. v. International Maritime Supplies Co. Ltd. [1967] 1 W.L.R. 445.* However, it cannot be over-emphasised that the slip rule power can never entitle the trial judge or a court to reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud: *per* Lord Halsbury in *Preston Banking Co. v. William Allsup & Sons [1895] 1 Ch. 141,* 143."

[17] In ***Preston Banking Company v William Allsup & Sons,*** the scope of the operation of the rule was considered. In that case, an application was made to the Vice-Chancellor of the County Palatine of Lancaster that costs, which the applicant obtained under a previous order and which the applicant was directed to pay, be made costs in the cause and for a stay of proceedings, on the basis that the order had been secured by misrepresentation. The Vice Chancellor refused the application. On appeal it was held that the court had no jurisdiction to rehear the previous order. Lord Halsbury said at page 143:

> "If by mistake or otherwise an order has been drawn up which does not express the intention of the Court, the Court must always have jurisdiction to correct it. But this is an application to the Vice-Chancellor in effect to rehear an order which he intended to make, but which, it is said, he ought not to have made. Even when an order has been obtained by fraud, it has been held that the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous."

[18] In the case under review, it is common ground that the learned judge, in the formal order, signed judgment in the sum of US$56,840.00, while in the minute of order, judgment was entered for US$22,000.00. The question, therefore, is whether in signing judgment for a greater sum than that which was stated in the minute of order, he had made a mistake or an error amounting to an accidental slip which could be corrected by the application of rule 42.10 of the CPR.

[19] In paragraph 18 of his affidavit of 12 March 2012, Mr Kenric Davis stated that in March 2012 the sum of US$58,440.00 was due. In an affidavit sworn by him on 27 August 2012, at paragraphs 6, 7, and 8 he said:

> "6. At the date of that [sic] my affidavit (March 12, 2012) the Respondent [sic] are owing the sum of Fifty Eight Thousand, Four Hundred and Forty (US$58,440.00) United States Dollars for rent.
>
> 7. At the court hearing in April, 2012 another US$12,000.00 for April's rent was added to the sum. Thus bringing the total to US$70,440.00.
>
> 8. At court on April 11, 2012 the Respondents verbally told the court that since the affidavit was sworn they had paid an amount of $13,600.00 to the Applicants.
>
> 9. The Court subtracted the amount of US$13,600.00 from the total outstanding of US$70,440.00 and made an

> order for the sum of US$56,840.00 without any objection from the Respondents or their lawyer."

[20] Relying on ***Leo Pharma***, Mr Earle sought to make a comparison between that case and the present case to demonstrate that the slip rule could not be employed in circumstances where the parties agreed to a minute of order which was inconsistent with an oral order of the judge. In the instant case the record does not reveal that the entry of judgment for US$56,840.00 was as a result of a consent by the parties. However, it was further submitted by Mr Earle that **Leo Pharma** also shows that the rule cannot be employed to correct errors of substance. Clearly, the principle laid down in **Leo Pharma** bolsters the proposition that the operation of the rule is confined to correcting mistakes, accidental slips or errors and not errors of substance.

[21] The present case is not one in which the learned judge made a pronouncement in the formal order as to the judgment sum but demonstrably meant something else. It is obvious that he had taken into account Mr Davis' averment in his affidavit of March 2012 and the statement of account exhibited to the affidavit that a sum of $58,440.00, which had accrued from June 2011 to March 2012, was due and owing. As shown in Mr Davis' affidavit of 27 August 2012, a further sum of US$12,000.00 accrued and was added to the US$58,440.00, making a total of US$70,440.00 from which the learned judge deducted a sum of US$13,600.00, which the 1st appellant informed the court that he had paid. Clearly, the deduction having been made, a balance of US$56,840.00 remained. In these circumstances, it is obvious that the learned judge had clearly intended to sign judgment for the sum of US$56,840.00.

[22] ***Smith v Harris*****,** on which the appellants rely, does not assist them. In that case, the judge awarded the claimant £250.00 against two defendants. The judgment was erroneously recorded as "Order [sic] each defendant liable for half judgment and costs". On appeal by the claimant to have the judgment rectified, it was held that the error in recording the judgment could be rectified under the slip rule. Du Parcq LJ said at page 966:

> "It is plainly a case where the judge made no mistake at all; there was no desire to correct any error he had made. His manifest intention had been expressed by him and had been erroneously interpreted by what must, I think, have been an accidental slip. Nobody would suggest that any official of the county court deliberately recorded something which was quite different from what the judge had said, and if it was not deliberately done, it seems to me that one may say it reasonably follows that it was accidentally done."

[23] That case is distinguishable from the present case. In that case the clear intention of the judge was expressed by him but had been mistakenly interpreted and therefore, his order could have been corrected by invoking the slip rule. The circumstances are clearly different in the case under review.

[24] This case is not one which would fall within the purview of rule 42.10. The formal order had already been perfected at the time of the application for its amendment. The learned judge did not make a mistake in awarding a sum greater than that which had been claimed. By the formal order, he had definitively ruled that the respondents were entitled to US$56,840.00. It could not be said that the amount specified in the formal order had been erroneously recorded. The learned judge's

intention had been clearly expressed in his judgment. This inevitably leads to the conclusion that he would not have been empowered to rectify his order. It is necessary to state that, contrary to Mr Adedipe's submission, even if the learned judge had taken into account accrued rent which would have given rise to a separate cause of action, he could not have rectified his judgment by applying the slip rule.

[25] Before departing from this appeal, it is necessary to mention a matter which raises grave concern. The order signing judgment is for an amount in excess of that which has been claimed. Unfortunately, no ground of appeal has been filed to challenge this anomaly. As a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded - see ***Chantell v Daily Mail*** (1901) 18 TLR 165 CA. It follows therefore, that even if as submitted by Mr Earle, there was a consent for an amount in excess of that which was claimed, judgment for an increased amount ought not to have been entered unless the pleadings were amended to reflect the increase and the parties had consented to an amendment of the claim form prior to signing judgment. Notwithstanding this serious defect, the judgment remains valid.

[26] We would dismiss the appeal against the learned judge's refusal to correct the formal order but would allow the appeal against his refusal to grant a stay of execution of the order. A stay of execution of the formal order is granted, pending an application for leave to appeal against it. We would make no order as to costs.