[2019] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**GLASFORD PERRIN**	**APPELLANT**
AND	**DONALD COVER**	**RESPONDENT**

Written submissions filed by Nunes, Scholefield, DeLeon & Co for the appellant

Written submissions filed by Marion Rose-Green and Company for the respondent

20 April 2018 and 4 October 2019

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read in draft the reasons for judgment of my brother Pusey JA (Ag) and agree with his reasoning and conclusion. There is nothing that I wish to add.

PHILLIPS JA

[2] I too have read the draft reasons for judgment of my brother Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

PUSEY JA (AG)

[3] This was an appeal from the decision of Lindo J (Ag) (as she then was) made on 12 May 2017, refusing Mr Glasford Perrin's (the appellant) application seeking, *inter alia*, a declaration that, firstly, the court had no jurisdiction to try Mr Donald Cover's (the respondent) claim, as the claim form filed on 12 June 2014 had expired and was therefore invalid; and secondly, that the order made on 13 July 2015, purporting to extend the life of the claim form, be set aside.

[4] On 20 April 2018, we dismissed the appeal and varied the orders accordingly to extend the validity of the claim form, in the following terms:

> 1. The appeal is dismissed.
>
> 2. The Order of the Supreme Court made on the 12th May, 2017 is varied to add the following:
>
> The order made by Lindo J on the 13th July, 2015 in paragraph 1 is amended to read as follows:
>
> That the Claim Form filed on the 12th June, 2014 is renewed for a period of six months from the 3rd June, 2015 to the 3rd December, 2015.
>
> 3. No order as to costs."

We promised to put our reasons in writing. This is a fulfilment of that promise.

[5] The respondent's claim stemmed from a motor vehicle accident that occurred on 1 July 2008. On 3 June 2015, he filed a notice of application which was amended on 10 July 2015, in which he sought the following orders:

> "11. That permission be granted for the Claim Form filed herein on the 12th day of June, 2015 to be renewed for a period of six (6) months **from the date hereof**.
>
> 12. That personal service on the [appellant] of the sealed Claim Form dated and filed June 12, 2014 with prescribed Notes for Defendants (Claim Form), Acknowledgement of Service of Claim Form, Defence and Counterclaim and Particulars of Claim dated and filed the 12th day of June, 2014 together ("the Documents") be dispensed with and that service of the Documents and all other subsequent proceedings be effected by registered post on the [appellant], GLASFORD PERRIN of 102 Angels Drive, Spanish Town in the parish of Saint Catherine.
>
> 13. That service of the sealed Claim Form dated and filed June 12, 2014 with prescribed Notes for Defendants (Claim Form). Acknowledgement of Service of Claim Form, Defence and Counterclaim and Particulars of Claim, dated and filed the 12th day of June, 2014 on the [appellant] by registered post on the 22nd day of December, 2014 be allowed to stand pursuant to Rules 5.14(1) of the Civil Procedure Rules 2002.
>
> 14. That the time for filing of Acknowledgement of Service be twenty-one (21) days from the date of service by registered post and the time for filing Defence be fifty-six (56) days from the date of service by registered post.
>
> 15. That costs be costs in the claim." (Emphasis added and underlined as in the original)

[6] The application was heard by Lindo J (Ag) on 13 July 2015, and she granted the orders in the terms as prayed.

[7] On 14 September 2015, the appellant applied for:

> "1) A Declaration that the Claim Form having expired on June 12, 2015 and having not been extended or renewed by an Order of the Supreme Court taking effect on or before June 12, 2015, the Court has no jurisdiction to try the claim.
>
> 2) The Order of the Supreme Court per Justice A. Lindo (Ag.) on July 13, 2015 be set aside as being void and of no effect as it is purported to take effect when the Claim Form had already expired.
>
> 3) The Claim form filed on June 12, 2014 stand struck out as its twelve (12) month lifetime expired on June 12, 2015 and was not renewed on or prior to that date.
>
> 4) The period for filing Defence in accordance with the said Order of the Supreme Court await the hearing of this application."

[8] Mr Jeffrey Mordecai, who represented the appellant, argued that the claim was invalid because the order made by the learned judge was to take effect on a date after the claim form had expired.

The decision in the court below

[9] The application filed on 14 September 2015, was also heard by Lindo J (Ag). The learned judge stated that there was no dispute that the claim form was valid at the time of the application since it was made "during the currency of the claim form".

Further, that the application could properly be heard after the 12 month lifetime of the claim form had expired, once it had been made before the expiration of the claim form.

[10] The learned judge was of the view that to allow the respondent to benefit from a statute of limitations defence in these circumstances did not advance the overriding objective of the Civil Procedure Rules 2002 (CPR). The learned judge correctly identified the problem before her as being that "the [respondent] made an error in stating that the order being sought should be from 'the date 'hereof'... and that the court in granting the order in the terms as sought, did not make an order which would be valid".

[11] The learned judge reasoned that courts exist to do justice and not merely to enforce technicalities. She found solace in the decision in **Gladston Watson v Rosedale Fernandes** [2007] CCJ 1 (AJ), in which the Caribbean Court of Justice (CCJ) considered the legal effect of procedural irregularities. The CCJ considered that breaches of procedural rules should not deprive a litigant of the opportunity for his case to be heard. The CCJ referenced the statement of Wooding CJ in **Baptiste v Supersad and Montrose** (1967) 12 WIR 140 that:

> "The law is not a game, nor is the court an arena. It is ... the function and duty of a judge to see that justice is done as far as may be according to the merits." (page 144)

[12] Fortified by this and other authorities to the same effect, Lindo J (Ag) held at paragraph [13] that:

> "... I find that the claimant in this case would be deprived of having his case heard on its [merits] because of an error on the part of his Counsel which went undetected by the court at the time the application was heard."

[13] The learned judge concluded that, although "clumsily drafted", it was clear from the application and the other orders sought that the respondent was showing an intention to pursue the claim. Further, she observed that "the order made by the court... does not give effect to what was being sought and as stated earlier, is solely based on the manner in which the request was worded". She conceded that "[t]he order made by the court was therefore of no effect", as the claim form would have already expired when the order was made. In addition, the order should have been requested for a period of six months "from the 12th day of June 2012".

[14] Having rationalised that this sort of error ought not to prevent the respondent from prosecuting his claim, the learned judge concluded that "[t]he administration of justice would be advanced by the court seeking to cure the defect in the drafting of the application by the attorneys for the [respondent] to rectify the subsequent order made on July 13, 2015". She held that the formal defect amounted to a mere "procedural inadequacy which should not be fatal as the court should in the circumstances be able to exercise its discretionary powers to put things right in order to give effect to the overriding objective". She therefore refused the application made by the appellant. We were not provided with a copy of the perfected order made on 12 May 2017, but the minute of order of the proceedings of the Supreme Court read as follows:

"1. The application for declaration that the court has no jurisdiction is refused.

2. Period for filing defence is 42 days of the date of this order.

3. Leave to appeal is granted.

4. No order as to costs."

Appellant's submissions

[15] Before this court, the appellant argued that the claim form had expired and the order purporting to extend the validity of the claim form failed, as it took effect on a date after the expiration of the claim form.

[16] The appellant submitted that the learned judge's acceptance of the fact that the claim form cannot be extended without an application being filed before it expires, and that any extension granted must take effect before the claim form expires, was completely inconsistent with her overall conclusion. Further, the decision to dismiss the appellant's application was in essence to allow the claim to continue on the strength of an order which was not valid, and which could not operate to extend the expired claim form.

[17] In relation to the court's jurisdiction, the appellant argued that the learned judge erred in finding that the court retained the jurisdiction to correct or cure certain defects. This was so because her finding that the defect in the order was a mere "procedural inadequacy" was inconsistent with rule 8.14 of the CPR. Also, there was no inherent

jurisdiction in the court to alter an order it had made, which had been duly perfected and acted upon.

[18] In addition, it was submitted that the court could not reverse the order on its own motion merely because it had second thoughts about the order and considered it to be incorrect. The decision in **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27 was relied on to show that a court does not have a general power to reopen and correct defects in orders after they have been perfected.

[19] The appellant submitted that the intention of the respondent in making the application was to obtain an extension of the validity of the claim form for six months from the hearing of the application, and that the learned judge intended to grant an extension of time in the said terms. Further, that there was no intention then or at any other time to obtain any other order.

[20] The appellant also argued that it was by virtue of the appellant's application that it became apparent that the order was wrong and of no effect, but, that does not provide a legal basis upon which to seek to look behind or correct the order. Furthermore, the learned judge made no order to correct the original order.

[21] The appellant then cited the case of **Sarah Brown v Alfred Chambers** [2011] JMCA App 16 and submitted that, in that case, this court cited with approval the decision in **Gamser v Nominal Defendant** (1977) 136 CLR 145 where the High Court of Australia held that the appellate court had no inherent jurisdiction.

[22] It was also submitted that the decision in **Watson v Fernandes** is not authority for the general proposition expressed by the court below, and is distinguishable from the instant case in light of its peculiar facts. He stated further that the court in **Watson v Fernandes** was applying a rule similar to rule 26.9 of the CPR, and that it is settled in this jurisdiction that the discretion under that rule only gives jurisdiction in relation to breaches which result in irregularities as opposed to nullities. The appellant also relied on the decision in **Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter** [2017] JMCA Civ 3.

[23] The appellant contended that the judge failed to consider or adequately consider the position of the appellant and the significant prejudice to him in allowing the invalid order to stand.

[24] The appellant maintained that **Watson v Fernandes** was not applicable given the clear provisions of rule 8.14 of the CPR. He stated also that, the balance of interests advocated for in that case was not achieved in the instant case.

[25] The appellant argued that the learned judge failed to give due consideration to the injustice to the appellant of having to contend with an invalid claim which was by then statute barred. The appellant cited the decision in **Leroy McGregor v Verda Francis** [2013] JMSC Civ 172 regarding the purpose of the limitation period which is to protect a defendant against a stale claim.

[26] It was also argued that any perceived prejudice to the respondent should be considered against the backdrop of that party having waited to the brink of the

limitation period to institute proceedings. **Vinos v Marks & Spencer Plc** [2001] 3 All ER 784 from the United Kingdom Court of Appeal and **Raymond Price v Egbert H Taylor & Company Limited** BM5/007/A, Claim No A04YM127, judgment delivered on 16 June 2016, from the Birmingham County Court in the United States of America, were cited to support the principle that litigants who wait until the last minute to take action will not be treated with generosity by the court.

[27] The appellant maintained that the learned judge wrongly exercised her discretion in refusing the appellant's application on the basis of the perceived injustice to the respondent. Further that the learned judge also failed to give due consideration to the prejudice to the appellant and to balance the interests of both parties.

Respondent's submissions

[28] The respondent submitted that there is no dispute that rules 8.14 and 8.15 are the relevant rules that deal with the lifespan of a claim, and the process for obtaining an extension of time for service of the claim form.

[29] It was pointed out by the respondent that the application to renew the life of the claim form was made pursuant to these rules. Further, there was no dispute that the claim form was valid at the time the application was filed, and the application was made in order to proceed with the claim.

[30] The respondent argued that the dispute arose because the application called for the claim form's renewal "from the date hereof", which, given the date of the application, would have been a date after the claim form had already expired. However,

the respondent went on to argue, this error cannot be seen to completely decimate the specific intention of the court and the litigant to renew the life of the claim form.

[31] As a result, the respondent contended that the learned judge was correct in her view and approach that the defect should have been cured when the application was made. It was argued that the court should look beyond mere technicalities when issues arise between parties, and give way to the tenets of the overriding objective and this was what Lindo J (Ag) did.

[32] It was submitted that the court below had the jurisdiction to correct or cure the defect in the order made to give effect to its intention, which was to give life to and maintain the validity of the claim form for service, and to enable the respondent to pursue his claim.

[33] The respondent contended that the order granted does not accurately express the intention of the court based on the application made, since the court would have been cognizant of the purpose, and would not therefore have made an order with such an error which would have made the order ineffective. The cause of the order being ineffective was clearly an error or an accidental slip, which the learned judge admitted could have been corrected at the hearing of the application.

[34] The respondent referred to the dicta of Morrison P in **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 where the need to vary an order that did not represent the intention of the court was highlighted. It was also submitted that Phillips JA, in the same case, underscored the point that if due to a mistake the order drawn up does not

reflect the intention of the court, then the court must always have the jurisdiction to correct it.

Analysis and discussion

[35] In my view, Lindo J (Ag) had the power or jurisdiction to correct the order made to give effect to her true intention to extend the life of the claim form; and this court also has the jurisdiction to correct the order to reflect her expressed intention.

[36] Rule 8.14 of the CPR states that the claim form must be served within 12 months after being filed. If the period has elapsed, the claim form is deemed to be invalid. Rule 8.15 outlines the procedure and requirements for the application to extend the validity of claim form.

[37] Both parties and the judge accepted that the order extending the life of the claim form should take effect on or before the date that the claim form was slated to expire. Therefore, if the order extending the validity of the claim form takes effect after the claim had expired, the claim would be invalid. This would be the effect of the order if it was left unadjusted.

[38] Apart from the jurisdiction of an appellate court, errors can be corrected by the court that made the order in certain circumstances. These circumstances are narrow and clearly defined. The guiding principle is that it cannot be an attempt to note a change of mind on an issue, it must be to correct an obvious error or accidental slip.

[39] Rule 42.10 of the CPR gives the court the power to correct errors in judgment or orders. Rule 42.10(1) states:

> "The court may **at anytime** (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." (Emphasis added)

[40] In **Weir v Tree**, a number of the authorities on this issue were examined as it relates to the general principles. The following passage from Lord Herschell in **Hatton v Harris** [1892] AC 547 was cited with approval and adopted by Phillips JA, who wrote the main judgment, which reflected the general rule as to the jurisdiction of the court on this point:

> "Therefore, my Lords, having regard to the nature of this case, I am unable to see any ground upon which it can be said that this order, in the terms in which it was made, could have been intended to be made by the Lord Chancellor. I myself think that it was a mere accidental omission that the words were not inserted that in the case of a bond the amount should not exceed the penalty; and if attention had been called to the fact that those words were not so inserted, and that one imcumbrancer might thereby be prejudiced as against another in respect of the omission, I cannot doubt that the correction would at once have been made." (page 557)

[41] Phillips JA in **Weir v Tree** discussed the principle that this power cannot be utilised when a court has changed its mind about a matter, and cited a passage from **Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia; The**

Montan [1985] 1 All ER 520 that explained the significance of this distinction in this way:

> "It is the distinction between having second thoughts or intentions and correcting an award of judgment to give true effect to first thoughts or intentions, which creates the problem. Neither an arbitrator nor a judge can make any claim to infallibility. If he assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected ... The remedy is to appeal, if a right of appeal exists."

[42] Lindo J (Ag) was therefore correct to endeavour to rectify the problem caused by the terms of the order of 13 July 2015. The learned judge correctly identified the tools that she had to correct the defective order. She acknowledged the legal principles which would have allowed her to use the tools at hand. She recognized that based on the above authorities she had the jurisdiction to deal with the matter, and so refused the point in limine challenging that she had none. It was clear that the words "from the date hereof" in the application meant just that (from the date the application was made), and not the date of the hearing of the application, which would have been at a time when the claim was invalid, and the order would have been sanctioning service of an invalid claim. That was obviously not what the court intended to do.

[43] In the light of the circumstances of this case, since the error had been brought to the learned judge's attention at the time of the hearing of the application, she could have and undoubtedly would have immediately corrected that error. In **Weir v Tree**, the order had been perfected and this court still went ahead and corrected the order so

that it would accord with the court's intention. In my view, the nature of the error in the order of 13 July 2015 clearly fell within the category of errors that a court can correct to give effect to its true intentions. The learned judge therefore could have corrected the order to reflect her true intention and rectify the matter.

[44] In my view, therefore, the learned judge ought to have stated in the order made on 13 July 2015 that the word "hereof" in the phrase "from the date hereof" meant from the date the application had been filed, and not the date of the hearing of the application. That would have reflected her true intention, and would have extended the life of the claim form from 3 June 2015 to 3 December 2015. In her reasons for judgment, the learned judge outlined several reasons why the claim form ought to have been extended. She refused the application for the declaration that the court had no jurisdiction to try the claim, which had been made based on the fact that the order to extend or renew the claim had not taken effect before the expiry of the claim. She also granted a period of 42 days from the date of that order for the filing of the defence, and by so doing, had effectively achieved the intent of the order which had been made in error previously, although that intention had not been expressly so stated in the order of 12 May 2017.

[45] Phillips JA, at paragraph [68] of **Weir v Tree** said that a court has the jurisdiction to correct, in certain circumstances, errors in its own orders in order "to preserve the clarity and functioning of its order". In this case, the order needed to be

corrected to preserve the functioning or efficacy of it, so that the life of the claim form could be extended in order to proceed with the matter.

[46] This court's power to correct errors is outlined in section 10 of Judicature (Appellate Jurisdiction) Act. This section states that:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, **and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon**, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958." (Emphasis added)

[47] By virtue of this section and the principles in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191, this court has the jurisdiction to add to the order, the specific variation of the previous order made. The well-known principles in **Hadmor** state that this court can only interfere with a judge's exercise of discretion if she misunderstood the facts, applied the law incorrectly or if it can be shown that there is a change in circumstances which indicates that her exercise of the discretion was plainly wrong.

[48] In the instant case, the order made on 13 July 2015 clearly encompassed an error as previously stated. It had not been the intention of the court to direct the respondent to proceed ex parte in an invalid claim. It was the clear intention of the

court that the claim be extended to permit service on the appellant by registered post; that the acknowledgement of service be filed within 21 days from the date of service by registered post; and that the defence be filed 56 days from the date of service by registered post. Lindo J (Ag) proceeded, by her order made on 12 May 2017, to correct the error made in her earlier order on 13 July 2015, on the application made ex parte before her on that date. However, the orders made on 12 May 2017, as set out in paragraph [14] herein, do not expressly state that the order made on 13 July 2015 ought to be varied, although in essence the order achieved that. This court, by its enabling statute, can give clarity to the orders.

[49] I have considered the appellant's argument that he would be deprived of the benefit of a defence under the Limitation of Actions Act, in circumstances where the respondent initiated proceedings close to the expiration of the limitation period. Further, he complains that the respondent did not act carefully in proceeding with the claim, and that if the order is modified in any way to reinstate or validate the claim, it would be extremely prejudicial to him.

[50] These submissions did not find favour with the court below and were not persuasive in this court either. This court will give effect to the order of the learned judge made on 12 May 2017, whereby having clearly stated in her reasons for judgment, and which can be discerned from her orders made then, she endeavoured to vary her earlier order made on 13 July 2015, which had been made in error, in order to give effect to the intention of the court. The claim had been properly instituted and the

respondent had taken the necessary steps to proceed with the claim, although he had failed to pay proper attention to the wording in the application before the court to ensure the extension of the validity of the claim form.

Conclusion

[51] The learned judge was correct in her reasoning that the intention of the court should be carried out. The correct principles were espoused by the court as the effect of the order that the matter could proceed on the invalid claim form was clearly an error on the part of the respondent, and one which the learned judge stated had gone undetected by the court when the application was heard. The error in the order of 13 July 2015, ought therefore to have been expressly corrected in the order made by the learned judge on 12 May 2017, although it had been impliedly done. Applying the principles as set out above, I am of the view that this court has the power to vary the orders made on 12 May 2017 and 13 July 2105 to extend the validity of the claim form.

[52] Accordingly, as stated at paragraph [4] herein, on 20 April 2018, the court made the order, effectively extending the validity of the claim form.