JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 68/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**PRIME SPORTS JAMAICA LIMITED (CORAL CLIFF ENTERTAINMENT)**	**APPELLANT**
AND	**LORI MORGAN**	**RESPONDENT**

Written submissions filed by Samuda and Johnson on behalf of the appellant

Written submissions filed by H Charles Johnson and Co on behalf of the respondent

20 October 2017

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 judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing further to add.

P WILLIAMS JA

[2] This is an appeal seeking to set aside orders made by Sinclair Haynes J (as she then was) whereby she varied orders made by Hibbert J on 5 June 2015. The details of the order made by Sinclair-Haynes J on 7 October 2015 are as follows:

> " 1) Order of Justice Lloyd Hibbert of June 5, 2015 is varied as follows:
>
> (a) Unless the claimant's representative attends the adjourned Pre-trial Review the matter stands struck out.
>
> (b) The trial dates are vacated.
>
> (c) The trial date is now fixed for July 20 and 21 2016.
>
> 2) Pre-trial Review is set for May 11, 2016 at 11am for half hour.
>
> 3) Costs to be costs in the claim.
>
> 4) Claimant's attorney-at-law to prepare file and serve this order."

[3] The appellant is seeking to have the following order made by Hibbert J restored:

> "4. Unless the claimant attends the Pre-trial Review and all orders made at the Case Management Conference are complied with on or before July 31, 2015, then the Statement of Case of the Claimant shall stand struck out."

Background

[4] Lori Morgan, the respondent, was employed at Prime Sports Jamaica Limited (Coral Cliff Entertainment), the appellant, when on 2 April 2010 an incident occurred on

the appellant's premises. As a result, she said, she received injuries to her back which significantly impacted her ability to stand or walk for long periods.

[5] In November 2012, the respondent commenced her claim against the appellant for damages for negligence. In her particulars of claim she alleged the following as the particulars of negligence of the defendant:

> "1. Failing to provide the right complement of staff on duty to carry out task effectively.
>
> 2. Failing to treat matter at the workplace with the urgency it deserve."

[6] A defence denying liability and asserting that the alleged injuries sustained by the respondent were caused and/or materially contributed to by her own negligence was filed on 14 February 2013. The matter was automatically referred to mediation pursuant to rule 74.3(3) of the Civil Procedure Rules (CPR), and the mediation session was held on 25 July 2013. No agreement was reached and the matter was set for a case management conference on 25 April 2014.

[7] Neither the respondent nor her attorney-at-law was present on that date and the case management conference was adjourned to 18 November 2014. The respondent again failed to attend but her attorney-at-law was present and case management orders were made, with the date of 5 June 2015 being set for pre-trial review.

[8] On 5 June 2015, the appellant was compliant with the case management orders. The respondent and her attorney-at-law were absent and had not complied with the orders. Hibbert J made the following orders:

> "1. Time for compliance with orders made at the Case Management Conference extended to June 5, 2015 in respect of the Defendant.
>
> 2. Documents that are already filed allowed to stand as properly filed.
>
> 3. The date of the Pre-trial Review adjourned to October 7, 2015 at 10:00 am for half hour.
>
> 4. Unless the Claimant attends the Pre-trial Review and all orders made at the Case Management Conference are complied with on or before July 31, 2015 then the Statement of case of the Claimant shall stand struck out.
>
> 5. Costs for today to the Defendant to be taxed if not agreed.
>
> 6. The Defendant's Attorney-at-law to prepare, file and serve this order."

[9] The respondent's attorney-at-law was served with the formal order on 27 July 2015. The respondent subsequently complied with the orders requiring the filing and serving of the relevant documents. However, when the pre-trial review came on for hearing on 7 October 2015 the respondent was again absent. Her attorney-at-law was however in attendance.

[10] The learned judge eventually made the orders now being sought to be set aside. On 16 October 2015, the appellant filed a notice of application seeking permission to appeal the orders of Sinclair-Haynes J. On 24 July 2016, Rattray J heard the application

and granted leave to appeal. He also ordered that the trial dates of 20 and 21 July 2016 be vacated and a new trial date set for 15 March 2018 for two days.

The proceedings before the judge

[11] There are no written reasons provided for the orders made by the learned judge. However, it will perhaps be useful to have an understanding of what transpired before the learned judge, culminating in the orders being made. Such an understanding will be gleaned from the affidavits from counsel who appeared before the learned judge.

[12] Miss Kalima Bobb-Semple, the attorney-at-law then appearing for the appellant, filed an affidavit in support of the appellant's application for leave to appeal. She asserted that at the pre-trial review she advised the learned judge that the respondent was in breach of the order made by Hibbert J, having failed to attend the hearing. Further, counsel stated that Mr H Charles Johnson, the respondent's attorney-at-law, did not offer any explanation for the respondent's absence. Counsel said there was no application for relief from sanctions supported by the required affidavit filed on behalf of the respondent.

[13] In his affidavit in response to that of Ms Bobb-Semple, Mr H Charles Johnson indicated that the respondent had been residing in the United States of America since 2013. He explained that "due to circumstances beyond her control", neither the respondent nor himself could have attended the pre-trial review when the unless order was made by Hibbert J. He further explained that although he was served with a formal order from that pre-trial review on 27 July 2015, the respondent could not afford

to make the necessary travel arrangements and obtain leave from her job to facilitate her attending the adjourned pre-trial review. He however attended on her authority.

[14] Mr H Charles Johnson agreed that it was Ms Bobb-Semple who advised Sinclair-Haynes J of the unless order. He asserted however that the learned judge "listened to [his] response to the matter and varied the order made by her brother, Justice Hibbert".

[15] It is agreed between counsel that the learned judge in making the orders that she eventually did was acting on her own initiative.

The appeal

[16] On 6 July 2016, the appellant filed notice of appeal and written submissions in support of the notice of appeal, challenging the orders of Sinclair-Haynes J. Seven grounds of appeal were filed which stated as follows:

> "1) The learned judge erred in varying the unless order of Mr Justice Lloyd Hibbert dated June 5, 2015, striking out the Respondent's statement of case on October 7, 2015, in circumstances where the Respondent had not filed an application for relief from sanctions and there was therefore no material before the Learned Judge which enabled her to properly exercise her discretion.
>
> 2) The decision of the Learned Judge to vary the Pre-Trial Review Orders of Mr Justice Hibbert was unreasonable in light of the Respondent's repeated breaches of the Court's orders and her failure to attend either the Case Management Conference or the Pre-Trial Review hearings scheduled in the substantive proceedings.

3) The Learned Judge failed to have any or any due regard to the relevant law in exercising her discretion in varying the Pre-Trial Review Orders made by Mr Justice Hibbert.

4) The Learned Judge reversed/varied the Order of a Judge of concurrent jurisdiction in circumstances where the said order was regularly made.

5) The Respondent's statement of case stood struck out and there was therefore no proceedings before the Learned Judge which enabled her to properly exercise a discretion in making the said order dated October 7 2015.

6) The learned judge failed to give the appellant a reasonable opportunity to make representation in relation to the order made on made on October 7, 2015 which purported to vary the said Order of Mr Justice Hibbert.

7) On June 24, 2016 Mr Justice Rattray granted permission to the Appellant to appeal the said order of Mrs Justice Sinclair-Haynes dated October 7 2015."

[17] The orders sought are as follows:

"(i) The Appeal be allowed.

(ii) The Order of Mrs Justice Almarie Sinclair-Haynes made on October 7 2015 be set aside and the Order of Mr Justice Lloyd Hibbert striking out the Respondent's statement of case be restored.

(iii) The costs of this Appeal and the costs below be awarded to the Appellant.

(iv) There be such further or other relief as may be just."

The submissions

[18] Counsel for the appellant in his written submission identified four issues to be determined, namely:

"a. What is the effect of a party's non-compliance with an Unless Order of the Court, to which is attached a specific sanction;

b. Does the Court have the power to vary an Unless Order in respect of which a party is in breach in the absence of a written application for relief from sanctions supported by the required affidavit evidence;

c. Is it reasonable and does it further the Court's overriding objective where the Court makes an order of its own initiative without having afforded the party likely to be affected by the said Order a reasonable opportunity to make representations in respect of the said Order;

d. Does a Court have the power to vary a previous Order of a court of concurrent jurisdiction which was regularly made, in the absence of fraud/misrepresentation, non-disclosure or a specific procedural rule which enables the Court to act in this manner."

[19] It was counsel's primary contention that the learned judge erred in law in varying the unless order of Hibbert J which took effect on 7 October 2015 when the respondent failed to attend the adjourned pre-trial review hearing. Counsel submitted that the learned judge had no material before her on which she would properly exercise her discretion in varying the orders of Hibbert J, since the respondent had failed to file an application for relief accompanied with the required affidavit in support as per rule 26.7 of the CPR. It was counsel's submission that since the respondent was in breach of an order it meant that the learned judge could only properly have dealt with the matter in accordance with that rule of the CPR that dealt with relief from sanctions. Counsel relied on a decision of this court, **Peter Crosswell v Financial Institutions Services Ltd** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No

45/2005, judgement delivered 28 September 2007, in support of this aspect of his submissions.

[20] Counsel also submitted that the learned judge failed to comply with rule 26.2(1) of the CPR when she opted to make an order on her own initiative. He pointed out that the rule requires that the party likely to be affected be given a reasonable opportunity to make representation. No such opportunity was afforded to the appellant prior to the making of the order varying that of Hibbert J, hence, counsel submitted, the making of the order did not advance the overriding objective.

[21] Counsel's final submission related to the issue of whether the learned judge had the discretion to set aside the order of a judge of concurrent jurisdiction. He contended that since there was no evidence of fraud/misrepresentation or material non-disclosure on the part of the appellant which caused Hibbert J to make the orders, there was no legal basis on which Sinclair-Haynes J could properly have exercised her discretion to set aside those orders.

[22] For the respondent, it was submitted that there was a single issue to be determined, namely:

> "Does the court have the power to vary an unless order in the absence of a written application for relief from sanction."

[23] Counsel also relied on **Peter Crosswell v Financial Institution Services Ltd**. He contended that whereas Cooke JA in that case did say that where a party wishes to apply for relief from sanction there must be compliance with rule 26.8 of the CPR, there

was no mention of the relevant consideration or regime to be applied when the court decides on its own initiative to grant relief from sanction under rule 26.2(1) of the CPR. It was counsel's submission, that where the court on its own initiative makes an order for relief from sanction, an application or affidavit evidence is not required to be placed before the court before it can exercise its discretion. Counsel relied on **Marcan Shipping (London) Ltd v Kefalas and another** [2007] EWCA Civ 463.

[24] Counsel submitted that the appellant in the instant case was given a reasonable opportunity to make representations but failed to do so. Further, he submitted that if the appellant needed time to make better representations an adjournment could have been sought but no such request was made of the learned judge. Thus, he concluded that the learned judge in fact observed the mandatory prerequisites under rule 26.2.

[25] Counsel contended that in any event, the learned judge did not set aside the unless order of Hibbert J, but merely varied it. Counsel submitted that in varying the unless order, the learned judge applied the overriding objective as stated in part 1.1(2) (a) and (d) of the CPR. Further, counsel submitted that under the provisions of rules 38.3, 26.1(2)(v) and 26.1(7) of the CPR, the learned judge could vary the order which amounted to making the appropriate direction in an effort to further the overriding objective.

Discussion and analysis

[26] The order made by Hibbert J was appropriate in these circumstances where the respondent had failed to comply with the orders that had been made at the case

management conference and then failed to attend the pre-trial review. The unless order was made in an effort to secure the compliance of the respondent such that the matter could proceed quickly and efficiently to trial.

[27] This order was made in keeping with rule 26.7 of the CPR which states:

> "(1) Where the court makes an order or gives directions the court must whenever practicable also specify the consequences of failure to comply.
>
> (2) Where a party has failed to comply with any of these Rules, a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply.
>
> (3) Where a rule, practice direction or order:
>
> (a) requires a party to do something by a specified date; and
>
> (b) specifies the consequences of failure to to comply, the time for doing the act in question may not be extended by agreement between the parties."

[28] In a recent decision of this court, **Dale Austin v the Public Service Commissions and the Attorney General of Jamaica** [2016] JMCA Civ 46, one of the issues considered was similar to the central issue which arises in this case. In that case, one of the complaints raised by the appellant was that the judge had erred in varying a costs order made by another judge whereby costs of an application were to be paid to the claimant within a specified time, otherwise the defendant's statement of case would stand as struck out.

[29] Edwards JA (Ag) conducted a comprehensive and useful review and analysis of the relevant rules and instructive authorities concerning the issue. She commenced her analysis by considering rules 26.1(2)(c), 26.1(2)(v), 26.1(7), 26.2(1) and (2), 26.7 and 26.8 of the CPR. She referred to the cases of **Robert v Momentum Services Ltd** [2003] 1 WLR 1577; **Marcan Shipping (London) Ltd v Kefalas and another** and found persuasive support in **Keen Phillips (A Firm) v Field** [2007] 1 WLR 686 and **Samuels v Linzi Dresses Ltd** [1981] QB 115.

[30] She concluded at paragraph [101]:

> "Having examined the issue and having looked at the rules and the authorities which I found to be highly persuasive, I am prepared to make the following propositions:
>
> i. Where a party is of the view that he is unable to comply with any rule, practice practice direction, order or direction of the court within the time stipulated to do so, he may apply for any extension of time to comply, before the time for compliance has expired and it will not be treated as an application for relief from sanctions. In determining whether to grant such an extension, the court will give due regard to overriding objective (Rule 26.1(2) (c) and rule 1.1.; **Robert v Momentum Services Ltd**.)
>
> ii. A party may apply for extension of time even though the time limited for compliance has expired. (Rule 26.1(2) (c).
>
> iii. A party in default of compliance with an unless order may apply for relief from sanctions even after the sanction

has taken effect. (Rule 26.1(2)(c)); **Keen Phillips, Marcan Shipping and Samuels v Linzi Dresses Ltd**).

iv. One of the reliefs from sanction which a court may grant is an extension of time within which to comply with an unless order.

v. There need not be a formal application, and the court may act on its own motion or initiative even though it is under no duty to do so (Rule 26.1(2)(v); 26.2(1) and rule 26.1(7); **Marcan Shipping, Keen Phillips and Kinsey v Commissioner of Police for the Metropolis.)"**

[31] Applying these propositions to the instant case, it is first necessary to acknowledge that the learned judge did have the power to vary the order (see rule 26.1(7)). The position is that the court may indeed vary the terms of an unless order if in the interests of justice it is appropriate to do so.

[32] In the instant case, it is important to note that the order made by Hibbert J had two components. Firstly, the respondent was to comply with the orders made at the case management conference and secondly, the respondent was to attend the pre-trial review. It is apparent that by the time of the adjourned pre-trial review, there was compliance with the case management orders. The failure of the respondent to attend was therefore the one aspect of the order that was not complied with.

[33] Rule 27.8 of the CPR addresses the issue of attendance at case management conference or pre-trial review:

> "27.8 (1) Where a party is represented by an attorney-at-law, that attorney-at-law or another attorney-at-law who is fully authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review.
>
> (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the attorney-at-law) must attend the case management conference.
>
> (3) However the court may dispense with the attendance of a party or representative."

[34] Although the attendance of the claimant was specifically ordered by Hibbert J, the question which arises is whether, in the circumstances where there had been compliance with one aspect of the order and the attorney-at-law had attended the pre-trial review on behalf of the respondent, it would be just to have the respondent suffer the draconian penalty of having her case struck out. This is especially so since the court could in fact dispense with her attendance. It would seem that an explanation was given for her non-attendance and this explanation was accepted, causing the learned judge to make the order she then made. Notably, the learned judge varied the unless order to require the attendance of "the claimant's representative" suggesting an appreciation of the difficulty in the respondent attending.

[35] The learned judge could properly have acted on her own motion or initiative in the circumstances. There was no need for a formal application. What was required was that the party likely to be affected be afforded a reasonable opportunity to make a

representation whether orally, in writing, telephonically or by such other means as the court considered reasonable (rule 26.2(2) and (3) of the CPR). Unfortunately, from the material available to this court, it is not clear whether such an opportunity was indeed afforded to the appellant but it is not suggested that the appellant was in any way prevented from objecting to the action the learned judge was taking.

[36] However, ultimately it cannot be said that the orders made by the learned judge in exercise of her discretion were "palpably wrong" warranting this court's intervention. I would therefore dismiss this appeal with costs to the respondent.

EDWARDS JA (AG)

[37] I too have read the draft judgment of P Williams JA and agree with her reasoning and conclusion.

MORRISON P

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.