[2012] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 134/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**KEITH ANTHONY SILVERA**	**APPELLANT**
A N D	**OWEN A. MCFADDEN**	**1ST RESPONDENT**
A N D	**EARL WILBY**	**2nd RESPONDENT**
A N D	**DAPHNE WILLIAMS**	**3RDRESPONDENT**

Lord Anthony Gifford QC instructed by Gifford Thompson and Bright for the appellant

Miss Tavia Dunn and Mrs Tashia Madourie instructed by Nunes Scholefield, DeLeon & Co for the 2nd respondent

8 and 22 June 2011 and 30 March 2012

HARRIS JA

[1] I have read in draft the judgment of my brother Hibbert JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of Hibbert JA (Ag) and agree with his reasoning and conclusion.

HIBBERT JA (Ag)

Background

[3] The appellant who was a passenger in a motor vehicle which was being driven by the 2nd respondent on 5 December 1999, suffered injury as a result of a collision between the vehicle in which he was travelling and another, which was being driven by the 1st respondent. Consequently, by a writ of summons which was filed on 24 August 2001, he brought an action against the 1st and 2nd respondents seeking damages for personal injuries.

[4] The writ of summons remained un-served and by a notice of application for court orders, which was filed on 22 March 2005, the appellant sought the following orders:

> "(1) That the time to apply for renewal of the Writ of Summons herein be extended to the date of the hearing.
>
> (2) That the Writ of Summons herein be renewed for a period of six (6) months from the date hereof."

The orders sought were granted by Master Lindo on 16 November 2005.

[5] The 2nd respondent was, on 30 November 2005, served with the writ of summons and statement of claim and on 14 December 2005 an acknowledgement of service was filed on his behalf. His defence was filed on 14

February 2006. On 8 June 2006 an order was made joining the 3rd respondent as a defendant and on 12 June 2006, the 1st and 3rd respondents filed an ancillary claim seeking damages against the 2nd respondent for negligence. A defence to the ancillary claim was filed on 3 November 2006. The matter was thereafter referred to mediation pursuant to Part 74 of the Civil Procedure Rules (CPR).

[6] On 27 April 2009 an application was filed on behalf of the 2nd respondent seeking the following order:

> "1 That these proceedings be struck out pursuant to the transitional Provisions (Part 73) of the Civil Procedure Rules, 2002."

On 27 April 2010 another application was filed on behalf of the 2nd respondent. In this application the order sought was:

> "1 A declaration that these proceedings including the Ancillary Claim have been automatically struck out pursuant to the transitional Provisions (Part 73) of the Civil Procedure Rules 2002."

[7] This application was heard by Brooks J (as he then was) on 2 November 2010, and on 9 November 2010 he made the following orders:

> "1 It is declared that these proceedings have been automatically struck out pursuant to the transitional provisions of the Civil Procedure Rules 2002;
>
> 2 The orders herein made by the Master on 16 November 2005 are hereby struck out and the statement of defence and ancillary claims filed thereafter, herein, are declared null and void;

3 Costs of the application to the applicant to be taxed if not agreed;

4 Leave to appeal granted."

[8] The orders that the appellant has sought are as follows:

> "That the appeal be allowed in respect of the Declarations and Orders 1-3 made by the Supreme Court on the 2nd and 9th November 2010 in the Judgment of His Lordship Mr Justice Patrick Brooks."

The grounds of appeal are set out as follows:

> "a. The learned judge erred in law in holding that the proceedings in this matter were in existence as at 1st January 2004 and that therefore they were automatically struck out under CPR 73.3 (8).
>
> b. The learned judge erred in law in holding that the Order of the Master dated 16th November 2005 was a nullity and in not holding that the said Order took effect unless set aside or quashed on appeal.
>
> c. The learned judge erred in law in holding that the Defendants, by acknowledging service, filing Defences and taking other steps in the proceedings, had not waived their right to challenge the validity of the said Order of the Master."

Submissions

[9] Before this court Lord Gifford QC has submitted that Part 73 of the CPR is not applicable to the instant case. He argued that the writ having been filed on 24 August 2001, ceased to be in force after 24 August 2002 as a result of the provisions of section 30 of the Judicature (Civil Procedure Code) Law (CPC) which provided that: – "No original writ of summons shall be in force for more

than twelve months from the day of the date hereof… ." This, he submitted, remained the position until 16 November 2005 when the writ was renewed. Thus, he submitted, these proceedings were not in existence on 1 January 2003 when the CPR came into force and therefore, did not fall within the definition of "old proceedings" in rule 73.1(3) of the CPR. As a consequence, he submitted, the pre-conditions for automatic striking out under Part 73 of the CPR had not been fulfilled.

[10] Lord Gifford QC also submitted that there could have been no case management conference as the respondents were not served with the writ before January 2003 and therefore were not parties to the suit until they were served.

[11] Lord Gifford QC further submitted that even if there was an irregularity, the 2nd respondent waived it by (a) filing an acknowledgement of service; (b) filing a defence; (c) filing a defence to the ancillary claim; and (d) making no objection to the service of the writ or to the order of Master Lindo, until the application seeking the declaration that the writ was automatically struck out, was filed. In support of this proposition, he relied on the judgments in ***Sheldon v Brown Bayley's Steelworks*** [1953] 2 All ER 894 and ***Banning v Wright*** [1972] 2 All ER 981.

[12] Miss Dunn in reply submitted that the writ of summons, although not served within 12 months as required by section 30 of the CPC remained in

existence until 31 December 2003 when it was automatically struck out. This, she said, was supported by the decisions in ***McNaughty v Wright and Others*** SCCA No 20/2005, judgment delivered 25 May 2005 and ***Re Kerly, Son & Verden*** [1900-3] All ER Rep 858. She further submitted that even though the writ was not served before January 2003, the proceedings still fell within the definition of "old proceedings". She cited the judgment of ***Saddler v Sadler*** SCCA No 53/2006, delivered 30 August 2006 in support of this submission.

[13] Miss Dunn also submitted that no application to renew the writ under the CPC, as was purported to have been done, could be validly done in 2005 as, by then, the CPC had been repealed.

The Law

[14] The CPR 2002 came into operation on 1 January 2003 "subject to the transitional provisions contained in part 73". These rules were made in exercise of the powers conferred upon the Rules Committee of the Supreme Court by section 4 of the Judicature (Rules of Court) Act. By Act No 4-2003 entitled the Judicature (Civil Procedure Code) Law (Repeal) Act, 2003, the CPC was repealed on 26 March 2003.

[15] Rules 73.1 to 73.3 (1) state:

> "73.1 **Scope** …
>
> 73.1 (1) **Scope of this Part**

This Part deals with the extent to which the former rules remain in force after these Rules come into force and the way in which actions, matters and other proceedings in existence as at the commencement date become subject to these Rules.

(2) Any reference to the Judicature (Civil Procedure Code) Act in any statute or rule is to be deemed to be a reference to these Rules.

(3) In this Part -
"**commencement date"** means the 1st January 2003;
"old proceedings" mean any proceedings commenced before the commencement date.

New proceedings

73.2 These Rules apply to all proceedings commenced on or after the commencement date.

Old proceedings

73.3 (1) These Rules do not apply to any old proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date."

Rule 73.3 (4) states:

"(4) Where in any old proceedings a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed."

Rule 73.3 (8) states:

> "(8) Where no application for a case management conference to be fixed is made by 31st December 2003 the proceedings (including any counterclaim, third party or similar proceedings) are struck out without the need for an application by any party."

[16] Provisions were, however, made for the restoration of proceedings which were struck out by virtue of the operation of rule 73.3(8). These are contained in rule 73.4(3-8) which states:

> "73.4 …
>
> (3) Any party to proceedings which have been struck out under rule 73.3(7) [sic] may apply to restore the proceedings.
>
> (4) The application must be made by 1st April 2004.
>
> (5) The application must be on notice to all other parties and must be supported by evidence on affidavit.
>
> (6) The court may restore the proceedings only if-
>
> (a) a good reason is given for failing to apply for a case management conference under rule 73.3 (4);
>
> (b) the applicant has a realistic prospect of success in the proceedings; and
>
> (c) the other parties to the proceedings would not be more prejudiced by granting the application than the applicant by refusing it.
>
> (7) Any order restoring the proceedings may be made on such terms as the court thinks just.

(8) These Rules apply to any proceedings restored under this rule."

[17] The proceedings in the instant case, having been commenced before 1 January 2003, were, until then, governed by the CPC. Although section 30 of the CPC required that an application for the renewal of a writ should be made within 12 months of its issue, section 676 provided for the extension of time for the making of such an application.

Analysis

Did the writ of summons cease to be in existence after 24 August 2002?

[18] In ***Re Kerly, Son & Verden*** Sterling LJ sitting in the English Court of Appeal, in his judgment at page 860 stated:

> "The main objection which has been pressed upon us is that, having regard to R.S.C. Ord. 8,r.1, the writ for purposes of service is spent, so to speak, and no doubt Ord. 8, r.1, is to be taken into consideration on this question. It provides:
>
> > 'no original writ of summons shall be in force for more than twelve months from the day of the date thereof…'
>
> It is conceded on all hands that that does not mean that it is not to be in force for any purpose, but that it is limited to being in force for the purpose of service. Therefore, if it is not served within the period of twelve months it is at an end, for it is no longer in force… "

That portion of Ord. 8, r. 1 contains identical terms to section 30 of the CPC.

[19] This statement of Sterling LJ was examined by the Court of Appeal in ***Sheldon v Brown Bayley's Steelworks*** Singleton LJ at page 895 said:

> "Under R.S.C., Ord. 8, r.1, the writ of summons ceases to be in force after twelve months from the day of the date thereof. A note in the *ANNUAL PRACTICE*, 1953, at p.59 says:
>
> > 'This means shall be in force for *the purpose of service* for twelve months, not that the writ ceases to be efficacious for any purpose whatever…' ."

He thereafter stated:

> "Support for that statement is to be found in ***Re Kerly, Son & Verden***."

At page 896 Singleton LJ further stated:

> "I do not regard it as strictly accurate to describe a writ which has not been served within twelve months as a nullity. It is not as though it had never been issued. It is something which can be renewed. A nullity cannot be renewed. The court can grant an application which results in making it just as effective as it was before the twelve months' period had elapsed. I do not think that the court had in mind what had been said in ***Kerly's*** case …to which I have referred…If the writ had been a nullity, there would have been no point in considering whether the court should exercise its discretion to renew it. The position under Ord. 8. r.1, is that the writ is not in force for the purpose of service after the twelve months' period had run. It is still a writ…"

[20] These authorities clearly show that a writ remains in existence even if it was not served within the 12 months period. Apparently, recognizing this difficulty, Lord Gifford initially argued that under the provisions of section 31 of the CPC, when a writ is renewed, it has the effect of making the date of the

commencement of the action, the date of the renewal. If this assertion were correct then the date of the commencement of the proceedings before us would be 18 November 2005. However, with a little nudging from the bench, he resiled from this position. The proceedings in the instant case definitely fall within the meaning of "old proceedings" to which the CPR applies and in which no application for a case management conference was made on or before 31 December 2003.

[21] I can find no merit in the submission of Lord Gifford that because the defendants were not served with the writ of summons they were not parties to the action, hence, no case management conference would be held. The Concise Law Dictionary by P.G. Osborn LLB (Lond) 5th Edition defines "parties" as persons suing or being sued". Support is also to be found in rule 5.6(1) of the CPR which speaks to the attorney-at-law being authorized to accept service of the claim form on behalf of a party.

[22] The further suggestion that a case management conference could not have been applied for because the claim was not served on the defendant named in the suit is unsustainable. Rule 27.3 (1) of the CPR states:

> "The general rule is that the registry must fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim."

This rule imposes a duty on the registry to act as soon as a defence is filed. Rule 73.3(4), however, imposes a duty on the claimant to apply for a case

management conference to be fixed. This duty is not conditional on the service of the claim or the filing of a defence. Clearly, rule 27.3(1) is not applicable to the transitional provisions.

[23] I therefore agree with Brooks J when he declared that the proceedings were "old proceedings" which were automatically struck out on 31 December 2003 as a consequence of the failure of the appellant to apply for a case management conference.

[24] Could the master properly make the order "that the time to apply for renewal of the Writ of Summons herein be extended to the date of the hearing" The short answer to that question must be "No". As Miss Dunn correctly submitted, the CPC having been repealed in 2003, no application could be made under it in 2005. The application could only be made under the provisions of the CPR. Before this could be done, there would have had to be an application made by 1 April 2004 to restore the proceedings. No such application having been made, the proceedings, therefore, remained struck out.

[25] The consequences of failure by 1 April 2004 to apply for the restoration of proceedings which were struck out by virtue of rule 73.3 (8), was shown in ***McNaughty v Wright***. In that case an application was made to extend the time for making an application to restore proceedings which had been struck out, beyond 1 April 2004. Counsel for the applicant sought to invoke the provisions in rule 26 of the CPR which empowered the court to extend time for compliance

with any rule, practice direction, order, or direction of the court even if the application for an extension is made after the time for the compliance had passed. Counsel for the respondents took a preliminary point that the applicant, having failed to apply for restoration by 1 April 2004, the court had no jurisdiction to entertain the application. Campbell J upheld the respondents' submissions and dismissed the application.

[26] An appeal from the decision of Campbell J was dealt with as a procedural appeal by Smith JA. In upholding the decision of Campbell J, he held that rule 26 did not apply to rule 73 because:

> "Rule 26 concerns the powers of the court in case management proceedings under the new Rules. Rule 73 was enacted specifically as transitional provisions. The scope of these transitional provisions is stated in Rule 73 (1)…
>
> The procedure to bring the appellant's claim within the purview of the CPR was completely ignored. It is clear, in my view that the court's general powers of case management under Rule 26 do not apply to the transitional provisions of Rule 73."

Waiver

[27] ***McNaughty's* case** impacts on the submission of Lord Gifford that by their conduct the respondents waived any irregularity which might have existed. In ***Sheldon v Brown Bayley's Steelworks and Another*** Singleton LJ, as I have shown in paragraph [19] stated that because the writ could be renewed it was not a nullity and that service of the writ after 12 months was an irregularity

which could be waived. This position was supported by Denning LJ (as he then was). At page 897E he said:

> "Now, if a writ can be renewed after the twelve months have expired, that must mean that it is not then a nullity."

At page 897G he further stated:

> "That shows that the service out of time was only an irregularity which could be waived."

At page 897 D however, he stated:

> "This depends on whether the service of a writ, after the twelve months permitted by the rule has [sic] expired is a nullity or an irregularity. If it was an irregularity, then the irregularity was waived by the unconditional appearance. But if it was a nullity, then it could not be waived at all. It was not only bad, but incurably bad."

In the instant case, the writ having been struck out and not restored, ceased to exist and therefore became a nullity, and subsequent service of it could not be waived. The submissions concerning waiver must therefore fail.

[28] For the reasons stated, the appeal ought to be dismissed with costs to the 2nd respondent to be taxed if not agreed.

HARRIS JA

ORDER

Appeal dismissed. Costs to the 2nd respondent to be taxed if not agreed.