[2013] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 120/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**TRADE BOARD LIMITED**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND APPELLANT**
AND	**DANIEL ROBINSON**	**RESPONDENT**

Ms Carlene Larmond and Harrington McDermott instructed by Director of State Proceedings for the appellant

Glenroy Mellish and Mrs Kerri-Gaye Rushton instructed by Glenroy W Mellish and Co for the respondent

22, 23 July and 6 December 2013

MORRISON JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of Brooks JA. I agree and have nothing further to add.

BROOKS JA

[3] On 21 October 2011, Lawrence-Beswick J (as she then was) delivered a judgment refusing an application by Trade Board Limited and The Attorney General of Jamaica (the appellants) whereby they sought orders to set aside a judgment in default of defence entered against Trade Board and for a defence, in respect of both, which had been filed out of time, to stand. The appellants have appealed against that decision, arguing that the learned judge erred by:

> "a. holding that [Trade Board] did not have a good explanation for its failure to file its Defence in time;
>
> b. holding that [Trade Board] did not have a real prospect of successfully defending the Claim."

[4] Mr Daniel Robinson, the bailiff for the parish of Saint James, filed the claim from which the application had emanated. It was filed on 27 July 2010. In the claim, Mr Robinson asserted that Trade Board delivered a writ of seizure and sale to him instructing him to execute it against the property of Grains Jamaica Limited. The writ was in the sum of $209,860,694.56. He executed the writ on 28 August 2002. He claimed that Trade Board owed him the sum of $24,886,044.00 as fees and expenses incurred as a result of his having done so. His claim against the Attorney General was for the identical sum. He asserted that the Attorney General had, by letter dated 1 February 2007, given him an undertaking to pay his fees and costs in respect of the said writ.

[5] The appellants failed to file their defence within the time prescribed by part 10 of the Civil Procedure Rules (the CPR). Consequently, Mr Robinson entered a judgment in

default of defence against Trade Board (in respect of which no permission was required) and abandoned the claim against the Attorney General (in respect of which permission would have been required). It is for that reason that the application before Lawrence-Beswick J was not identical for both appellants.

The submissions

[6] The appellants contended in this appeal, that they have a defence which has merit as it is based on the fact that, although it is Trade Board that requested Mr Robinson's services, Trade Board is not the creditor that has first priority in benefitting from the execution of the writ against Grains Jamaica Limited. The appellants contended that it is Peppersource Limited that is the creditor that holds first priority and should, therefore, be responsible for Mr Robinson's fees. To hold Trade Board responsible, the appellants argued, would result in the inequitable position whereby Trade Board would be responsible for paying Mr Robinson's fees and expenses, while Peppersource reaps the benefit of his work. The appellants contended that as the writ was issued by the court and it is the court that fixed the order of priority of creditors, the proper course, therefore, is for the court to identify the party that is liable to Mr Robinson.

[7] In addition to that position, it was contended that the Attorney General did not give an undertaking to Mr Robinson. The Attorney General asserted that the letter, to which Mr Robinson points as containing an undertaking, cannot properly be construed as so doing.

[8] Based on those positions the appellants argued that the learned judge's decision should be set aside and that they should be allowed to defend the claim.

[9] Mr Mellish, on behalf of Mr Robinson, argued that the learned judge was correct in finding that the appellants had not satisfied the established requirements for the application that they had filed. He asserted that not only was there no good explanation for the delay in filing the defence but that the defence, as filed, was a bare denial of the claim and, therefore, had no merit.

[10] On the merits of the defence, he contended that the law is clearly in Mr Robinson's favour. He asserted that the party who engages the bailiff is responsible for his fees and expenses. There is no basis, Mr Mellish argued, for Mr Robinson to approach any other party in respect of those fees and expenses. For completeness, it must be said that there were other writs of seizure and sale that were issued by the court in respect of Grains Jamaica Limited, but it was the writ that was issued at the request of Trade Board that had been executed.

The analysis

[11] In assessing this appeal, the main issue to be decided is whether the learned judge erred in exercising her discretion not to set aside the judgment in default. There are a few subsidiary issues in considering the main issue. They concern the matters to be considered in applications for setting aside a default judgment and for the extension of time for filing a defence. The analysis of the issue of an extension of time to file a defence is closely allied to the issues involved in considering an application to set aside

a default judgment and therefore both aspects of the present application will be considered as one. In addition to those issues, the question of the liability of an execution creditor for the bailiff's fees for executing a writ of seizure and sale, also arises for consideration.

[12] Two preliminary points should be noted. It will be borne in mind that this court will not lightly set aside a decision made by a judge at first instance in exercise of a discretion given to that judge (see **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191). Secondly, it should be noted that, initially, there was a complaint that the judgment against Trade Board had not been regularly entered. That complaint has been abandoned. Since there is now no dispute as to the regularity of the default judgment, it is rule 13.3 of the CPR that is relevant to this application.

[13] Rule 13.3 requires a party who is applying to set aside a default judgment, to show that it has a real prospect of successfully defending the claim. In assessing the application the court must consider whether the applicant has:

> "(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be." (rule 13.3(2))

The substantive test is, however, whether the applicant has any real prospect of successfully defending the claim.

[14] In assessing the other elements of delay and an explanation it may first be noted that there was no issue of any delay by Trade Board in making its application. The application was filed on 11 March 2011, which was the same day that Trade Board's attorneys-at-law were served with the default judgment. In considering the explanation for the failure to file a defence within the specified time, in the context of rule 13.3, the learned judge outlined the explanation given by Trade Board. She said at paragraph 9 of her judgment:

> "Counsel for the Trade Board argues that it was unable to file a defence because it did not have sufficient instructions and had requested information from Bailiff Robinson which had not been forthcoming in time."

[15] The learned judge was dismissive of the explanation. She noted that not only had a statement of defence been filed on the same day that the request for information was filed, but that all the information requested of Mr Robinson was already in the possession of the attorneys-at-law who had conduct of the matter for Trade Board. Those very attorneys-at-law had, in other proceedings concerning Grains Jamaica Limited, collaborated with Mr Robinson about the details of the writ of seizure and sale as well as related matters. Indeed, it was through those attorneys-at-law that the writ in question was requested. The learned judge, at paragraph 10 of her judgment, noted the connection between the respective proceedings. She said:

> "...The Counsel who signed the Draft Defence and the Request for Information was the same counsel who appeared for the Trade Board in that related appellate matter [involving Mr Robinson's application to intervene in a

> dispute over the priority of interests in the proceeds of sale of the assets of Grains Jamaica Limited]."

She futher noted that the records indicated that those very attorneys-at-law, "had initially represented Bailiff Robinson in the related matter of **Pepper Source v Trade Board and Grains Jamaica Limited** CL 2002/T031, and...[had] filed Bailiff Robinson's affidavits, on his behalf, based on the existence of the Writ of Seizure and Sale and an acceptance of its attendant circumstances". The learned judge was quite correct in her approach to that explanation.

[16] Although the learned judge properly rejected the reason given for the failure to file a defence in time, the authorities show that the absence of a good reason is not, by itself, fatal to an application of this type. **Finnegan v Parkside Health Authority** [1998] 1 All ER 595 is one of the authorities that is usually relied upon in support of that principle. In that case, the headnote accurately summarises the decision of the court in respect of that principle:

> "...the absence of a good reason for any delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension, but the court was required to look at all the circumstances of the case and to recognise the overriding principle that justice had to be done."

That principle is particularly applicable where no prejudice, as a result of the delay, has been asserted or proved. The principle has been relied upon by this court in **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4.

[17] Since the absence of a good reason for the delay, by itself, is not fatal to the application, the court must also consider the substantive issue of whether the

appellants have a real prospect of successfully defending the claim. The learned judge also closely considered the issue of the merits of the defence. In order to place her comments in context, it would be of assistance to set out the relevant portions of the particulars of claim and of the defence. In respect of the Trade Board, the particulars of claim stated, in part:

> "1. The Claimant is the Bailiff of the Resident Magistrate's court for the parish of Saint James. In this capacity the Claimant executed a writ of seizure and sale which was issued by the Supreme Court of Judicature of Jamaica on August 27, 2002 on behalf of the 1st Defendant.
>
> 2. The 1st Defendant is a limited liability company with offices at 72 Harbour Street, Kingston who [sic] had obtained a judgment against Grains Jamaica Limited.
>
> 3. ...
>
> 4. The Claimant duly executed the writ of seizure and sale and in obedience to the orders of the court provided security for the unsold chattels and the land and buildings which belonged to the judgment debtor, Grains Jamaica Limited.
>
> 5. The authority to engage the services of a security company derived from the order of Mr. Justice Anderson of March 25, 2003, when upon the application of the 1st Defendant, he ordered the Claimant to 'sell such chattels as may be required to secure the chattels and land'.
>
> 6. …
>
> 7. The Claimant submitted his report to the Defendants and the court in his Bailiff Report dated May 2, 2008. In the report he accounted for the following:
>
> - Sale of assets of the judgment which realized proceeds of $5,762,413.24

- Payment to the security company out of the proceeds of $1,993,749.00

- Payment to other creditors amounting to $1,123,624.24

- Cash in hand and with the 2nd Defendant of $2,645,040.00

- Amount due and payable to the security company of $18,386,044.00

8. On November 10, 2008 the Claimant in a letter gave the 1st Defendant an explanation for the charge of $6,000,000.00 relating to his expenses and fees."

[18] In answer to those averments, the portions of the defence that related to Trade Board stated:

"1. Paragraph 1 of the Particulars of Claim is neither admitted nor denied. **The Defendants are unaware of the Writ of Seizure and Sale to which the Claimant makes reference**.

2. Paragraph 2 of the Particulars of Claim is admitted.

3. ...

4. The Defendants **neither admit nor deny the allegations made in paragraphs 4 and 5** of the Particulars of Claim and put the Claimant to strict proof thereof.

5. ...

6. **Paragraphs 7 and 8 of the Particulars of Claim are neither admitted nor denied** and the Claimant is put to strict proof of the same.

7. ...

8. The Defendants state that **due to the Claimant's failure to particularize the Writ of Seizure of** [sic] **Sale** referred to [sic] paragraphs 1, 3 and 4 of the Particulars of Claim, **the Defendants are unable to properly respond to the allegations** in the Statement of Claim.

9. ...

10. Save as is hereinbefore expressly admitted the Defendants deny each and every allegation of the Particulars of Claim as if the same were separately set out and traversed seriatim." (Emphasis supplied)

[19] The learned judge found that the proposed defence was insincere. The evidence that was before her supports that finding. The transactions between Trade Board's attorneys-at-law and Mr Robinson did not allow Trade Board to deny knowledge of the details of the writ of seizure and sale.

[20] In addition to the aspect of insincerity, the learned judge was also correct in finding that the proposed defence "is replete with bare denials as it concerns the Trade Board, a situation which is regarded as being unacceptable by the courts". A reading of the proposed defence would not have revealed the nature of the defence. Rule 10.5(1) of the CPR requires that the "defence must set out all the facts on which the defendant relies to dispute the claim". Merely to say, as is said in paragraphs 1 and 4 of the proposed defence, that the assertions are neither admitted nor denied, does not outline a defence with a real chance of success. This is especially so when it has been demonstrated that the Trade Board, through its attorneys-at-law, was seised with the information on which the claim is based. It stands to reason, therefore, that an application for the defence, as filed, be allowed to stand, was doomed to failure.

[21] In its application before the learned judge, Trade Board did go further than relying on the contents of the proposed defence. It sought to rely on affidavit evidence which asserted that Peppersource held first priority in securing the benefits of the execution of the writ of seizure and sale. Learned counsel for Trade Board submitted before the learned judge, as Ms Larmond did before us, that, in light of that priority, it would be inequitable to saddle the Trade Board with the costs of that exercise. The complaint before this court is that the learned judge wrongly rejected that premise as affording the defence a real prospect of success.

[22] In addressing that point, the learned judge relied on an excerpt from Halsbury's Laws of England 4th edition Vol 17(1) in support of the principle that the execution creditor who moves the bailiff is liable for the bailiff's fees, despite the execution being unsuccessful. The learned editors of that work, at paragraph 208 state:

> "…the execution creditor is liable to the sheriff for the expenses and the seizure and mileage, even if the execution results in nothing."

[23] Ms Larmond submitted that the learned judge was wrong in relying on the principle stated in Halsbury's. Learned counsel is only partially justified in making that complaint. The case on which the learned editors rely as authority for the principle cited by the learned judge, referred to an English statute (The Sheriffs Act, 1887) that is not applicable in this jurisdiction. However, the principle to which it refers is applicable to this case. In the 3rd edition of Halsbury's, at Vol 34 paragraph 1183, the learned editors state the principle, in this way:

> "If a sheriff is unable, without any default on his part, to levy his fees against the execution debtor, he has a right of action for them against the execution creditor by or on whose behalf he is requested to execute the writ…"

[24] The learned editors rely, as authority, on, among other cases, **Stanton v Suliard** (1599) Cro Eliz 654. **Stanton v Suliard** considered and applied an earlier English statute, namely 28 Eliz 4 (1587), which fixed the sum (termed "poundage") that the sheriff was entitled to charge for serving or executing process or writs of the court. The report indicates that a sheriff may recover his fees against an execution creditor. The court held that an execution of a writ by a sheriff at the instance of an execution creditor, was "good consideration [to the execution creditor]; because the execution was made at his request, and was a benefit unto him; and by the statute a sheriff may lawfully take his fees, and therefore may take a promise to have them paid him".

[25] In Jamaica, section 12 of the 1879 Judicature Law stipulated that bailiff's fees may be fixed by Rules of Court. Part 1 of the General Rules and Orders of the Supreme Court of Judicature of Jamaica fixed those fees. Ellis CJ commented in **Geffrard v Gunter** (1888) vol 1 Stephens' Report 151, that Part 1 of the General Rules and Orders of the Supreme Court contained the equivalent of 28 Eliz 4 in respect of the fixing of the bailiff's fees. **Geffrard v Gunter** was, however, considering the liability of a judgment debtor to the bailiff, where the former had undertaken to settle the bailiff's fees. It is, therefore, not on all fours with the instant case. The bailiff's entitlement to his fees for execution of the writ was, however, plainly recognised from at least 1879,

up to the time of the promulgation of the CPR. The liability to the bailiff is established by the common law, as reflected in cases such as **Stanton v Suliard**.

[26] The CPR does not set out the fees payable to the bailiff for executing writs issued by the court. Rule 54.2(5) does, however, state that a judgment creditor, in an interpleader matter, is liable to the bailiff for the latter's fees and expenses that are incurred in carrying out his duties. This is so despite the subsequent institution of a successful claim by another party, who asserts a proprietary interest in property that has been seized pursuant to a writ of seizure and sale. The principle that may be inferred from that rule is that it is the execution creditor who is liable to the bailiff for the latter's fees and expenses which are not recouped from the execution of the writ. The principle stated by the learned judge was, therefore, correct, even if the authority she cited in support of it was not entirely appropriate.

[27] In addition to the complaint mentioned above, Ms Larmond argued that this writ of seizure and sale cannot be viewed in isolation but must be looked at in the context of there being other judgment creditors. She made the bold submission that "[Mr Robinson's] entitlement to be paid arose from the Court Order and not from [the contract created by the delivery of the writ to him]". Not surprisingly, there was no authority cited in support of that submission. Indeed, it is without merit. The existence of other judgment creditors does not affect the fact that it is Trade Board that set Mr Robinson in motion. Nor can that existence allow Trade Board to point to the origin of the writ instead of to the fact that it was Trade Board that delivered the writ to Mr Robinson.

[28] There was an order by Reid J that the proceeds of sale of the chattels and land of Grains Jamaica Limited be applied in paying the costs of the sale, firstly, and then settling all sums due to the bailiff. By that order also, the balance was, thereafter, to have been paid into an interest bearing account and held in escrow until the determination of the priorities. That order, does not supercede the bailiff's entitlement to be paid by the execution creditor. In the event of a shortfall, it cannot be said that the order prevented the bailiff from seeking to recover his fees and costs from the execution creditor.

[29] There is also the further point raised by the appellants whereby they asserted that a judgment against Trade Board is inequitable, bearing in mind Trade Board's lower ranking in the priority of creditors. It is to be noted, however, that those priorities were fixed in other proceedings involving Grains Jamaica Limited's liabilities. It is not inconceivable that a further application may be made in those, or some other proceedings, clarifying the matter of how the proceeds of sale of Grains Jamaica Limited assets are to be used. Trade Board may ask that the proceeds of sale be used to pay Mr Robinson, or that it be refunded, from the proceeds of sale, any payments it has been obliged to make to Mr Robinson. The point is that Trade Board will not be left without options.

[30] This court considered a similar, though not identical, situation in **Jamaica Export Credit Insurance Corporation v Alcron Development Limited and another** (1991) 28 JLR 629. In that case there was a contest between an execution

creditor and the holder of a bill of sale over certain goods of a judgment debtor. The bailiff, on the instructions of the execution creditor, seized and sold some of the execution debtor's goods, a portion of which were secured by the bill of sale. The holder of the bill of sale objected to the distribution of any of the proceeds of sale, including those of the unsecured goods. During the course of his judgment, Wright JA cited the 1991 English Supreme Court Practice to demonstrate that, in any event, it was the execution creditor who was liable for the bailiff's fees for executing the writ. He quoted order 17/8/1 of that work. This appears at pages 634-5 of the report:

> "As a general rule in a sheriff's interpleader where the claimant [the party seeking to establish a proprietary interest in the property] fails the sheriff is entitled to his costs (including possession money) from the time of the notice of claim or from the sale, whichever be the earlier. Where the claimant succeeds the sheriff is entitled as against the execution creditor to costs from the time when the latter authorized the interpleader proceedings - i.e. generally from the return of the interpleader summons. **But in either case the sheriff gets his costs from the execution creditor who (if successful) obtains a remedy over against the claimant.** Similarly a successful claimant gets his costs against the execution creditor from the return of the interpleader summons." (Emphasis supplied)

It is accepted that at that time, the English rule would have been applicable by virtue of section 686 of the Judicature (Civil Procedure Code) Law. That provision stipulated that where that law was silent on a point, the English rule would be applicable. The current principle, which is similar in effect, is set out in rule 54.2(5) that is referred to above.

[31] Significantly, in answer to Ms Larmond's complaint about inequity, note may be taken of Wright JA's comment as to the justice of the position set out above. He said:

> "It is certainly not difficult to identify or apply the justice running through this provision."

[32] Based on those reasons, Trade Board has no real prospect of successfully defending the claim. There is, therefore, no reason to disturb the learned judge's decision, and no reason to consider the question of whether the Attorney General's letter constituted an undertaking to pay Mr Robinson's fees.

[33] It should be noted that during oral submissions, Ms Larmond introduced the issue that Mr Robinson had not placed any document before the court that justified the level of the fees and expenses that he claimed. Learned counsel argued that if the delivery of the writ to Mr Robinson created a contractual relationship with the Trade Board, the question of the reasonableness of the fees and expenses would become relevant. Ms Larmond submitted that Trade Board was not limited to the proposed defence that was filed but was entitled to rely on all the evidence in the matter to support its effort to defend the claim. She relied on **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Another** SCCA No 5/2009 (delivered 2 July 2009) in support of these submissions.

[34] Mr Mellish pointed out that Trade Board had paid some of Mr Robinson's expenses. He argued that there had been no previous complaint about the level of fees and expenses and that the execution creditors could not now complain about the level of the fees. Learned counsel pointed out that the writ of seizure and sale required Mr Robinson to provide a report and that he had done so.

[35] Mr Mellish submitted that the figures set out in the claim had not been "plucked out of the air". He pointed out that invoices had been submitted to support them. Learned counsel provided this court with a copy of a letter dated 7 June 2006, whereby the Attorney General had acknowledged receipt of an invoice for the sum of $9,616,944.60 representing expenses for security services.

[36] Mr Mellish is correct in his assertion that, as this matter was not raised before the learned judge in the court below, Trade Board cannot now seek to rely on it. This aspect of Ms Larmond's submission cannot succeed.

Summary

[37] In considering the application to set aside the default judgment the learned judge took into account the relevant provisions of rule 13.3 of the CPR and all the evidence in accordance therewith. She quite properly found that the reason given for the delay in filing the defence, and the proposed defence as filed, were insincere and that the latter had no merit, having failed to "set out all the facts on which the defendant relies to dispute the claim" as is required by rule 10.5(1) of the CPR.

[38] The learned judge was also correct in finding that the additional basis, namely, Peppersource's priority standing, on which Trade Board sought to resist Mr Robinson's claim, had no merit. It was Trade Board that set the bailiff in motion; it cannot point to some other party to be liable for his fees, although it may seek to recover its expenditure, due to its liability to him, from some other party.

[39] Based on the above, the appeal should be dismissed with costs to Mr Robinson.

MORRISON JA

ORDER

a. The appeal is dismissed.

b. The judgment of Lawrence-Beswick J delivered on 21 October 2011 is affirmed.

c. Costs to the respondent to be taxed if not agreed.