SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SUIT NO: 361 OF 1994

BETWEEN

(1) MICHAEL WALKER
(2) MARTIN WALKER

Claimants

and

SAMUEL FRANCIS

Defendant

Appearances:
Ms. Marcellina John for Claimants
Mr. Andre Arthur for the Defendant

2003: June 12 & 13

JUDGMENT

[1] Shanks J: This is yet another application under CPR39.5 to set aside a judgment made at a trial where one party was not present apparently as a consequence of the failure of their attorney to act in accordance with his professional duties.

Background

[2] The events leading to this claim and counterclaim go back to 1991. The Claimants hired the Defendant to act as foreman on the construction of a building at Cap Estate. The parties fell out 10 months later. On 3rd June 1994 the Claimants started proceedings

through Mr. Kenneth Foster Q.C. seeking a declaration that the agreement between them had been rescinded by the Defendant's acts, an order for the return of a vehicle he had used during the works (or its value) and an injunction to prevent him harassing the Claimants and their family about money he said he was owed. I understand that such an injunction was granted at some point but the balance of the claim was struck out for want of prosecution by Barrow J on 8th May 2001.

[3] A Defence and Counterclaim was filed on 4th August 1994 making various claims arising out of the 10 months work done by the Defendant. The claims were for the following:

(1) $6,000, being the balance between $17,000 for two retaining walls and $11,000 being the agreed price for the vehicle which the Defendant said had been sold to him by the Claimants

(2) an order that there should be a transfer of ownership of the vehicle

(3) $10,000 which the Defendant said had been deducted from his salary for a cement mixer which was to be sold to him but which had not been transferred

(4) the sum of $5,800 which was apparently made up of $750 for a week's work in June 1992, a 5% bonus payable at the termination of the contract ($1,500), $750 in lieu of one week's notice, the value of a circular saw ($800) retained by the Claimants and an assortment of tools also retained and valued at $2,000.

[4] No Defence to Counterclaim was ever filed or served in response to those claims, although under the old rules that would have been the normal course.

[5] On 12th November 1995 Mr. Arthur for the Defendant requested that the matter be set down for trial. Nothing further appears to have happened until Barrow J came on the scene in 2001. After two earlier hearings the matter came before Barrow J on 8th May

2001. Mr. Arthur attended but Mr. Foster did not. The claim was struck out for want of prosecution and directions were given for the trial of the counterclaim which was listed for 19th June 2001. Mr. Foster has apparently never told his client that he had failed to attend on 8th May 2001 or given them any explanation for his failure. On 28th May 2001 the Defendant filed a witness statement supporting his counterclaim.

[6] It appears that the Defendant did not attend court on 19th June 2001 and the counterclaim was in its turn struck out. According to the First Claimant's affidavit in support of this application, he had been told the night before by Mr. Foster that his claim was to be heard next day (though in fact it had already been struck out) and when he attended Mr. Foster persuaded him to let the matter drop and an agreement to that effect was reached by the two attorneys present. As far as the Claimants were concerned that was apparently the end of the matter. According to the affidavit evidence the Claimants were unaware of the counterclaim's existence at this point; however, I note that in a letter dated 3rd July 2002 to Mr. Foster which is produced as "MW4" there is reference to a counterclaim and to an agreement concerning both claim and counterclaim on the one occasion that the First Claimant attended court. I do not think much turns on this point.

[7] On 27th June 2001 an application was made by Mr. Arthur to re-instate the counterclaim which was heard on 28th September 2001. On that occasion, according to the Court's order, both attorneys did attend and it was ordered by consent that the counterclaim should be heard on 19th November 2001. It appears that Mr. Foster did not see fit to tell his clients of this development. On 19th November 2001 the counterclaim was tried by Saunders J in the absence of Mr. Foster and his clients. Mr. Arthur tells me and I of

course accept that his client gave evidence and that Saunders J checked the counter claim before giving judgment on it for $21,600 and costs of $3,690.

[8] A copy of the judgment was duly served on the Claimants on 13th June 2002. This application was made by new attorneys on 26th November 2002. Under CPR 39.5 the court may set aside a judgment given after a trial in the absence of a party if there was a good reason for failing to attend and if it is likely that attendance might have resulted in some other order. The application should normally be made within 14 days of service of the judgment.

Extension of time

[9] The first issue is therefore whether I should hear this application at all given that it has been made out of time. In order to do so I must extend time as I no doubt have power to do under CPR 26.1(2)(k).

[10] The explanation for the delay in applying to set aside the judgment is set out in paragraphs 16 to 20 of the First Claimant's affidavit. Again I regret to say that, at least according to that evidence which I accept for the purposes of this application, it was almost entirely the fault of Mr. Foster that an application was not made in good time. The First Claimant contacted Mr. Foster when he received notice of the judgment and had to keep telephoning him before a meeting was arranged at the end of September 2002: this evidence is confirmed to some extent by the letter dated 3rd July 2002 which I have already mentioned. In September Mr. Foster told him he would negotiate with Mr. Arthur to have the judgment set aside. Finally the First Claimant was called to Mr. Foster's office to sign

an affidavit but he refused to do so because the draft stated that neither he *nor Mr. Foster* had been aware of the hearing but he already knew from his research at the court that it was not true that Mr. Foster did not know about the hearing (see paragraph [7] above). After that the Claimants not surprisingly instructed new attorneys who made this application, as I have said, on 26th November 2002.

[11] Given this explanation and the acceptance by Mr. Arthur that the Defendant will not have been prejudiced by the delay in applying to set aside the judgment I think it right to extend time for making the application and to decide the application on its merits.

Good reason for failure to attend

[12] On the basis of the evidence I have already outlined the failure to attend the trial of the counterclaim is entirely the responsibility of Mr. Foster in failing to inform his clients of the existence of the hearing or to attend it himself when he was aware of the date because of his attendance at the hearing on 28th September 2001. I do not think one can generalize as to whether the failings of an attorney provide a good reason for failing to attend a hearing, but it seems to me that in this case where the clients were not aware that it was taking place because their legal advisor let them down, I should find that a good reason has been shown.

Different outcome

[13] The next question in the case is whether attendance by the Claimants or a legal representative would have made any difference. Unfortunately in this case no evidence was put in by the Claimants as to the merits (or, I should say, demerits) of the

counterclaim. Ms Marcellina John stated that it was not her understanding that such evidence was required and I am aware of other attorneys who have been under this misapprehension. It seems to me that it would generally be essential that such evidence be put before the court in a case where no witness statements have been filed by the applicant if the court is to be satisfied that some other result might have ensued if the applicant had attended the trial. However in this case Ms John was able to point to the pleadings and the Defendant's own statement dated 28th May 2001 to show that there was a likelihood of a different result if the Claimants had attended.

[14] There are undoubtedly a number of discrepancies between the counterclaim and the witness statement which give cause for concern as to the cogency of the Defendant's claim, notably between paragraph 2 of the Defence and paragraph 4 of the statement and between paragraphs 3-5 of the Counterclaim and paragraph 9 of the statement. More importantly, the claim relating to the vehicle was undoubtedly going to be resisted by the Claimants who had themselves in the statement of claim sought an order for its return; the claim for salary could only have been based on a wrongful dismissal but there was no evidence that the Defendant had been wrongfully dismissed; and the claims for the electric saw and the other tools were based on rough valuations which were not tested by cross-examination or counter-evidence as to value.

[15] I am therefore satisfied that if the Claimants had attended the trial of the counterclaim a different result might have ensued even though I have no evidence from the Claimants as to the merits of the counterclaim. Mr. Arthur points out that his client gave evidence and that the matter was tested by the judge. As I say above, I accept that that was so, but I do

not think that one can assume that all the points that could be established by cross-examination will necessarily be raised by a judge dealing with a case in the absence of one of the parties and, in any event, the point takes no account of the fact that the Claimants may have given evidence themselves if they had attended the trial.

Discretionary Factors

[16] I therefore conclude that I have power under CPR 39.5 to set aside this judgment. That is not the end of the matter however. The power is clearly a discretionary one and Mr. Arthur makes a number of telling points in favour of upholding the judgment.

[17] The first point is the extreme age of this matter which goes back to 1991. I agree that this is a strong factor in favour of leaving matters as they are. However, I am only too aware of the antiquity of many cases that were started before this court in the 1990's and it is also right to say that the Defendant himself did very little to progress his claims between 1992 and 2001.

[18] The second point is that the Claimants never put in a Defence to Counterclaim and that the Defendant would have been entitled to a judgment in default in any event; I think the answer to that point is that if the Defendant was entitled to a judgment in default he should have applied for one, and, if he had done so he would still have had to undergo an assessment of damages of some sort.

[19] The third point is that it is open to the Claimants to sue Mr. Foster if indeed it is his fault that the judgment was obtained when it should not have been. This is always a difficult

argument. It is never straightforward suing a former legal advisor and recovering the full extent of a loss and I am not sure if Mr. Foster would be insured in this case. In general I do not think that this can be an answer to an application to set aside a judgment if justice otherwise indicates that the judgment ought to be set aside.

[20] Ms John made a point rather against herself when she said that this dispute had been going on a long time and the parties needed "closure". I think that she successfully dug herself out of that particular hole when she stated that the closure must be a just and proper closure which left the parties feeling that justice had been done.

[21] Against these points (for what they are worth) must be set the consideration that if I do not set aside the judgment the Claimants (who are effectively defendants and who have done all they personally ought to have done) will be left with a judgment against them which may well be wrong through no fault of their own. Apart from the costs of the trial thrown away the Defendant does not suggest that any special prejudice will be suffered by him if the judgment is set aside.

Outcome

[22] I find this a difficult decision but in the end I have reached the view that fairness dictates that the judgment be set aside. This will be conditional on the costs of the hearing on 19th November 2001 and of this hearing (which I will assess) being paid to the Defendant by the Claimants by 27th June 2003. Although I have not heard Mr. Foster, it seems to me that, *prima facie*, he is entirely responsible for the problem in this case and I would expect him to pay such costs without demur, although I cannot order him to do so.

[23] In principle case management directions should be given thereafter but it seems to me that this case may benefit from mediation and I propose to make a compulsory mediation order in the event that the condition is met and the judgment is set aside. In this eventuality the parties should select a mediator and submit a standard mediation order to the court as soon as possible.

Murray Shanks
High Court Judge (Ag.)