

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.15 OF 2003

BETWEEN:

SAINT LUCIA FURNISHINGS LIMITED

Appellant

and

[1] SAINT LUCIA CO-OPERATIVE BANK LIMITED

[2] FRANK MYERS OF KPMG

Respondents

Before:

The Hon. Sir Dennis Byron
The Hon. Mr. Albert Redhead
The Hon. Mr. Brian Alleyne, SC

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Kenneth Foster, Q.C. for the Appellant
Mrs. Brenda Flossaic-Flemming; Ms. Shan Greer with her for the first Respondent
Mr. Kenneth Monplaisir, Q.C. for the second Respondent

2003: October 21;
November 24.

JUDGMENT

[1] **BYRON, C.J.:** This is an appeal against an order by the Master dated 6th day of May 2003 striking out the statement of case and dismissing the Claim of the Appellant, St. Lucia Furnishings, for non compliance with the rule requiring the attendance of the litigant and its legal representative at Case Management Conference, and ordering that judgment be entered in the amount of \$394,043.56 together with interest, in favour of the St. Lucia Co-operative Bank [the Co-op Bank] on its counterclaim for failing to file and serve a defence to the counterclaim.

The Pleadings

- [2] On 12th September 2002, St. Lucia Furnishings filed proceedings claiming compensation for trespass committed by Mr. Myers, acting as Receiver appointed by the Co-op Bank. It alleged that Mr. Myers entered its premises and took possession of its assets to enforce collection of moneys alleged to be owing on a mortgage debt. It alleged that the loan had been repaid, that the actions of the Co-op Bank and Mr. Myers were wrongful and had caused substantial losses. Both Myers and the Co-op Bank filed defences denying liability.
- [3] The Co-op Bank counterclaimed for the sum of \$394,043.56 and interest, owing on a loan it made to St. Lucia Furnishings secured by a Second Hypothecary Obligation (Mortgage Debenture and Floating Charge) executed and registered in the Land Registry on 13th May 1999. It alleged that St. Lucia Furnishings neglected to make repayments despite demands. It asserted that it appointed Mr. Myers pursuant to the powers contained in the Hypothecary Obligation. It specifically denied that the loan was repaid. This counterclaim was filed and served on 15th November 2002
- [4] Since that date St. Lucia Furnishings did not file any other documents in the case. There was absolutely no rebuttal of the allegations in the defences of the Co-op Bank and Mr. Myers and no denial of liability for the amount claimed in the counterclaim.

The Hearings

- [5] The Court summoned a Case Management Conference for the 9th day of April 2003. Neither St. Lucia Furnishings nor its legal representative attended. The Court adjourned the matter to the 6th May 2003. There was no appearance by and on behalf of St. Lucia Furnishings this second occasion.

[6] The Master exercised the powers conferred by CPR Part 26.3 (1)(a) of the Rules of Procedure to strike out the statement of case filed by St. Lucia Furnishings. He dismissed its actions and ordered that judgment be entered on the counterclaim brought by the Bank.

Procedural Problems

[7] Counsel for the Co-op Bank rightly submitted that an appeal was not the appropriate process for the Appellant to obtain relief in these circumstances. The proper recourse was to apply to the High Court to set aside the judgment. The application must be made promptly and be accompanied by affidavit containing proof of reasons for the absent party's failure to attend the Case Management Conference¹. Counsel pointed out that the position with the default judgment is similar. The rules require the defaulting party to apply to the High Court to set aside the default judgment. The defaulting party is required to satisfy the Court by affidavit that there is a good explanation for his failure to file the defence and that he has a real prospect of successfully defending the claim or counterclaim.²

[8] The parties were already before us and we decided to consider the appeal. In the event that the Master had applied wrong principles or made errors of law it would have been appropriate to adjudicate. There was the risk of being affected by the handicap that the appeal process permits the defaulting party to circumvent the requirement to file affidavit evidence of the reason for the default, which is an important factor to be considered in the exercise of discretion to set aside the orders. In this case that did not prove to be the determining factor.

The Opportunity to attend Court

[9] Counsel for the Appellant made a passionate oration on the rights of the litigant. He submitted that his clients were prejudiced by not having an opportunity to have

¹ CPR part 26.6 and 26.8

² CPR part 13.3, and 13.4

their matter heard in their presence and that dealing with matters in their absence was a serious injustice. Despite the passion, when it was time to consider the substance of the matter there was no evidence to establish that the proceedings were heard without appropriate notice having been given nor that there was a reason for non attendance.

- [10] One of the important aspects of the new culture of litigation in the new civil procedure rules is the provision that litigants should attend all proceedings with their legal representatives. Their attendance is a duty imposed by CPR Part 27.4. This rule is for the benefit of litigants. It is intended to respond to the complaint that litigants do not get information about their cases, and are not sufficiently involved in the conduct of their litigation. I would think that it would have been more accurate to say that St. Lucia Furnishings did not avail themselves of the opportunity to be heard rather than that they did not have an opportunity to be heard. The sanction is intended to remedy another complaint of litigants; delay in the completion of litigation. Repeated adjournments, caused by non-compliance of one side with the Rules of Court, is denial of justice to the other side. The adage is still true that justice delayed is justice denied.

The Exercise of Discretion

- [11] The main concept in the overriding objective of the new rules set out in CPR Part 1.1, is the mandate to deal with cases justly. Shutting a litigant out through a technical breach of the rules will not always be consistent with this, because the Civil Courts are established primarily for deciding cases on their merits, not in rejecting them through procedural default. The flexible approach that should be adopted by the Court was discussed in the case of **Biguzzi v Rank Leisure**³. The Court has wide powers for imposing appropriate sanctions. It is therefore possible to formulate suitable sanctions for breach of rules and directions without immediately resorting to draconian responses such as striking out. I particularly

³ (1999) 1 WLR 1926

mention the provisions relating to “unless orders” which are intended to be used as a preliminary step to the imposition of sanctions. ⁴

- [12] There will be situations, however, where striking out without the intermediate step is an appropriate order. There are two relevant concepts in the overriding objective. One is saving the litigant’s expense and the other allotting an appropriate share of the Court’s resources. The ultimate solution would, therefore, be a proper exercise of discretion where failure to strike out would cause a waste of expenses and resources. This means that repeated non-compliance with a rule or non-compliance combined with a weak case would justify the striking out of the case. Counsel for the Co-op Bank submitted that consideration of the merits was irrelevant to this exercise because the jurisdiction being exercised by the Court was based on non-compliance with the rules and was not a decision based on the merits. This is only partially true, because in determining the remedy that suits the breach, the merits of the case could influence the exercise of the discretion of the Court.

Dealing Justly

- [13] Counsel for St. Lucia Furnishings contended that there was merit in its case because the debt had been paid. It was therefore wrong for Co-op Bank to appoint a receiver to enforce outstanding liabilities under the mortgage. It had thereby wrongfully damaged or destroyed the claimant’s business. In addition it had obtained judgment on the counterclaim for money it was not owed. If that was true his impassioned arguments on justice would have had a sound basis.
- [14] The record of appeal filed by St. Lucia Furnishings contained a copy of a cheque issued by the St. Lucia Development Bank for \$222,000.00 drawn in favour of the Co-op Bank and a copy of the audited accounts of St. Lucia Furnishings. Counsel for the Co-op Bank had filed an application for the removal of these documents

⁴ CPR part 26.4

from the record on the ground that their insertion was in breach of the rules. However, Counsel did not press the application. Ironically, these documents gave the lie to the impassioned arguments on justice. The cheque bore date 12th November 1998. The Hypothecary obligation was executed on the 6th May 1999, six months later. This indicated that the cheque had no relationship to the obligations which the Co-op Bank was enforcing. The matter was further clarified by the audited accounts filed by St. Lucia Furnishings which showed that at close of business on 31st December 1999 it was indebted to the Co-op Bank in the sum of \$344,539.00. This seemed to confirm the allegations in the defences and the counterclaim and to disprove the basis on which the entire claim of St. Lucia Furnishings was based. In these circumstances it would seem that any order which permitted the continuation of the case would result in purposeless delay, cause the litigants to incur unnecessary expenses and waste the resources of the Court. That would not serve the ends of justice.

The Dismissal of the Action

[15] The dismissal was not irregular. At a case management conference the High Court has power to strike out a Claimant's statement of case and dismiss the action if it appears to the Court that the Claimant has failed to comply with a rule of Court.⁵ It is a rule of Court that a Claimant and his legal practitioner are each under a duty to attend the Case Management Conference⁶. Consequently unless the High Court grants leave the failure to attend is a failure to comply with a rule of Court. Striking out the Claim and dismissing the action where the non attendance is plural and without explanation could be a proper exercise of the power conferred by the rules.⁷ The review of the exercise of the discretion, did not reveal any good reason to set it aside.

⁵ CPR part 26.3 (1) (a)

⁶ CPR part 27.4

⁷ *Pryer v Smith* (1977) 1 A.E.R. 218. per Megaw LJ at 225(g to j) and 226 (e to f).

The Judgment on the Counterclaim

- [16] A counterclaimant is entitled to a default judgment against a claimant for a specified sum of money if the claimant fails to file a defence to the counterclaim within 28 days after the service of the counterclaim on the claimant.⁸ In this case the default exceeded six (6) months. It was clear from the documents supplied by St. Lucia Furnishings that the money was in fact due. There could be no good reason for setting aside this judgment.

Costs

- [a] The Master ordered costs as follows: to the Co-op Bank \$25,000.00 and to Mr. Myers \$5,000.00. No reasons were given for the award, and no indication was given of the basis on which the award was made. This has become a practice which I must deplore.

Costs on the Dismissal of the Claim for Non-attendance at Case Management – the Myers Order

- [18] Costs in these circumstances are governed by part 65.5 which makes provision for prescribed costs. The claim was for an unspecified amount of damages so that the value of the claim is \$50,000.00. The scales of cost in appendices B and C of part 65 apply. These scales indicate that the full costs awardable to a defendant would be \$14,000.00. The scales indicate that where a claim concludes prior to trial, a percentage should be allowed. The prescribed percentage is "(2) after defence and up to and including the case management conference – 55%." Accordingly the prescribed costs would be \$7,700.00. Costs are in the discretion of the Court. Part 65.5 (4) (a) specifically empowers a Court to award a proportion of the prescribed sum having taken into account the matters set out in the rule. Although the Master did not indicate which circumstance justified reducing the prescribed

⁸ CPR parts 10.2; 10.3(1) and 12.5.

costs, it is apparent from the record that neither St. Lucia Furnishings nor Mr. Myers took any steps in pursuit of the case after the defence was filed. It was the Court that acted in summoning the case management conference and making the orders terminating the case on its own initiative. The manner in which the issues were pursued is a basis for the exercise of discretion. I would affirm the order he made on the basis of the rationalization I have just undertaken

Costs on Judgment in Default – the Order in Favour of the Bank

[19] Part 12.12(1) prescribes that a default judgment must include fixed costs under rule 65.4 unless the Court assesses the costs. It is clear that no assessment was made. There was no application for such an assessment in accordance with part 65.4(2). The quantification of fixed costs is set out in Appendix A to Part 65. It prescribes that where there is a claim exceeding \$100,000.00 but not exceeding \$500,000.00 the fixed costs should be \$2,000.00. To this figure should be added the Court costs and \$100.00 for personal service of the claim form and additional costs of \$350.00.

[20] It is true that this judgment was entered at a case management conference, and it may have been considered that the costs should be 55% of the prescribed costs for judgment on the counterclaim as in the case of the defence. But the Co-op Bank had been entitled to enter judgment in default of defence once 28 days had elapsed from the service of its counterclaim. I would think that it would be inconsistent with the overriding objective for the costs to be awarded on the basis that it was judgment was entered at a case management conference. A litigant should not get costs on the higher basis by failing to take the step of applying for the entry of a default judgment. I would think therefore that the costs awarded to the Co-op Bank should include the fixed costs for the default judgment and the costs for the dismissal of the claim at the case management conference. In the circumstances I would order that the costs to the Co-op Bank in the sum of \$5,000.00 together with \$2,450.00 totaling \$7,450.00.

Costs on Appeal

- [21] CPR part 65.13 stipulates that in general the costs on appeal should be calculated in accordance with the provisions regulating costs for the trial but must be limited to two thirds of the amount that would otherwise be allowed. In this case, I should comment that Counsel for the Co-op Bank carried the rebuttal of the appeal. In the circumstances I would order therefore costs to the Co-op Bank in the sum of \$4,966.66 (two thirds of \$7,450.00) and to Mr. Myers the sum of \$3,333.33 (two thirds of \$5,000).

Guidelines on Costs

- [22] In accordance with a decision being delivered in **Rochemel v Construction Limited v National Insurance Corporation**, I would like to reiterate the importance of dealing with costs in accordance with the new culture and make some simple requirements.
- [a] Whenever a costs order is being made the learned trial judge or master should identify the rule that is being applied and if discretion is being exercised give the reason.
 - [b] Legal practitioners should be encouraged to assist the court in the making of costs orders by providing information and or submissions as early as possible.

Order

- [23] I order that:
- [b] the order of the learned Master be varied to the extent that the order for costs to be paid by St. Lucia Furnishings to the Co-op Bank be \$7,450.00
 - [c] the appeal stand dismissed
 - [d] St. Lucia Furnishings pay the costs of appeal:

- [i] to the Co-op Bank in the sum of \$4,966.66;
- [ii] to Mr. Myers in the sum of \$3,333.33.

Sir Dennis Byron
Chief Justice

I concur.

Albert Redhead
Justice of Appeal

I concur.

Brian Alleyne, SC
Justice of Appeal