COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

HCVAP 2010/016

BETWEEN:

JUSTIN PEMBERTON

Appellant

and

[1] THE ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA
[2] INSPECTOR MERVIN PENDENQUE
[3] CONSTABLE DELBERT CONSTANCE

Respondents

Before:
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances on paper:
Mr. Geoffrey Letang for the Appellant
Ms. Tameka Hyacinth for the Respondents

2012: March 6.

Civil appeal – Interlocutory appeal – Whether the learned trial judge erred in striking out claim where the appellant's counsel was present in court but the appellant was absent

This is an appeal arising from the grant of an oral application for the striking out of a claim on the basis that the appellant, on the day of the trial, failed to appear, with no reasonable explanation as to his absence forthcoming. Albeit counsel for the appellant was present in court, the learned trial judge granted the application and struck out the claim. The appellant, within the allotted 14 day limit provided by rule 39.5 of the Civil Procedure Rules 2000 (CPR), filed an application in the High Court for the order to be set aside and the claim restored. The respondents opposed that application. The learned trial judge subsequently refused the application but granted the appellant leave to appeal. The appellant appealed.

Held: setting aside the learned judge's orders of 10th October 2011 and 11th November 2011 striking out the claim; ordering that the matter be restored to the list and be tried before another

judge and; ordering that the appellant is entitled to costs of the appeal, to be assessed if not agreed, that:

1. A trial judge has the power to strike out a claim when the claimant does not attend for his trial. However, a court should not exercise its power to strike out a claim if, though a party is not present, his counsel is. Presence of counsel is a sure indication that without more, the claimant is not intentionally absent and there may be a good reason for his not turning up for the trial on time.

   Rouse v Freeman (2001) The Times, 8 January 2002 applied.

2. A claim struck out by a trial judge, ought to be restored on an application made in good time and showing a good reason for failure to attend. The court must examine all the evidence relevant to the party's non-attendance and must ask whether the reason proffered is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. In the present case, the learned trial judge did not apply the correct test for determining whether the reason provided by the appellant was a good reason. The appellant, in his affidavit in support of the application to set aside the judgment, did proffer a good and sufficient reason for his absence.

   Brazil v Brazil [2002] EWCA Civ 1135 applied.

JUDGMENT

[1] MITCHELL, J.A. [AG.]: This is an interlocutory appeal that comes before me for hearing on paper. Both counsel have filed extensive submissions and authorities, which have proven of great assistance in determining the right way to decide the matter.

[2] It is always a distressing event for a trial judge to have a case set down for a two-day trial called up, and then to find that the defendants are present in court with their counsel, but, while counsel for the claimant is present, there is no appearance of the claimant, nor is there any explanation for his absence. That is what happened in this case. The respondents made an oral application for the claim to be dismissed. The learned trial judge struck it out with no order as to costs.

[3] A trial judge has the power to strike out a claim when the claimant does not attend for his trial. That power is given by CPR 39.4 which reads:

"Failure of party to attend trial

39.4 If the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules -

(a) if any party does not appear at trial, the judge may strike out the claim;

(b) if one or more but not all the parties appear, the judge may proceed in the absence of the parties who do not appear."

The order in this case as recorded in the transcript reads, "Claimant not having turned up, on the application of the defendants I am going to strike the Claim out."

[4] Well within the 14 day limit provided by CPR 39.5, the claimant applied in the High Court for the order to be set aside and for the claim to be restored. CPR 39.5 reads:

"Application to set aside judgment given in party's absence

39.5 (1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended, some other judgment or order might have been given or made."

[5] In his affidavit in support of his application to set aside the judgment, the appellant explained that he was a fisherman who lived in Layou. This was accepted as being less than a half-hour drive from the court. He left his home at about 8:30 a.m. in a bus. He was due in court at 9:00 a.m. The bus was held up for about a half hour in traffic at the Tarreau/Jimmit area due to the road construction by the Chinese in progress. Then, when the bus arrived in Massacre the bus was again held up in traffic for about 20 minutes when it encountered road blocks as a consequence of heavy machine equipment cleaning out the debris that was brought down during the heavy rain or flooding on 28th September 2011. He had no cell phone with which to notify his counsel of the delay he was suffering.

He was approaching the court at about 9:40 a.m. when he met his attorney who informed him that his case was dismissed because he was not present when his name was called. He complains that despite his attorney requesting that the matter be stood down for a few minutes his claim was struck out. If he had been present, he asserts, the matter could have proceeded and he would have had a reasonable prospect of success at a reconvened trial.

[6] At the hearing before the learned trial judge, the transcript reveals that the appellant's application was opposed by counsel for the respondents. She pointed out that the road works in question are not new. The flooding had occurred some two weeks before the trial. The claimant should have been aware of the possible obstacles on the road, and should have left his home in good time to arrive in court at 9:00 a.m. as required. The judge ruled that he was satisfied that the application had been made promptly, and that he was satisfied that had the appellant attended some other order might have been made. However, he was not satisfied that the reason given was a good reason. Everyone knows what the road conditions are like, and persons who have business before the court must take those road conditions into account when they are coming to court. He did not grant the application, but granted leave to appeal.

[7] The respondents opposed the application. There is no binding authority from within our jurisdiction, and none was shown to the judge for his assistance. So, I am obliged to look outside to see if the trial judge's exercise of his discretion can be upheld. The appellant relies for restoration on a mention of the case of Rouse v Freeman,[1] which apparently is authority for the proposition that, the court should not exercise its power to strike out a claim if, though a party is not present, his counsel is. I have not seen the report, but the case is cited in Blackstone's Civil Practice 2009,[2] which I have seen, under the rubric "Non-attendance at trial."

[1] (2001) The Times, 8 January 2002.
[2] Para. 60.2, page 822.

[8] It certainly seems a just and good rule that a claim should not be automatically struck out when counsel is present in court, but his client is not. Presence of counsel is a sure indication that, without more, the claimant is not intentionally absent and there may be some good reason for his not turning up for the trial on time. Any costs incurred by any delay or postponement may be visited on the delinquent claimant. At any rate, if the claim is struck out by the trial judge, it should be restored on an application made in good time and showing a good reason for his failing to attend. What is a good reason is not defined or limited by the rules. As Mummery LJ said in **Brazil v Brazil**,[3] the court must examine all the evidence relevant to the party's non-attendance. Looking at the matter in the round, the court must ask whether the reason proffered is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. The phrase "good reason" is a perfectly ordinary English phrase and a sufficiently clear expression of the standard of acceptability to be applied. In my opinion, my going fishing would certainly not be a good reason. Being held up in traffic on my way to court is, even if I should have known that there were road works in progress that might hold me up. I am therefore satisfied that the learned judge did not exercise his discretion reasonably and that he did not apply the correct test for determining whether the reason provided was a good reason.

[9] I would set aside the learned judge's orders of 10th October 2011 and 11th November 2011 striking out the claim. I would order the matter to be restored to the list, and I would order that the matter be tried before another judge. The appellant is entitled to costs of the appeal, to be assessed if not agreed.

Don Mitchell
Justice of Appeal [Ag.]

[3] [2002] EWCA Civ. 1135.