THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2010/055

BETWEEN:

CCYY LIMITED
(of 97 Granby Street, Kingstown)
(of Arnos Vale) **APPLICANT/2nd DEFENDANT**

- AND -

GARFDON ADAMS of Brighton
(Administrator of the Estate of
ELMOTH GRANTLEY ADAMS **1st RESPONDENT/CLAIMANT**

ANNETTE STEPHENS
(of Arnos Vale) **2nd RESPONDENT/1st DEFENDANT**

Appearances: Mr. Stephen Williams for the Applicant/2nd Defendant, Ms Paula David for 1st Respondent/Claimant and Ms Samantha Robertson for the 2nd Respondent/1st Defendant.

2015: Feb.16 & 19

JUDGMENT

[1] **Henry, J. (Ag.):** Mr Garfdon Adams brought a claim against CCYY Limited ("CCYY") and Ms Annette Stephens for recovery of possession of two Yamaha outboard engines, a steering box and damages for detinue and conversion of those items.[i] At the first case management conference,[ii] the learned Master

made an Order for standard disclosure[iii] and exchange of witness statements.[iv] CCYY served its witness statements but did not make standard disclosure.

[2] Over two and a half years later[v], at the second case management conference, the learned Master noting that the pre-trial review and trial dates had passed, adjourned the case management conference to facilitate settlement discussions among the parties. The third case management conference was held 20 days after the second one.[vi] On that occasion, the learned Master dispensed with a pre-trial review, ordered the parties to make standard disclosure within two and half months[vii] and file pre-trial memoranda. She set a trial window for July 2014.

[3] At the fourth scheduled case management conference nine months later,[viii] the learned Master, noting that CCYY had still not made standard disclosure or filed the pre-trial memorandum as ordered, made an order directing that CCYY's statement of case stands dismissed unless it provides "reasons sufficient to satisfy the court why …its statement of case ought not to be dismissed for failure to comply" with that order. The learned Master also scheduled pre-trial review for May 22, 2014. It appears that the matter was not listed again until 8 months later,[ix] when it was given a fixture for status hearing before me.

[4] CCYY had not filed any reasons to explain its non-compliance with the learned Master's Order. It was invited to indicate orally to the court what those reasons were, but none were forthcoming. Instead, CCYY submitted that "it was too much of a drastic step to strike out a party's statement of case and an "unless order"

should be made instead. I ordered that CCYY's statement of case is dismissed in accordance with the learned Master's Order for its failure to file standard disclosure and failing to provide satisfactory reasons for its non-compliance with Master Lanns' June 25, 2013 as directed by Master Taylor-Alexander. CCYY seeks leave to apply from that order.

ISSUE

[5] The sole is to be decided is whether CCYY should be granted leave to appeal the order striking out its statement of case. Determination of this issue involves consideration of two main sub-issues:

(a) Whether CCYY complied with the mandatory procedural requirements outlined in the Civil Procedure Rules ("CPR") in lodging its application for leave to appeal? and;

(b) Whether CCYY's appeal has a realistic prospect of success?

REASONS FOR DECISION

[6] In delivering the decision on January 12, 2015, I gave no reasons for the decision. I do so now. Having reviewed the file before the hearing, I observed that CCYY had been the beneficiary of much consideration and latitude by the Masters who conducted the case management conferences. In this regard, I noted that the learned Master first made an order for standard disclosure on October 12, 2010[x] and the second one on June 25, 2013[xi]. CCYY did not comply

with either order and no explanation appears to have been provided for this failure. It was apparent that CCYY appears to have disregarded those provisions of the both case management orders with impunity. Master Taylor-Alexander's April 2014 order reflected an attempt to call CCYY to account and seemingly to ensure that the matter proceeded to trial in an expeditious manner in furtherance of the overriding objective to dispose of matters justly. It also afforded CCYY an opportunity to comply with two validly issued court orders. I observed too that this matter had been on the calendar for over 4 years with not much traction. The words of Master Taylor-Alexander's order were unambiguous and attracted a severe sanction for CCYY if it did not comply with the simple request to explain its non-compliance with a previous case management order.

[7] CCYY was represented by competent legal counsel at the hearing before Master Taylor-Alexander who was capable of seeking any clarification of the import and intent of the order. This option remained even after the order was made right up to January 12, 2015. No such clarification was sought prior to or at that hearing. No objections were made to the order when it was made. Having asked counsel for CCYY on no less than three occasions on January 12, 2015 to provide an explanation and not receiving any, or any application for a further period to consider the matter, I concluded that CCYY's failure to provide an explanation was intentional and displayed blatant disregard for a court order. I took note of the length of the intervening period available to CCYY to comply with the order or even seek relief from sanctions and in the absence of any or a satisfactory

explanation I proceeded to activate the mandatory sanction imposed by Master Taylor-Alexander. In doing so, I took account of the overriding objective and the court's general and specific powers contained in the CPR, particularly CPR Parts 25.1 (i), 26.1 (1) (w), 26.2, 26.3 (1) (a), 26.7, 26.8 and 26.9 which collectively:

a) seek to ensure that no party enjoys an unfair advantage through failure to disclose relevant materials;
b) empowers the court to make an order of its own initiative; (which Master Taylor-Alexander did in the instant case);
c) empowers the court to strike out a statement of case for a party's failure to comply with an order;
d) establishes the protocol governing the procedure which the court must employ when imposing a sanction for failure to comply with an order;
e) establishes the procedure to be adopted by a party who seeks relief from sanctions; and
f) excludes from the general rectification powers of the court, instances where a sanction is imposed for non-compliance with an order.

[8] From that background, it appears that little attempt was made by CCYY to address its mind to the terms of the order. I concluded that CCYY would not be prejudiced by the making of the order as it had ample time to prepare itself and provide the explanations ordered by the learned Master or to seek relief from sanctions. I considered this to be reflected a total disregard for the significance of a court order and the party's obligation to the court and the other parties. It is for those reasons why the order was made striking out CCYY's statement of case.

ANALYSIS

Did CCYY comply with the mandatory procedural steps?

[9] An applicant is entitled to be granted leave to appeal from an interlocutory order if the application is in writing, sets out the grounds of the proposed appeal,[xii] has a realistic prospect of success and is lodged within 14 days of the order from

which leave to appeal is being sought;[xiii]. The order appealed against is an interlocutory order as it does not fully resolve the issues which arise in the substantive claim.[xiv] CCYY filed its application for leave to appeal on January 26, 2015, 14 days after the decision which they are seeking to impugn. It is in writing and the proposed grounds of appeal are exhibited to the affidavit[xv] in support. The application for leave to appeal complies fully with the CPR requirements regarding the timeline for filing and the format and content of the application.

Does CCYY's proposed appeal have a realistic prospect of success?

[10] It is a well established principle of law that the expression "realistic prospect of success" calls for a determination as to whether the intended appellant has a real and not a just fanciful or whimsical prospect of success. It does not require the court to decide whether the proposed grounds of appeal will succeed but whether they have a reasonable chance of success or for some other compelling reason.[xvi] This is the yardstick against which the application for leave to appeal will be assessed. The relevant portion of the "unless order" which is the subject of this application states:

> "**IT IS FURTHER ORDERED THAT** unless the First Defendant provides reasons sufficient to satisfy the court as to why her statement of case ought not to be dismissed for non compliance with the order of Master Lanns dated 25th June, 2013 to file witness statements and a pre-trial memorandum, and the Second Defendant as to why its statement of case ought not to be dismissed for failure to comply with the order of Master Lanns dated 25th June, 2013 at the pre-trial review, both the statements of case are to stand dismissed.

These proceedings are to come on for pre-trial review before a Judge of the court on the 22nd May, 2014." (Underlining mine).

[11] The section of the order against which CCYY now seeks leave to appeal reads:

"The Second defendant's statement of case is dismissed pursuant to paragraph 2 of the "unless order" made by Master Taylor-Alexander dated April 11, 2014 and filed on April 25, 2014, for non-compliance by the 2nd Defendant with Master Lanns' Order dated June 25, 2013 to file standard disclosure and pre-trial memorandum and for failing to provide satisfactory reasons for its non-compliance."

[12] CCYY did not appeal against the order and now challenges it[xvii] arguing that the learned Master could not properly make an "unless order" pursuant to the court's inherent jurisdiction, but only on the basis of an application by another party.[xviii] CCYY also contends that an order to strike out its case was not appropriate because the "unless order" did not specify CCYY's breach, or a time within which to remedy the breach and consequently did not comply with CPR Part 26.4. Both arguments are fallacious. There is nothing in the order which can lead to the conclusion that it was made pursuant to the court's inherent jurisdiction and there is no other basis on which to so conclude. The court has wide discretion to exercise its powers on its own initiative,[xix] on condition that it provides an opportunity for the party affected to make representations.[xx] The learned Master

clearly exercised her powers under the CPR to make the order of her own initiative did not have to await an application from a party to make the order. The learned Master included in the order a period of 1 ½ months for CCYY to formulate and present its explanation before the sanction is activated.

[13] In this regard, CCYY had at least until May 22, 2014 to provide explanations to the court for its non-compliance with Master Lann's order. It was not called upon to provide an explanation until 9 months later. At that time, it tendered no explanation. It is trite law that an order remains in force unless it is set aside or overturned. The "unless order" was not dismissed or set aside and accordingly remained in force. Further, the CPR does not bind the court (when it makes an order of its own initiative), to identify the breach and require the party to remedy it within a specified period. The court is however bound to specify the consequences for non-compliance and the sanction takes effect without more.[xxi] Very importantly, in such circumstances, the court is precluded from making an order to put things right.[xxii] The learned Master's complied fully with the protocol for imposing a sanction in those circumstances. For these reasons, those intended challenges are not likely to succeed on appeal.

[14] CCYY submits that on January 12, 2015, the time had not come for it to give an explanation for its non-compliance with the order because the matter was listed for a status hearing and not for pre-trial review.[xxiii] I have great difficulty understanding this logic. It is a matter of mathematical computation that the date

for the pre-trial review had come and gone some 9 months before. This ground does not present a realistic prospect of success at the appellate level.

[15] CCYY contends that the learned Master's order was vague, that the court should have had regard to the dicta in **Real Times Systems Limited v CCAM and Company Limited et al**[xxiv] and **George Allert et al v Joshua Matheson et al.**[xxv] The factual matrix in the instant case can be distinguished from those in the **Real Time** and **Allert** cases. Neither judge in those cases was faced with an order containing a mandatory sanction for non-compliance. Both judges were required to evaluate for themselves, the severity of the respective party's non-compliance and decide what sanction to impose. In the instant case, the learned Master had already pronounced a sanction, which was never challenged. In the instant case, the order concentrated the judge's discretion on a consideration of whether CCYY provided a satisfactory explanation for its non-compliance with the order. In the absence of an explanation, that discretion is inoperative. In the circumstances, the latitude available to the judges in the two cases did not exist in the instant case. This argument does not afford CCYY any real prospect of success on appeal.

[16] CCYY submits further that the learned Master failed to consider that it had filed its witness statements since 2010. It also contends that since Garfton Adams's lawyer notified the court that he was dead, the judge should not have considered the contents of the learned Master's order, because the claimant was restricted from taking part in the proceedings other than applying for a representative to be

appointed to represent him.[xxvi] It is not appropriate to consider the first limb of this submission within the current application. It seeks to impugn the learned Master's order and introduces matters which are fit for consideration only within the context of an appeal from that order. It is factually incorrect to imply that the claimant or his counsel attempted to take any steps in the proceedings on January 12, 2015. Their involvement was not necessary and they took no "step" in those proceedings. This would be reflected in the court's transcript. It is not clear what step CCYY is claiming that Adams took in the proceedings. Neither of these submissions provides a basis from which CCYY could realistically launch a successful appeal.

[17] CCYY claims that the vague and imprecise nature of the learned Master's order resulted in confusion, and it therefore concluded that it was made in error. I have difficulty understanding why CCYY did not appreciate that its non-compliance described in the learned Master's order, referred to any and all deficiency in its compliance with the June 25, 2013 order. If even that is sustainable by CCYY, it did not seek clarification nor did it object to the order when it was made or after. This ground does not afford CCYY a reasonable chance of success on appeal.

[18] CCYY submits that the striking out of its statement of case is draconian and breached its constitutional right to a fair hearing,[xxvii] and amounted to a deprivation of its property without compensation.[xxviii] CCYY had an opportunity to provide reasons explaining its non-compliance with Master Lanns' order. The deadline for doing so had elapsed over 9 months before CCYY was called upon

to provide the reasons. It failed to do so although it was aware of the consequences for such failure for close to 10 months. Section 1 (c) of the Constitution does not create a protected right from deprivation of property. In any event, CCYY has failed to provide any evidence of such alleged deprivation. There is no evidence in Mr Sargeant's affidavit which provides the particulars of the property which was allegedly compulsorily acquired. In the premises, there is no material on which to assess this assertion. Neither of these 2 grounds presents a realistic challenge to the judge's order and do not provide any real prospect of success on appeal.

[19] CCYY contends implicitly that I entered judgment for the claimant[xxix] and denied it the right to set aside that judgment. No judgment was in fact entered for the claimant and CCYY has not made any application to set aside such non-existent judgment. The directions which were given clearly direct the registrar to fix a date for trial. These proposed grounds of appeal are misconceived, erroneous, misleading and do not offer CCYY an opportunity for a realistic chance at a successful appeal.

[20] CCYY's proposed grounds of appeal do not offer it a realistic prospect of success on appeal. For these reasons, the application for leave to appeal is refused.

ORDER

[21] It is therefore ordered as follows:

1. The Applicants/Intended Appellants application for leave to appeal the order dated January 12, 2015 is dismissed.

2. The Applicants/Intended Appellants shall pay the claimant costs of $750.00.

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Esco L. Henry
HIGH COURT JUDGE (Ag.)

[i] The claim was filed on February 12, 2010.

[ii] On October 12, 2010.

[iii] By November 30, 2010.

[iv] On or before January 12, 2011.

[v] On June 5, 2013.

[vi] On June 25, 2013.

[vii] By September 17, 2013.

[viii] On April 11, 2014 – three months before the scheduled trial period.

[ix] January 12, 2015.

[x] 32 months before the learned Master made the unless order.

[xi] 10 months before the learned Master made the unless order.

[xii] Ibid. Part 62.2(2) which provides:" An application for leave to appeal must be made in writing and set out concisely the grounds of the proposed appeal.".

[xiii] Section 32 (2) (g) of the Eastern Caribbean Supreme Court Act Chapter 24 of the Laws of Saint Vincent and the Grenadines ("Supreme Court Act"); "CPR" Part 62.2(1); see also **David Shimeld et al v. Doubloon Beach Club Limited SLUHCVAP 2006/0033**. Section 32 (2) (g) of the Supreme Court Act provides:

> "No appeal shall lie under this section without leave of the judge making the order or the Court of Appeal from any interlocutory order given or made by a judge except:
>
> (i) Where the liberty of the subject or the custody of infants is concerned;
>
> (ii) Where an injunction or the appointment of a receiver is granted or refused;
>
> (iii) In the case of a decree nisi in a matrimonial cause or a judgment or order in an admiralty action determining liability;
>
> (iv) In such cases to be prescribed as are in the opinion of the authority having power to make rules of court of the nature of final decisions."

CPR Part 62.2(1) states: "(1) Where an appeal may be made only with leave of the court below or the court, a party wishing to appeal must apply for leave within 14 days of the order against which leave to appeal is sought."

[xiv] See Part 62.1 (2) of the CPR which defines "interlocutory appeal" as "an appeal from an interlocutory judgment or an interlocutory order; and Rule 62.1(3) which states:

"In this Part-

(a) A determination whether an order or judgment is final or interlocutory is made on the "application test";
(b) An order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided; and, …".

[xv] See affidavit of S. Sten McN. Sargeant filed on January 26, 2015 and exhibit SS2 attached to it.

[xvi] **Swain v. Hillman [2001] 1 All E. R. 91** per Lord Woolf. See also **Attorney General of Grenada et al v. Andy Redhead GDAHCVAP 2007/0010** Per Edwards J.A. (Ag.) (as she then was) at para. 15.

[xvii] Dated January 12, 2015.

[xviii] Pursuant to CPR Part 26.4.

[xix] CPR Part 26.2 (1) which provides: "Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative. See also CPR Part 26.7 which provides:

"26.7 (1) If the court makes an order or gives directions, the court must whenever practicable also specify the consequences of failure to comply.

(2) If a party has failed to comply with any of these rules, … or any order, any sanction for non-compliance imposed by the rule, direction or order has effect unless the party in default applies for and obtains relief from the sanction and rule 26.9 does not apply."

[xx] CPR Part 26.2 (2) which states: "If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations."

[xxi] Ibid.

[xxii] CPR Part 26.7 (2) and 26.9. Part 26.9 empowers the court to make orders to correct any procedural irregularity, on its own motion or on application by a party. Rule 26.7 (2) expressly restrains the court from doing so in the instant case.

[xxiii] Grounds 4. i, iv, viii and ix of the Notice of Application and grounds 1) i, iii. and iv. of the proposed appeal.

[xxiv] **[2014] UKPC 6**;

[xxv] **GDAHCVAP2014/0007**

[xxvi] See grounds 4 ii, iv, b. i, in the Notice of application and grounds 2. I in the proposed grounds of appeal. CPR Part 21.7 (4) provides: “Until the court has appointed someone to represent the deceased persons estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.”

[xxvii] Under section 8(8) of the Constitution of Saint Vincent and the Grenadines, Cap. of the Revised Laws of Saint Vincent and the Grenadines 2009.

[xxviii] Contrary to section 1 (c) of the Constitution, Ibid.

[xxix] See grounds 4, c and d of the Notice of Application and grounds 3 and 4 of the proposed Notice of Appeal.