

EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2009/0159

BETWEEN:

(1) RESTORE THE ENVIRONMENT INC
(2) SYLVESTER BERNARD JOSEPH

Claimants

and

ANDREW MC PHEE

Defendant

Appearances:

Mrs. Wauneen Louis-Harris for the Claimants

Mr. Gerard R. Williams for the Defendant

2018: July 25.

JUDGMENT

[1] Wilkinson J: On 13th February 2009, the Claimants filed their claim form and statement of claim. They sought the following relief:

1. Delivery up of the equipment forthwith or alternatively payment of its value.
2. Delivery up of the parts forthwith and payment of any consequential damages or alternatively payment of its value.
3. Damages for detinue.
4. Damages for conversion.
5. Damages for loss of use of the equipment.
6. Payment of the sum of \$33,694.00.
7. Interest thereon.
8. Costs.

9. Further or other relief.

[2] When the matter came on for hearing, there were 2 applications pending. The **Claimants' application filed 29th May 2012, and the Defendant's application filed 15th June 2012.** There being 2 applications filed and pending hearing, the Court is guided by the Court of Appeal 6/2002 St. Kitts, Nevis, Anguilla National Bank v. Caribbean 6/49 Ltd. as to the sequence in which it ought to proceed and which is that the application filed first in time, ought to be heard first in time. The Court **therefore proceeds with the Claimants' application** seeking an order that the **Defendant's defence be struck out.**

[3] Given the nature of the applications before the Court, the full details of the pleadings between the Parties are not relevant. In brief, by their statement of claim the Claimants allege deceitful behaviour and unlawful transactions by the Defendant in support of a claim of detinue in relation to use and retention of the **First Claimant's property.** On April 20th 2009, the Defendant in his defence denied all the allegations. There was no reply filed to the defence.

[4] The facts following the pleadings are largely uncontested. On 30th November 2009, the matter came on before Georges J. for the case management conference. While the order recorded the presence of Counsel, there were no Parties recorded and so it is unclear from the order if any of the Parties were present. A case management order was made and read as follows:

1. "There will be five (5) witnesses for the Claimants and three (3) for the Defendant.
2. There will be standard disclosure between the Parties on or before the 25th January 2010.
3. Witness statements to be filed and exchanged by 26th February 2010.
4. Witness statements to stand as examination-in-chief and all witnesses to attend trial unless notified otherwise in writing.
5. Trial date fixed for 14th April 2010.
6. Pre-trial fixed for 31st March 2010.
7. Costs to be costs in the cause."

- [5] The Claimants in compliance with the case management order filed their list of documents on 25th January 2010, witness summaries on 26th February 2010, and pre-trial memorandum on 26th March 2010 (this being 4 days before the pre-trial review and in compliance with CPR 2000 rule 38.5(2)).
- [6] The Defendant filed his list of documents on 26th January 2010, this being 1 day after the time fixed in the case management order.
- [7] According to the **Court's file**/record the matter came on for hearing on no less than 9 occasions before Belle J. **struck out the Defendant's defence on the 10th** occasion. Those occasions and those subsequent were: (a) 31st March 2010, both Counsel for the Parties appeared and it was recorded that there were no Parties present and the matter was adjourned to 9th April 2010; (b) 14th April 2010, both Counsel for the Parties but no Parties were recorded and in relation to an application by defence Counsel for leave to withdraw as Counsel for the Defendant, leave was granted to publish the application by way of 2 publications in the Gazette and 2 publications in a newspaper and the matter was adjourned to 22nd June 2010, (c) 22nd June 2010, both Counsel for the Parties appeared and an order was made granting Counsel leave to withdraw as Counsel for the Defendant and the matter was adjourned to 29th July 2010, for further case management, (d) 29th July 2010, Counsel for the Claimants appeared and so too did the **Defendant's former** Counsel and she informed the Court that the Defendant had yet to be served the order of her withdrawal of representation, no Parties are recorded and the matter was adjourned to 16th November 2010, (e) 16th November 2010, Counsel for the Claimants appeared and again so too did former Counsel for the Defendant for the same reason i.e. the Defendant had yet to be served the order granting leave to withdraw as Counsel, no Parties are recorded and the matter was adjourned 8th February 2011; (f) 8th February 2010, Counsel for the Claimants appeared and Belle J recorded that despite service the Defendant had failed to appear and made the unless order recorded subsequent, and the matter was adjourned to 10th May 2011, (g) 10th May 2011, Counsel for the Claimant

appeared and Belle J made an order adjourning the matter to 27th September 2011, to allow for service and the order of 8th February 2011, was to continue in force, (h) 27th September 2011, Counsel for the Claimants appeared and Belle J made a 2nd unless order recorded subsequent, and the matter was adjourned to 17th January 2012, (i) 17th January 2012, Counsel for the Claimant appeared together with the Second Claimant, and the matter was adjourned to 3rd April 2012, (j) 3rd April 2012, Counsel for the Claimant appeared and new Counsel, Mr. Gerard Williams appeared for the Defendant together with the Defendant, Belle J **made an order striking out the Defendant's defence and entering judgment for the Claimants** and the matter was adjourned to 22nd May 2012, (k) 22nd May 2012, Counsel appeared for both Parties and Belle J noted that an appeal had been filed against his order of 3rd April 2012, and the matter was adjourned to 2nd October 2012, (l) 2nd October 2012, Counsel for both Parties and the Defendant appeared, Belle J transferred the matter to the present Court for hearing and it was adjourned to 30th January 2013, (m) 19th June 2013, both Counsel for the Parties and the Parties appeared before the present Court and **the hearing of the Claimants' application filed 29th May 2012, and the Defendant's application filed 15th June 2012, were fixed for hearing on 24th June 2013**, (n) 24th June 2013, Counsel and the Parties appeared, and the Court after making certain observations ordered the Parties to file submissions.

[8] There was also evidence by way of an affidavit of service from Ernest La Feuille PC 458 that on 7th July 2011 that he served the Defendant with a notice of hearing for 27th September 2011.

[9] The first unless order made by Belle J on 8th February 2011 read:-

1. "The matter is adjourned to 10th May 2011.
2. Unless the Defendant Andrew McPhee attends court on 10th May **2011, and complies with the Court's order of 30th November 2009**, his defence will be struck out and judgment may be entered for the Claimants for orders claimed, damages and costs."

[10] **Belle J's second unless order of 29th September 2011**, read:

1. "The Claimants to serve a copy of the order of 8th February 2011, on the Defendant forthwith.
2. The Defendant is to file an affidavit on or before 7th October 2011, **containing an explanation for his failure to comply with the Court's order of 30th November 2009**, and his apparent lack of interest in the matter failing which his defence will be struck out and judgment will be entered for the Claimant.
3. The matter is adjourned to 17th January 2012, for hearing."

And on 3rd April 2012, Belle J made the order entering judgment for the Claimants, it read:

1. "**The Defendant's defence of 20th April 2009** is struck out for failure to **comply with the Court's order of 30th November 2009**, and failure to sufficiently comply with the order of 27th September 2011.
2. Judgment is entered for the Claimants.
3. **The Claimants' Counsel** is to file and serve the draft judgment by 23rd April 2012.
4. The matter is adjourned to 22nd May 2012."

[11] On 6th **October 2011**, the Defendant filed an affidavit pursuant to Belle J's order of 29th September 2011. Therein he deposed that throughout the proceedings he had resided at his stated address, he was self-employed as a general handy-man and worked away from his home daily. It was not uncommon for him to leave home at 8.00a.m and return between 5.00p.m-6.00p.m. He deposed that due to his failure to appear in Court throughout the matter, Belle J made his order of 27th September 2011, seeking by affidavit the with reasons for his perceived lack of interest in the matter. He did recall the matter being referred to mediation, and which he attended on 4th and 25th June 2009. He was aware that following the failure of the mediation process that the matter was returned to case management. He did recall being informed after the breakdown of the mediation by his Counsel at the time of the case management date. He was informed by his Counsel that in the 2 years following mediation the court was beset by number of events including industrial action by the court staff, significant renovations, and these led to a number of adjournments. He expressed the view that during these periods it would have been impossible for the matter to move forward. He did try to attend the case management conference but on his arrival at the court compound he was informed

by a police officer that there was a bomb scare in the court building and so he could not enter the court compound as it was cordoned off by yellow tape. This particular situation he said lasted the course of an entire morning. He said that following this he made at least 4 telephone calls to his former Counsel seeking an update but was always told that she was in court. On a few occasions he left messages including 1 with a staff member known to him. He never received any calls in return. He was informed by his present Counsel that his former Counsel made several attempts to reach him. He denies ever receiving her calls and he does not recall seeing on his telephone any missed calls from his former Counsel. He has had the same telephone number throughout. He deposed that having not heard from his former attorney, he assumed that everything was fine and that they had just not received a date for hearing and that he would be informed when there was one. As a consequence, he did not think it unusual when he was served a notice of hearing for 27th September 2011. When he attended court on 27th September 2011, he was surprised that so much had transpired in the case during his “unintentional” absence. He was aware that his former Counsel had filed a defence and he was very much interested in defending the claim. He said that he was informed by his present Counsel about the case management directions and was made aware that he must comply with them. He asked the Court to allow his participation in the proceedings as the claim was for a considerable sum and it would be in the interest of justice to allow him to participate.

[12] **The Defendant appealed Belle J's order of 3rd April 2012.** On 22nd May 2012, the Court of Appeal made the following order:

1. “The application for leave to appeal by consent is treated as an interlocutory appeal.
2. The appeal is allowed and the Order of the Trial Judge made on 3rd April 2012, is set aside.
3. The respondent shall have costs on the application and on the appeal in any event fixed in the sum of \$1,500.00 to be paid by the appellant no later than Wednesday 13th June 2012.”

[13] Seven (7) days **after the Court of Appeal's order, on 29th May 2012**, the Claimants filed an application pursuant to CPR 2000 Rule 26.3. The application was supported by the affidavit of the Second Claimant. The Claimants sought the following orders:

- i. The defence of the Defendant filed herein on the 20th day of April 2009 be struck out.
- ii. That judgment be entered for the Claimants on their claim.
- iii. That the Claimants be granted costs on the claim and costs on the application.

The grounds of the application were:-

1. The 30th day of November 2009, the Court issued case management directions.
2. That the Defendant is in breach of the case management directions and has compromised the date for the trial of the 14th April 2010.
3. That the delay of the Defendant has caused prejudice to the Claimants who have been deprived of the movables which form the subject matter of the instant proceeds and the profits of their business in inter alia hiring and heavy duty machines.
4. That the Defendant's actions in unlawfully maintaining possession of the heavy equipment have forced the Claimants into severe financial hardship to the extent that they are unable to satisfy their loan payments as required.
5. The Claimants have complied with all the pre-trial directions.
6. The severe breaches of the Defendant are an abuse of the process of the Court.
7. Rule 26.3 of the Civil Procedure Rules 2000 confers the power on the Court to strike out a statement of case if it appears to the Court that there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings.

- [14] The **Second Claimant's** affidavit recorded much of what the Court has stated about the state of pleadings, the case management order, status of compliance with the case management order, presence of the Defendant at or lack thereof at the various hearings and orders made, the application and order granting leave to the **Defendant's first Counsel to withdraw as Counsel for the Defendant**. He deposed that he had not served his filed witness summaries on the Defendant but had filed **a notice pursuant to rule 29.7 and served same on the Defendant's Counsel**. He also deposed that on 4th **October 2011, the Defendant's current Counsel, Mr. Gerard Williams** filed a notice of acting and that yet up to the date of his affidavit, 25th May 2012, the Defendant had failed to comply with the case management order. He deposed that the Defendant chose to evade service and this led to his former **Counsel's withdrawal of representation**. His failure to comply with the case management order demonstrated a lack of interest and which lack of interest brought about delay, caused prejudice to the Claimants who have been deprived of the movables and so suffered financial hardship to the extent of not being able to meet their loan payment and they suffered loss of profits.
- [15] **Upon review of the Court's file, the Court could find no affidavit filed by the Defendant in reply to the Claimants' application. There is therefore strictly speaking no evidence from the Defendant in rebuttal to the application.** There is before the Court however and recorded earlier, the affidavit of the Defendant filed on 6th **October 2011, in compliance with Belle J's order of 27th September 2011.** The Court will in the interest of justice and given the reason why Belle J ordered it, will give the Defendant some benefit by considering it to assist in considering the **Claimants' application.**
- [16] **As regards the Defendant's application, save that the Court observes that it was** 26 days after the Court of Appeal order, 17 days after the Claimants filed their application to strike out the defence and now some 21/2 years after the case management order, on 15th June 2012, the Defendant filed an application

pursuant to CPR 2000 rule 26.8 seeking an extension of time to file his witness statements and for his list of documents to be deemed properly filed.

Findings and Analysis

[17] **The Claimants' application is stated to be made pursuant to** CPR 2000 Rule 26.3 and which provides:

"26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) There has been a failure to comply with a rule, practice direction, order or directions given by the court in the proceedings;
- (b) ...;
- (c) The statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d)"

[18] Rule 26.3 requires the Court to exercise its discretion and as always this discretion must bear in mind the overriding objective to deal with the case justly and ensure that efficient use is made of the resources of the Court¹.

[19] **By the Court of Appeal's order which set aside** the order of Belle J., the matter was then as if Belle J's **order** striking out the defence had never been made. The Court believes this is further supported by the fact that the Court of Appeal gave no further directions for continuance of the proceedings. The Court therefore proceeds to consider the matter from the date on which the case management order was made setting out the timetable for standard disclosure, witness statements to be filed and exchanged, pre-trial review and trial dates.

[20] In relation to the day that the Defendant believes that the case management conference was to take place he says in his affidavit of 6th October 2011, that he tried to appear at the case management conference but due to a bomb scare in the court building he was told by a police officer that he could not enter the court

¹ **Caribe (Realties) Canada Limited/Immeubles Caribe Ltee et al v. Wycliffe Baird, St. Christopher & Nevis Appeal No. 10/2005, Rawlins JA paragraph [14].**

compound and this was the situation for the entire morning. Curiously, he does not state what date he tried to appear and this is of importance because a case management order was made in the presence of both Counsel for the Claimants and Defendant on 30th November 2009.

[21] The Defendant then says that the day following the bomb scare that he made at **least 4 telephone calls to his former Counsel's chambers to be updated** on the matter and failed to reach her and that he did leave messages for his former Counsel at her chambers and one such message was left with a person known to him at the chambers. Following this, he said that having not heard from his former Counsel he assumed that everything was fine and that they were awaiting a hearing date. Following that assumption he then says that he was surprised when he attended Court on 27th September 2011, almost 2 years later, to find that much had transpired in the proceedings.

[22] If the Court accepts that the Defendant was aware that the case management conference was to occur, and events unfolded as he says they did when he appeared on the day fixed, given that Saint Lucia is a small island State, the Court believes that it would have been reasonable that he would have visited chambers to see his former Counsel for an update on the suit.

[23] The Court **finds it difficult to accept the Defendant's presumptions as to the state of** play between 30th November 2009, when the case management order was made and when the Defendant finally appeared before the Court on 27th September 2011, 1 year 10 months later, because during this time the matter came on for hearing on 7 occasions and on none of those occasions was the matter adjourned because of the state of the court building. On the contrary, all of the adjournments were brought about by the absence of the Defendant and which resulted in Belle J making 2 unless orders.

- [24] There was also no excuse from him as to why he failed to attend court before Belle J on 8th February 2011, **as the Judge's** order on that day records that he had been served on 3rd February 2011, to appear on 8th February 2011.
- [25] There is then the matter that his former Counsel would most likely only have gone through, as a last resort, and at considerable costs to her chambers, the costs of 4 publications, 2 in a local newspaper and 2 in the Government Gazette, to publish her application seeking leave to withdraw her representation of him in the suit because she could not locate the Defendant to serve the application. This is instructive **in the Court's view of former Counsel's efforts to reach the Defendant.**
- [26] The Court observes that the Defendant appears to be once again not acting with any haste in the proceedings because the Court of Appeal order restoring the case to the state it **was before Belle J's order of 3rd April 2012**, was made on May 22nd 2012, and it was 24 days later that the Defendant filed his application seeking orders deeming his list of documents to be properly filed and for an extension of time to file his witness statements. At this juncture his witness statements were now 2 years and 31/2 months late. In the alternative, even if the Court accepts that the Defendant believed that time started to run for him again from the date of the **Court of Appeal's order, the Defendant** still does not act with haste, as it was 24 days (3 weeks and 3 days), before he filed his application for an extension of time.
- [27] At this juncture, recalling the statements of Barrow J (Ag) in Grenada Civil Case No. 84/1999 Kenton Collison St. Bernard v. The Attorney General of Grenada et al where he said:

"[14] The excuse that chambers have been unable to contact the client contains the hidden premise that it is the duty of chambers to contact the client but there is not the duty on the client to contact chambers. That premise is false. When a litigant is going to be, or has become, unreachable at his previous address or by previous methods the litigant has a duty to make proper arrangements to enable his lawyer to reach him. The litigation belongs to the litigant, not the lawyer.

The client needs at all times to be involved with the litigation. This truth was ignored under the old rules and practice. The new rules position that truth as a centerpiece. This is seen in the general rule that the litigant or his representative (which means someone other than the lawyer) must attend the case management conference or pre-trial review and in the sanctions provided for non-attendance, see rule 27.4. A litigant, therefore, who neglects to tell his lawyer how to reach him is likely to end up in breach of a primary obligation that rest on him rather than the lawyer, that is, the obligation to be present at the various states of his case. In this case, one assumes, the claimant had an abundance of time to think about his pending case and the probability that his lawyer would need to reach him. It does not appear that the claimant did **anything about informing his lawyer on how to reach him.**"

- [28] **The record reflects that the Court for over 2 years "bent over backwards" to give the Defendant an opportunity to appear and participate in the proceedings. Bearing in mind the statements of Barrow J, the Court is of the view that the Defendant acted to his peril in not paying attention to his litigation. The Claimants incurred much costs through the several appearances and adjournments' when the Defendant was a "no show". And the Court's resources were certainly not being efficiently used with the several adjournments as the Court awaited the appearance of the Defendant.**
- [29] The Court believes that the Defendant failed to exercise the reasonable option of **visiting his former Counsel's chambers as for almost 21/2 years he made no effort to know what was occurring in the litigation against him.**
- [30] Against the facts before the Court, the Court believes that it can only exercise its **discretion in favour of the Claimants' application and strike out the Defendant's defence and enter judgment for the Claimants.**

[31] **Court's Order**

1. **The Defendant's defence is struck** out.
2. Judgment is entered for the Claimant.
3. There being damages to be assessed, the matter is to be fixed before the master within 90 days for assessment of damages and other final orders of the judgment.
4. Prescribed costs to the Claimants.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar