

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2015/0009

**[1] AGNES DANZIE
[2] TRACY ANN ESTEL DANZIE
[3] BILL DANZIE**

Appellants

and

**CECIL ANTHONY
(Executrix of the estate of EMMANUEL GRESHAM)**

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

On Written Submissions:

Ms. Isabella Shillingford for the Appellants
No appearance by the Respondent

2015: December 4.

Interlocutory appeal – Appellants’ defence struck out in court below by learned judge for non-compliance with previous order of court which required that costs be paid prior to late filing of defence – Judgment entered for respondent in her absence – Whether learned judge erred in striking out appellants’ defence and entering judgment for respondent in her absence – Whether striking out of defence and entry of judgment by learned judge was contrary to CPR 27.2(3) and rules of natural justice

The respondent filed a fixed date claim on 2nd June 2014, in which she sought several reliefs, including possession of a parcel of land and payment of \$37,800.00, which sum represented rent/mesne profits. On 29th September 2014, time for filing a defence to the claim expired and no defence had been filed by the appellants. The learned judge granted the appellants leave to file their defence out of time, but ordered them to pay the respondent costs in the sum of \$750.00 prior to the late filing and set the first hearing of

the matter for 23rd March 2015, which was after the new deadline for filing the defence. Although the appellants filed their defence before the new deadline, they did not pay the costs which the learned judge had ordered them to pay.

On 20th March 2015, days before the adjourned first hearing was scheduled for, the respondent made an application for the appellants' defence to be struck out on the following grounds: (i) it was 'in violation of the Order of the Court in this matter dated the 29th day of September 2014'; (ii) it was not compliant with rules 10.5 and 10.7 of the Civil Procedure Rules 2000; and (iii) it did not disclose any reasonable cause on which the court could adjudicate and was an abuse of process of the court. The respondent was not present at the hearing on 23rd March 2015. The learned judge, however, noting that there was no evidence before the court that the costs of \$750.00 had been paid, ordered that the defence be struck out for non-compliance with the order of 29th September 2014 and that judgment be entered for the respondent in terms of the prayer in her statement of claim filed on 2nd June 2014.

The appellants appealed the learned judge's decision on the grounds that he misdirected himself and therefore erred in principle of law by firstly, striking out the defence, and secondly, by entering judgment in favour of the respondent without taking evidence. The appellants further contended that the disposal of the matter in a summary manner was in breach of the principles of natural justice, which resulted in unfairness in the trial process.

Held: allowing the appeal, setting aside the order of the learned judge, awarding the appellants costs in the sum of \$1,000.00 and ordering that the matter be relisted for first hearing, that:

1. While CPR 26.3(1)(a) gives the court a discretion to strike out a statement of case or part of one where 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, it is a well-established principle that this power should only be used sparingly. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances. At the hearing on 23rd March 2015, one of the options available to the learned judge was to make an unless order and specify that one of the consequences for failure to comply could have included striking out of the defence. Having regard to the very wide case management powers of a judge, striking out the appellants' defence was not an appropriate response to the breach of the order of the learned judge by the appellants.

Real Time Systems Limited v Renraw Investments Limited and Others [2014] UKPC 6 applied; **Salfraz Hussain v Birmingham City Council and Others** [2005] EWCA Civ 1570.

2. CPR 27.2 (3) empowers the court to treat the first hearing as a trial if the claim is not defended or where there is a defence and the court considers that the claim can be dealt with summarily. However, dealing with a claim summarily does not mean entering summary judgment. The claimant must still prove that he is entitled to the relief sought. A trial must therefore be conducted, albeit in a summary way. The respondent not being present at the first hearing to pursue her claim meant that there was no trial. The learned judge therefore erred in ordering that judgment be entered for the respondent in terms as prayed in her statement of claim.

Richard Frederick et al v Comptroller of Customs et al SLUHCVP2008/0037 (delivered 6th July 2009, unreported)

JUDGMENT

- [1] **THOM JA:** This is an interlocutory appeal against an order by the learned judge dated 23rd March 2015 striking out the appellants' defence for non-compliance with a previous order of the learned judge dated 29th September 2014 and ordering that judgment be entered in terms of the relief sought in the statement of claim.

Background

- [2] On 2nd June 2014, the respondent filed a fixed date claim in which she sought several reliefs including possession of a parcel of land and payment of \$37,800.00 being rent/mesne profits. The claim was served on the second and third appellants on 10th June 2014 and on the first appellant on 12th June 2014.
- [3] On 29th September 2014, the time for filing a defence having expired and no defence having been filed by the appellants, the learned judge granted the appellants leave to file their defence on or before the 13th October 2014, ordered them to pay the respondent costs in the sum of \$750.00 prior to filing the defence and adjourned the first hearing to 23rd March 2015.

- [4] The appellants filed their defence on 13th October 2014, but the costs of \$750.00 was not paid prior to filing the defence. The defence was served on the respondent on 15th October 2014.
- [5] On 20th March 2015, three days before the adjourned first hearing was due to resume, the respondent made an application for the defence to be struck out on the grounds that: (i) it was in violation of the order of 29th September 2014; (ii) it was not compliant with rules 10.5 and 10.7 of the **Civil Procedure Rules 2000** ("CPR 2000"); and (iii) it did not disclose any reasonable cause of action and is an abuse of process.
- [6] At the hearing on 23rd March 2015, the respondent was not present. The learned judge noted that there was no evidence before the court that the costs of \$750.00 had been paid and he ordered as follows:
- "1. The defence filed herein on 13th October, 2014 be and is struck out for non-compliance with the Court's Order of 29th September, 2014 which required that costs of \$750.00 be paid by Defendants prior to filing the defence.
 2. Judgment be and is entered for the Claimant in favour of the Claimant's prayer in the statement of claim filed on June 2nd, 2014."
- [7] The appellants appealed the order on two grounds being:
- "(i) The Learned Trial Judge misdirected himself and therefore erred in principle of law firstly by striking out the defence and secondly by entering judgment in favour of the Respondent without taking evidence.
 - (ii) The disposal of the matter in a summary manner was in breach of the principles of natural justice resulting in unfairness in the trial process."
- [8] The record of appeal including the notice of appeal and the skeleton arguments were served on the respondent on 2nd April 2015. The respondent took no part in this appeal.

Submissions

Ground 1

- [9] Ms. Shillingford referred to rules 26.3(2)(c), 26.4(1) and (2), 26.9 and 27.2(3) of CPR 2000 and submits that the learned judge erred in striking out the defence and entering judgment when there was no “unless order” in the order of 29th September 2014. There was no sanction imposed for failure to pay the costs and therefore the striking out of the defence was both premature and draconian. She relied on the cases of **C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd.**¹ and **Saint Lucia Furnishings Limited v Saint Lucia Co-operative Bank Limited et al.**²

Discussion

- [10] While the respondent based her application to strike out on several grounds, the learned judge’s reason for striking out the defence was the appellant’s breach of the order of 29th September 2014 in failing to pay the costs of \$750.00 prior to the filing of the defence.
- [11] Undoubtedly, the appellants were in breach of the court’s order. It cannot be overemphasised that litigants are required to comply with the orders of the court made during case management within the time specified by CPR 2000 or by the order of the court. Litigants are not at liberty to breach the orders of the court with impunity.
- [12] CPR 26.3(1)(a) gives the court a discretion to strike out a statement of case or part of the statement of case where 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.

¹ SLUHC VAP2011/0017 (delivered 19th March 2012, unreported).

² SLUHC VAP2003/0015 (delivered 24th November 2003, unreported).

- [13] It is a well-established principle that the court's power to strike out a statement of case should only be used sparingly.³ Also, in **Salfraz Hussain v Birmingham City Council and Others**⁴ the English Court of Appeal, in considering the exercise of discretion to grant relief from sanctions where judgment was entered in default, stated: 'it must be kept in mind that discretionary powers are not to be exercised in order to punish a party for incompetence – they must be exercised in order to further the overriding objective'⁵. In exercising his discretion, the learned judge was required to consider what was the appropriate response having regard to all of the circumstances, including whether there were other alternatives available that would be just in the circumstances.
- [14] CPR 2000 gives the court very wide case management powers. CPR 26.1(2)(k) empowers the court to extend or shorten the time for compliance with any rule, practice direction order or direction of the court even if the application for an extension is made after the time for compliance has passed. Also CPR 26.1(2)(w) empowers the court to take any other step, give any other direction or make any other order for the purpose of managing the case.
- [15] The learned judge, in making the 29th September 2014 order, did not specify the consequences of failure to comply as he was empowered to do pursuant to CPR 26.7. At the 23rd March 2015 hearing, one of the options available to the learned judge was to make an unless order and specify that one of the consequences for failure to comply could have included striking out of the defence.
- [16] In my view, having regard to all of the circumstances of the case, the very wide case management powers of a judge, striking out the defence was not an appropriate response to the breach by the appellants.

³ See *Real Time Systems Limited v Renraw Investments Limited and Others* [2014] UKPC 6.

⁴ [2005] EWCA Civ 1570.

⁵ At para. 36.

Ground 2

- [17] Ms. Shillingford submits that CPR 27.2(3) provides that a first hearing could be treated as a trial. However, she argues that it was necessary for evidence to be taken and the appellants afforded an opportunity to cross-examine the respondent. The striking out of the defence and the entry of judgment was contrary to CPR 27.2(3) and the rules of natural justice. Further, since the respondent was absent, it meant that she was not in a position to prove her case.
- [18] The proceedings were properly instituted by fixed date claim. CPR 12.2 expressly precludes entry of judgment in default of defence in claims commenced by fixed date claim. CPR 27.2 (3) empowers the court to treat the first hearing as a trial if the claim is not defended or where there is a defence and the court considers that the claim can be dealt with summarily. In **Richard Frederick et al v Comptroller of Customs et al**,⁶ George-Creque JA, in making the distinction between Part 15 and rule 27.2 of CPR 2000, stated the effect of rule 27.2 as follows: 'Dealing with a claim summarily does not mean entering summary judgment. The claimant must still prove that he is entitled to the relief sought. Therefore a trial must be conducted albeit in a summary way'.⁷ The respondent was not present at the first hearing to pursue her claim. There was no trial. The learned judge therefore erred in ordering that judgment be entered for the respondent in terms as prayed in her claim.

⁶ SLUHCVAP2008/0037 (delivered 6th July 2009, unreported).

⁷ At para. 46 of judgment.

[19] For the reasons stated above the appeal is allowed, the order of the learned judge is set aside and costs are awarded to the appellants in the sum of \$1,000.00. The matter is to be relisted for first hearing.

Gertel Thom
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal