[2014] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 29/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)

BETWEEN	**SUPER PLUS FOOD STORES LTD**	**1ST APPELLANT**
AND	**TIKAL LTD**	**2ND APPELLANT**
AND	**CONTINENTAL BAKING CO LTD**	**RESPONDENT**

Written submissions received from Nigel Jones and Co for the appellants

Written submissions received from Henlin Gibson Henlin for the respondent

25 September 2014

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing useful to add.

BROOKS JA

[2] On 24 May 2013, E Brown J handed down a judgment against Super Plus Food Stores Limited and Tikal Limited (together referred to herein as 'the appellants') in favour of Continental Baking Company Limited (Continental Baking). The judgment, in the sums of $139,951,452.00, $16,774,552.00 and $33,093,241.00, was based on admissions made by the appellants.

[3] Although it is the appellants who admitted in their defence, to owing those sums to Continental Baking, they have complained in this appeal that the sums awarded in the judgment are in excess of the amount that Continental Baking had claimed against them. In the claim filed against the appellants Continental Baking had claimed $139,951,452.00, Rainforest Seafood Ltd (Rainforest) had claimed $16,953,744.00 and Copper Wood Limited (Copper Wood) had claimed $41,153,680.00. All these sums represented monies owing for goods sold and delivered. The claimants' separate claims were, very curiously, included in a single action against the appellants.

[4] The explanation for the rolled-up claim seems to lie in the fact that there were apparently prior negotiations between the claimants and the appellants in which, according to the claimants, the sum due to each claimant was agreed and a method of settlement was proposed. There was no agreement on the method of ensuring the payment and, in the absence of payment, the claimants filed their claim in the Supreme Court.

[5] Continental Baking has filed a counter-notice of appeal contending that this court has the jurisdiction to order an amendment of the pleadings to accord with the

judgment on admission. Counsel for Continental Baking also submitted that this court has the authority to vary the judgment to accord with Continental Baking's claim.

[6] There does not seem to be a contest that the judgment cannot stand with the pleadings as they presently exist. The main issues for this court to assess are:

a. whether the pleadings may be properly amended so as to allow the judgment, as entered, to stand; and, if not,

b. whether the judgment should be set aside or varied.

The defect in the judgment, as it presently stands, will first be examined before turning to the issues raised by the counter-notice of appeal. It should first be noted, however, that the parties each had different representation in the court below.

The application for judgment on admission

[7] It would also be helpful to the assessment of this appeal to set out the application that resulted in this judgment. It will be noted that the application for judgment in favour of Continental Baking for the three sums was made as an alternative to judgments in favour of each of the claimants. The application stated, in part:

> "The Claimants, CONTINENTAL BAKING COMPANY LIMITED of 43 Half Way Tree Road, Kingston 5, in the parish of St. Andrew; RAINFOREST SEAFOODS LIMITED of 23-25 Coconut Way, Freeport, Montego bay, in the parish of Saint James; and COPPERWOOD LIMITED of 27 Upper Waterloo Road, Kingston 10 in the parish of Saint Andrew, seek the following orders that:
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> The Defendants' Defence be struck out:
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> 1. Summary Judgment be entered in favour of the 1st Claimant against the Defendants in the amount of

$139,951,452.00 with interest to be assessed at 1% above the commercial banks' lending rate for such period as the Assessment Court shall deem just;

2. Summary Judgment be entered in favour of the 2nd Claimant against the Defendants in the amount of $16,953,744.00 with interest to be assessed at 1% above the commercial banks' prime lending rate for such period as the Assessment Court shall deem just;

3. Summary Judgment be entered in favour of the 3rd Claimant against the Defendants in the amount of $41,153,680.00 with interest to be assessed at 1% above the commercial banks' prime lending rate for such period as the Assessment Court shall deem just;

4. Alternatively, judgment on admissions be entered for the 1st Claimant against the Defendants in the amounts of $139,951,452.00, and $16,774,552.00 and $33,093,241.00 with interest to be assessed at 1% above the commercial banks' prime lending rate for such period as the Assessment Court shall deem just;

5. Costs of the action including this application to the Claimants."

[8] It is clear that Brown J viewed the alternative claim as more appropriate as it was in line with the admissions made by the appellants.

The validity of the judgment

[9] The principle that a judgment may not be entered for more than the sum claimed is founded on established authority. In **Chattell v Daily Mail Publishing Company (Limited)** (1901-1902) 18 TLR 165 (CA) the Court of Appeal ruled that a judgment entered for a sum greater than that which had been claimed, was bad. In **Chattell** the plaintiff claimed £1000.00 as damages for libel. An interlocutory judgment in default of defence, with damages to be assessed, was entered. At the assessment

hearing, the speech of her counsel so inflamed the jury that it awarded damages in the sum of £2,500.00. Judgment was entered in the latter sum.

[10] On appeal, Collins MR, with whom the rest of the court agreed, ruled that the judgment could not stand as there had been no amendment to the claim. He said in part (at page 168 of the report):

> "To entitle the plaintiff to judgment for £2,500 the claim required amendment. The claim was not got rid of by the interlocutory judgment. The claim was a factor in that which went down to trial – namely, the amount of damages to be assessed. The judgment was therefore bad."

The court was prepared, on the condition that the plaintiff would accept a judgment for the sum that she had claimed, to refrain from ordering a new assessment of damages. It was clear from the judgment of the court, however, that the judgment for £2,500.00 could not stand.

[11] In this court, Harris JA in **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27 relied on the reasoning in **Chattell**. Harris JA emphasised that a judgment could not properly be entered for a sum in excess of the amount claimed. The learned judge of appeal did, however, contemplate an amendment to the pleadings, so as to have the claim increased, prior to the judgment being entered. The learned judge of appeal said, in part, at paragraph [25]:

> "...As a matter of law, a claimant cannot recover by a judgment, more than that which has been pleaded - see [**Chattell**] **v Daily Mail** … **It follows therefore, that even if as submitted by [counsel for the judgment creditor], there was a consent for an amount in excess of that which was claimed, judgment for an increased amount ought not to have been entered unless the pleadings were amended to reflect the**

> **increase** and the parties had consented to an amendment of the claim form prior to signing judgment." (Emphasis supplied)

[12] Based on that principle, the judgment in this case cannot stand, as entered. It does not necessarily follow that the orders sought in the appeal must be granted. There is yet to be considered, the question of the counter-notice of appeal. The orders sought in the appeal are:

> "(a) Order of Mr. Justice Evan Brown dated May 24, 2013 is set aside;
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> (b) Costs of this appeal and below to the Appellant to be taxed if not agreed; and
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> (c) Further and/or other relief."

Those orders may only be granted, as claimed, if the counter-notice of appeal or the circumstances of the case do not warrant some other order being made.

The counter-notice of appeal

[13] The counter-notice of appeal states as follows:

> "1. The Respondents [sic] claimed the sums severally against the Appellants as Defendants in the court below.
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> 2. The Appellants admitted the amounts due to the 1st [sic] Respondent as follows:
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> a. $139,951,452.00 at Paragraph 3 of the Defence.
> b. $16,774,552.00 at Paragraphs 7 and 8 of the Defence.
> c. $33,093,241.00 at Paragraphs 9 and 10 of the Defence.
>
> 3. The Court of Appeal, in relation to a civil appeal may exercise any of the powers of the Supreme Court in accordance with CAR 2.15 including making any

order, which, in its opinion, ought to have been made by the court below.

4. The Court below and accordingly the Court of Appeal has jurisdiction where a judgment is entered for too much to permit **an amendment of the pleadings** to accord with the amount for which judgment is or ought to have been entered.

5. This is a proper case where the learned judged [sic] could have permitted **an amendment of the pleadings** to accord with the judgment on admission in the sum of $139,951,452.00, $16,774,552.00 and 33,093,241.00 against the Appellants.

6. The Respondents [sic] therefore **seek an order to amend the pleadings** to accord with the Appellants [sic] admission and that the judgment be affirmed accordingly." (Emphasis supplied)

As formulated, these grounds seek to support the judgment as it stands, on the basis that the appellants had admitted owing the three sums to Continental Baking.

The submissions

[14] Mrs Gibson-Henlin, of the firm of Henlin Gibson-Henlin, in her written submissions on behalf of Continental Baking, pointed out that the judgment was not one on the merits of the claim. As a result, this court should, as the court below could have done, order that the pleadings be amended to accord with the judgment. In support of her submissions, Mrs Gibson-Henlin cited, among others, **Leymon Strachan v The Gleaner Company** PCA No 22 of 2004 (delivered 25 July 2005).

[15] Mrs Gibson-Henlin further submitted, in the alternative, that this court should, on the same principle that this is not a judgment on its merits, correct the judgment in order to reflect the sum of $139,951,452.00 that the appellants had admitted owing to

Continental Baking. She submitted that, as there is no issue that the appellants owe the sum of $139,951,452.00 to Continental Baking, this court should vary the judgment on admission so that it reflects this sum only. The claim for the remaining sums would be remitted to the Supreme Court for resolution there. There was, however, no application to amend the counter-notice of appeal in order to claim a variation of the judgment.

[16] Mr Jones, of the firm of Nigel Jones and Co, on behalf of the appellants, submitted that it would be unfair to allow Continental Baking to amend its pleadings to accord with the judgment. Mr Jones, in his written submissions stated that despite the judgment for the three sums, the appellants remain, at present, exposed to Rainforest and Copper Wood, since the claims of those parties have not been resolved. To allow the judgment to stand for the three sums would expose the appellants to having to pay the admitted sums to Continental Baking and to the risk of having to pay two of those sums again to Rainforest and Copper Wood respectively.

[17] Mrs Gibson-Henlin's submissions were filed quite late in the day and Mr Jones did not have an opportunity to respond to those made concerning the variation of the judgment.

The analysis of the counter-notice of appeal

[18] Mr Jones' submissions in respect of the counterclaim, as filed, are correct. The continued existence of the claims by Rainforest and Copper Wood demonstrates that an amendment of the pleadings to accord with the judgment in favour of Continental

Baking would be untenable. Such an amendment would leave the appellants exposed to the claims of Rainforest and Copper Wood.

[19] Apart from that fact, it is unlikely that Continental Baking could provide truthful affidavit support for an application to amend the pleadings. How could it, having previously collaborated with the two other claimants to claim a particular sum, alter its pleadings to assert a claim for other sums which may well overlap with the sums that those other claimants sought? Without seeking to prejudice any such amendment in the future, such assertions seem most unlikely.

[20] In addition to that reasoning, the submissions run contrary to the import of the reasoning in **Chattell** and **Laing**. The point made by both Collins MR and Harris JA is that the amendments to the pleadings ought to have been made before the judgment was entered. The judgment having been entered, and while it stands, the pleadings can no longer be amended. The judgment has first to be set aside. The counter-notice of appeal cannot succeed.

The analysis of the submissions concerning variation

[21] It is now necessary to analyse Mrs Gibson-Henlin's submissions in respect of the variation of the judgment.

[22] Learned counsel is correct that the court below, on an application for judgment on admission, did have the power, under rule 14.4(2) of the Civil Procedure Rules (the CPR) to award the judgment "as it appears to the court that the applicant is entitled to on the admission". The court below also has the power, based on the reasoning in

Leymon Strachan v The Gleaner Company, to take certain steps in respect of a judgment which has not been grounded on the merits of the claim.

[23] Rule 2.15(b) of the Court of Appeal Rules (the CAR) gives this court a number of alternatives in cases where it views a judgment of the court below to be defective. The relevant portion of the rule states:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition –
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> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
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> (b) power to –
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> (a) affirm, set aside or vary any judgment made or given by the court below;
>
> (b) give any judgment or make any order which, in its opinion, ought to have been made by the court below;
>
> (c) remit the matter for determination by the court below;
>
> (d) order a new trial or hearing by the same or a different court or tribunal;"

[24] In the regime previous to the introduction of the CPR, it could have been said that a variation should properly be based on an application for that relief. One of the aims of the CPR, however, is to save expense (see rule 1.1(2)(b)). The pleadings show that Continental Baking claimed from the appellants the sum of $139,951,452.00 and the appellants, among other things, admitted owing that sum to Continental Baking. On those bases there is no practical benefit to sending the claim back to the court

below to have Continental Baking renew an application for a judgment to which, based on the admissions, it is clearly entitled.

[25] On the claim and the admission to that claim, this is a proper case in which to exercise the power to vary the judgment that was entered in the court below.

Conclusion

[26] The judgment against the appellants, having been entered for a sum in excess of the amount claimed by Continental Baking, is defective and cannot stand. Although there is no formal application before this court for the judgment to be varied, the court has the authority to give the judgment which ought to have been given in the court below. The appellants having admitted owing the sum claimed by Continental Baking, a judgment ought to have been entered against them in that sum, in the court below. The order that would best serve the overriding objective is for this court to vary the judgment in order for it to reflect the order that should have been made.

[27] The appeal is, therefore, only partially successful. The counter-notice fails entirely but the submissions advocating the variation of the judgment are convincing.

Costs

[28] In addition to dealing with the costs in this appeal, the court also has to consider the issue of the costs of an application for security for costs which was concluded in the appellants' favour. At the time of that order the order regarding costs was reserved pending the resolution of the appeal. The honours have been shared in the appeal because the appeal has been only partially successful. It would seem, therefore, that

the appropriate order to be made is that each party should bear its own costs in both the application for security for costs and in the appeal.

McDONALD-BISHOP JA (Ag)

[29] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

PHILLIPS JA

Order

(1) The appeal is allowed in part.

(2) The judgment of E Brown J entered on 24 May 2013 is hereby varied so that paragraph 1 thereof shall read:

> "Judgment on admission is entered for the First Claimant against the Defendants in the amount of $139,951,452.00 with interest thereon to be assessed at 1% above the commercial bank's prime lending rate for such period as shall be determined on assessment of damages."

(3) The counter-notice of appeal is dismissed.

(4) Each party shall bear its own costs in respect of the appeal, the counter-notice of appeal and the application for security for costs.