IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1999/C 147

BETWEEN	LESTER CROOKS	CLAIMANT/RESPONDENT
A N D	D. R. FOOTE CONSTRUCTION CO. LTD.	DEFENDANT/APPLICANT

Miss Althea Wilkins for Claimant/Respondent.

Mr. Don 0. Foote for Defendant/Applicant.

IN CHAMBERS

Heard: 14 th and 16 th May, 2003

BROOKS, J.

The application before the Court is for the Judgment entered against the Defendant to be set aside and for the Defendant to be allowed additional time to file its defence.

The background to this matter has its genesis in a motor vehicle collision on the 2nd August 1997, between the Plaintiff's motor vehicle and the Defendant's. The Plaintiff made a claim on his insurer and a payment was made to him.

By suit No. C.L. C365/1998 (the first suit) the Plaintiff claimed damages against the Defendant for personal injuries said to have been suffered in the collision as well as for some of his uninsured losses (loss of use). An Interlocutory Judgment in default of defence was entered in the first suit on 5th February 1999.

On 18th May 1999 the Plaintiff's Insurers, relying on their right of subrogation, instituted the present action (this action). An Interlocutory Judgment in default of

appearance was entered on 3rd November 1999, damages were assessed on 25th July 2000 and a final judgment entered on 8th August 2000.

An application to set aside the Interlocutory Judgment in this action, was ordered, by Harris J. to be heard by motion. Upon the hearing of the motion, filed 28th May 2001, Anderson J. refused the application and dismissed the motion on 8th November 2001.

Arising from a development, in the Court of Appeal in the first suit the Defendant herein has renewed its application to set aside, which application (filed 29th April, 2002) is that which is presently before this tribunal.

When this application came on for hearing Miss Wilkins for the Plaintiff advanced a preliminary point that the application had already been adjudicated upon. She pointed to the fact of the similar application having been made before Anderson J. by motion in open Court. That application having been dismissed by the learned Judge, this application, she argues, is therefore an abuse of the process of the Court.

Mr. Foote made the following arguments in response:

(a) Despite the fact that a final Judgment had been entered pursuant to an Order on Assessment of Damages, the Judgment remained a default Judgment.

He relied on the Judgment of the Court of Appeal in the case of the Court of Appeal in the case of *Leymon Strachan vs. The Gleaner Co. Ltd. and Dudley Stokes*

SCCA 12/99 delivered December 6, 1999. At p. 11 of the Judgment Harrison J.A. stated that where the Defendant does not participate prior to Judgment, the Judgment remains a Default Judgment, and as such may be set aside under the principle laid down in *Evans v Bartlam [1937] A.C. 473.*

(b) Although a previous application was heard and dismissed by Anderson J., this present application is being made on the additional basis that the Judgment was entered for too much and the Defendant is therefore entitled *ex debito justitiae* to have it set aside.

He relied on the case of *Gordon & Gordon & Vickers & Vickers SCCA 59/88* (reported at (1990) 27 JLR 60) in support of the proposition that repeated applications may be made to set aside a default Judgment.

(c) The application may be made by Summons.

Authority for that proposition may be found in the case of *Mason v Desnoes & Geddes* 1990) 27 JLR 156 as well as in *Mills v Lawson & Skyers* (1990) 27 JLR 196.

Having considered the arguments of counsel I am persuaded that the application may be made despite a similar application having been dismissed by Anderson J. on a previous occasion. The fact that an additional aspect is being argued, brings the matter within the purview of the reasoning in the *Vickers & Gordon* case (p. 63 H).

The preliminary point therefore fails.

Under the provisions of S.354 of the Judicature (Civil Procedure Code) Law (CPC), and following the reasoning in the *Mills* case (supra), the application, though not barred, ought not to succeed. This is because no application was made, nor indeed any reason advanced, to allow for an extension of the ten-day period provided by that section, to accommodate applications such as these.

Since however, we now are governed by a new regime I shall consider the matter further.

In advancing the arguments in the substantive application to set aside the Judgment, Mr. Foote first stated that the judgment had been irregularly obtained. This, he said, was because the Plaintiff had previously secured an interlocutory judgment in another action brought by him (through different lawyers) arising from the same collision.

He relied on the case of *Ricketts v Tropigas S.A. Ltd & Others SCCA 109/99* delivered 31/7/2000.

The *ratio decidendi* of that case, is that a second and subsequent action by a Plaintiff against a Defendant, arising from the same incident, is barred by the operation of the rules relating to cause of action estoppel, unless some exceptional circumstances exist which allow for actions to be split.

Their Lordships in the *Ricketts* case cited a number of authorities reinforcing the need for there to be an end to litigation, which principle bars Plaintiffs from bringing one action for property loss and another for personal injury, arising out of the same incident.

Finally Mr. Foote submitted that the Judgment was entered for too large a sum, in that the insurer, which had bought the action, acting under its rights of subrogation, had claimed $629,450.00 as damages for property loss and consequential damages, when in fact it had only paid out $505,000.00 to its insured. In fact, he says, the sum claimed includes a duplication of a claim in the first suit for loss of use. The Judgment was, he submits, therefore irregular, and the Defendant was entitled to have it set aside.

In responding to these submissions, Miss Wilkins argued, firstly, that exceptional circumstances did exist to allow for this action to be permitted to subsist.

The circumstances, she indicates, are referred to in a letter from the plaintiff's insurer's lawyers, dated March 25, 2003 and exhibited to an Affidavit of Don 0. Foote. The affidavit was sworn to on the 29th April 2003. In that letter the explanation is given that the second suit was filed on the instruction of the insurers and that the default and final judgments respectively, were entered in ignorance of the existence of the first suit.

Up to the date of this hearing, the first suit still remains at the stage of an interlocutory judgment, though a date for the assessment of damages has now been set.

Secondly, Miss Wilkins submits that the judgment was not entered for too much as the Plaintiff did in fact incur that loss (which was proved to the satisfaction of the learned Judge assessing the damages). She argued that to the extent that there was a duplication of the claim, then the sum would have to be accounted for when damages shall have been assessed in the first suit.

I find that the principle applied in the ***Ricketts*** case is equally applicable in the instant case. The Judgment however, is not an irregular one, as the Court does have a discretion as to whether the action should stand or be barred.

The only issue that therefore remains, is whether there are exceptional circumstances which excuse the bringing of the second action, or more precisely, allow for it to remain in existence.

Whereas I am convinced of the need to have certainty in litigation and for the need for an end to litigation, I have considered the consequences of accepting the Defendant's submission that the instant suit should be barred. It would mean that the efforts in securing the Default Judgment and Assessment of Damages would have been wasted. In addition, the first suit, which is now proceeding to Assessment of Damages, would have to be halted. This, to allow for the amendment of the Statement of Claim and for the repeat of the assessment process, to the extent of the loss related to and consequential upon the damage to the vehicle.

Under The Civil Procedure Rules 2002 (CPR), the new principle is that if the rules of the CPR allow any discretion to the Court, it should seek to give effect to the

Overriding Objective. The Overriding Objective aims to enable the Court to deal justly with cases. Included in that consideration of dealing justly, are the factors of saving expense, ensuring that cases are dealt with expeditiously and fairly, and allotting an appropriate share of the Court's resources to each one (rule 1. 1 (2) (b) (d) and (e)).

I shall now examine Part 13 of the CPR to determine what, if any, discretion is given to the Court in these circumstances. Although the instant case was filed and brought to Judgment before the CPR came into force it seems that nothing in rule 13.2 mandates the setting aside of the judgment in this case. Rule 13.3 allows the Court a discretion, where, among other things, the Defendant has a real prospect of successfully defending the claim.

As previously indicated, in the first suit the Plaintiff already has secured an Interlocutory Judgment against the Defendant and is proceeding to Assessment of Damages. There is therefore nothing to be gained by the Defendant, except time, if this suit were to be struck out on the basis of the duplication.

I am therefore of the view that in addition to the reason advanced by the Plaintiff's Attorney (which I find, by itself, not to be exceptional within the meaning of the Ricketts case) the aim to achieve the Overriding Objective does bring the matter to the state that the circumstances are exceptional and so allow for the action and the judgment to continue to subsist.

The application is therefore refused and the order for stay of the execution process is hereby revoked.

I am of the view that although the Defendant/Applicant had some interesting and attractive arguments, the reality is that it is liable to the Plaintiff, and should have sought

to settle its liability instead of prolonging the matter. As a result, the costs of this application are awarded to the Plaintiff.

The orders therefore are:

1. Application refused and the order for stay of the execution process is hereby revoked.
2. Costs of $8,000.00 to the Plaintiff.
3. Leave to appeal granted.
4. Application for stay of execution refused.