Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 1997/F030

BETWEEN	FIRST TRADE INTERNATIONAL BANK & TRUST LIMITED	PLAINTIFF
AND	CROWN MOTORS LIMITED	DEFENDANT

Keith Bishop for the plaintiff.

Miss Carol Davis for the defendant.

Heard 2nd April 2004

Campbell J.

Before the Court is plaintiff's Summons for Sale of Lands and the defendant's Summons to Amend and or Set Aside Judgment.

The judgment that was sought to be set aside had been delivered on the 25th June 1998, when Karl Harrison J. granted a final judgment in favour of the plaintiff on a Summons for Summary Judgment in the sum of US$209,669.21. The Court had ordered at paragraph 2 that;

> "The said sum of US$209,6691.21 be lodged within ninety (90) days of the date hereof into an interest bearing account in the joint names of the Attorneys-at-Law representing the parties, at the Bank of Nova Scotia Jamaica Limited, Commercial Banking Centre to abide

> the outcome of the trial of the consolidated actions. That sum should have been lodged on or before September 24th 1998."

On the 24th February 1999 the plaintiff filed a Writ of Seizure and Sale. On the 9th February 2000 the Writ was issued and forwarded to the Bailiff.

On the 12th April 2000 the defendant filed a Summons Pursuant to Liberty to Apply, in which it was sought to amend paragraph 2, thus;

> "Leave be granted to it for the delivery of a guarantee form Alliance Investment Management Limited to the plaintiff for the sum US$209,669.21. The defendant further seeks an order that in the event that sums are found to be due from the plaintiff to Key Motors Limited and Executive Motors Limited before payment of the remainder, if any, to the plaintiff herein.
>
> The aid application also seeks a declaration that the furniture and equipment set out in the schedule at Exhibit "dp3" to the property of Executive Motors.
>
> Alternatively the defendant seeks an order for leave to pay into a joint account, the sum of J$8.5 million, pending the hearing of the consolidated matters and also requests an order for speedy trial of the consolidated matters herein."

Counsel for the plaintiff attacked the amendment sought on the ground that the Bank of Nova Scotia was chosen for its financial stability. In respect of the paying over by Crown Motors of any sum found due to Key and Executive Motors, counsel pointed out that those contentions were raised before Harrison J. on the hearing of the application for summary judgment.

There was no appeal from the judgment. In any event, Harrison's J. Order was that the sum so deposited was to await the outcome of the consolidated matters.

In respect of consolidated matters, the Court was advised that those are now set for hearing on the 19th April 2004.

Background

For a period of five years and some nine months after Mr. Justice Karl Harrison's Order, the claimant still had not reaped the fruits of his judgment. This is despite having filed, on the 24th day of February 1999, a Writ of Seizure and Sale. On the 10th April 2000, the Bailiff report clearly showed that such assets identified by him as owned by the defendant were "grossly insufficient" to realize the judgment sum. However, on the 12th April 2000, the defendant filed a Summons Pursuant to Liberty to Apply. The affidavit in support of the said Summons contained what the claimant described as being gross misrepresentation of the assets owned by Crown Motors and that Crown Motors representations amounted to 'bad faith.' The claimant then filed a Re-listed Summons for Sale of Lands dated 17th April 2001.

The application was set for hearing some eight occasions. The file was reported missing for two years. Although the matter was being heard after the commencement date of the new rules, to require the claimant to satisfy the

requirement of Part 55.2 would occasion even greater delay in this matter, as well, the liquidation proceedings of the Bank for which an official liquidator had been appointed by the Supreme Court of the Bahamas.

The Bank's Case

The disregard for Harrison's J. Order only came to an end when the plaintiff's attempt to enforce the judgment by executing the Writ of Seizure and Sale. Mr. Bishop also argued that the defendant had the benefit of the funds from the 24th September 1998 to April 2004. The amount that was due on the 2nd April 2004 was the sum of US$345,193.05, which includes interest compounded annually at nine percent. It was submitted that, due to the difference in the exchange rates at the time of award and presently, should Crown Motors request to pay $8,500,000.00 be successful, the plaintiff would only be receiving US$141,000.00 instead of the US$209,669.21, the Court ordered.

Mr. Bishop further submitted that the company, Cromo Investments Ltd, that was proposed by Crown Motors to facilitate the Bank holding a mortgage over its (Cromo's) property, had not filed certain statutory returns with the Registrar of Companies and was never activated according to the records of the Registrar. In addition, Crown Motors is no longer trading. No steps had been taken to prosecute an appeal from the judgment.

Mr. Bishop urged the Court that the defendant deliberately misrepresented the assets of Crown Motors to the Court, where Desmond Panton deponed, "the only assets of Crown Motors are premises at 29 Hagley Park Road, valued at approximately $20,000,000.00 and Honda car parts valued at approximately J$15,000,000.00," therefore, the Court should not exercise its discretion in the defendant's favour.

Crown Motors Case

It was submitted on behalf of Crown Motors that a counterclaim had been filed in a pending suit between members of the group of companies and Crown Motors. The amount counterclaimed in that suit was in excess of the sum awarded the Bank, by Harrison J.

It was submitted that the new procedure for dealing with a sale of land is Part 55 of the Civil Procedure Rules 2002. There was no compliance with the requirements of Part 55.2 in particular.

Part 73.3(1) provides that;

> "These rules do no apply to any proceedings in which a trial date has been fixed to take place within the first term after the commencement date unless that date is adjourned and a judge shall fix the date."

The trial in this matter has already taken place, what is before the Court is an enforcement of a judgment of the Court. Part 73.5 provides;

> "Where the former rules still apply and the court has to exercise its discretion it may take into account the principles set out in these rules and, in particular Parts 1 and 25."

There is in fact no compliance by the Bank with the provisions of Part 55, particularly 55.2(1), which requires the support of the application by affidavit evidence. However, the Court is seized of all the information that is required to be stated in that affidavit. The Rules that are prayed by Crown Motors have as their overriding objective (Part 1.1), the enabling of the Court to deal with cases justly. In the exercise of its powers the Court is mandated to strive to achieve this objective in the exercise of its discretion and the interpretation of any rule (Part 1.2). The scope of the Court's general power of management is wide and enables the Court to act on its own initiative or on an application.

On the exercise of the Court's powers of discretion as it concerns their application to the CPR, Harrison J.A. (Ag.), in Western Broadcasting Services Ltd. vs Edward Seaga, (unreported decision of the Court of Appeal, dated 20th December 2004) said;

> "Judges are therefore expected to exercise the wide powers of discretion which they have fairly and justly in all circumstances, while recognizing their responsibility to litigants in general, not to allow the same defaults to occur in the future as have occurred in the past. When judges do that, it is expected that the Court of Appeal should not interfere with their decisions unless it can be shown that the judge has exercised his or her power in some way which contravenes relevant principles."

1. Is there any prejudice to the defendant in dealing with this application? I have not been pointed to any; the judgment of the plaintiff is still unsatisfied. There is no appeal of the decision of Harrison J., neither party was responsible for the misplacement of the file which accounted for a substantial period of delay which has been encountered in this matter. This delay has inured to the detriment of the Bank which was therefore restricted in its efforts to enforce the judgment. If the file had not been misplaced, the matter would long have been disposed of under the old rules. It is the plaintiff who has been prejudiced by the delay. It cannot be just to further delay the matter, to require adherence to Part 55.

The Order on claimant's Summons granted. The defendant's Summons dismissed. Cost to the claimant to be agreed or taxed.