



[2019] JMCC Comm 19

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2011 HCV 00088**

<b>BETWEEN</b>	<b>MARILYN HAMILTON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>UNITED GENERAL INSURANCE COMPANY</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mr. Paul Beswick, Miss Gina Chang & Miss Terry-Ann Guyah instructed by Ballantyne Beswick & Company for the claimant

Mr. Andre Sheckleford instructed by Hart Muirhead Fatta for the defendant

December 18, 2018, January 8 and March 29, 2019

**Civil procedure - Appeal against decision of the Registrar to issue an Order for seizure and sale – Civil Procedure Rules, 2002, part 62.**

**Civil procedure - Order for seizure and sale – whether a Default Costs Certificate may be enforced by that method, Civil Procedure Rules, 2002, rules 45.2, 64.2 (3).**

**Civil procedure - Order for seizure and sale - Time for issue - Civil Procedure Rules 65.12 (b).**

**Civil procedure - Whether an order for seizure and sale can be set aside after its execution**

**SIMMONS J**

- [1] This appeal which is another step in the “*apparently never ending litigation*”<sup>1</sup> between these parties is concerned with the issue of an Order for Seizure and Sale by the Registrar of the Commercial Division. The order was made in pursuant to a Default Costs Certificate against the defendant in Supreme Court Civil Appeal No. 7/2014, Applications No. 143/17 and No. 144/17 for the sum of eleven million four hundred and eighty-four thousand and seventy dollars (\$11,484,070.00).
- [2] The Default Costs Certificate was issued on March 12, 2018 and served on the defendant’s Attorneys-at-law on the same day. The Order for Seizure and Sale was issued by the Registrar of the Commercial Division on March 13, 2018.
- [3] Three issues have arisen for the Court’s consideration. They are as follows: -
- (i) Whether the Default Costs Certificate could be enforced by an Order for Seizure and Sale unless associated with a money judgment;
  - (ii) Whether an Order for Seizure and Sale can be issued before the expiration fourteen (14) days after the issue of the Default Costs Certificate by the Registrar; and
  - (iii) Whether the Order for Seizure and Sale can be set aside after its execution

### **Applicant’s/ Defendant’s submissions**

- [4] Mr. Sheckleford commenced his submissions by giving a brief synopsis of the proceedings in this matter. He indicated that after the Order for Seizure and Sale was obtained, a stay of execution was granted by Batts J, pending the appeal against the issue of the Default Costs Certificate.

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<sup>1</sup> [2018] JMCC Comm 21 per Batts J at paragraph 2

- [5] Counsel submitted that the Order for Seizure and Sale ought to be set aside on two bases.
- [6] Firstly, it was submitted that rule 46.4 (1) (a) of the **Civil Procedure Rules, 2002 (CPR)** does not permit execution by that method unless such costs flow from a “*money judgment*”. In order to buttress his argument counsel referred to rule 46.4 (1) (b) of the **CPR** which makes specific reference to fixed costs and argued that if costs which were awarded on a default costs certificate were meant to be included, the rule would have spoken to that fact.
- [7] Secondly, Mr. Sheckleford stated that although rule 65.12 of the **CPR** gives the paying party fourteen (14) days within which to comply with an order for payment of costs, the Order for Seizure and Sale was issued within one day. He also pointed out that the Bailiff attended on the defendant to execute the said order on March 14, 2018. He stated that Counsel for the claimant’s Attorneys were fully aware that the defendant had fourteen (14) days within which, to comply and this is evidenced by their letter dated March 1, 2018.

#### **Claimant’s/Respondents submissions**

- [8] Mr. Beswick submitted that rule 46.4 (1) (a) of the **CPR** should not be interpreted in such a restricted fashion. He stated that if a party could not enforce an order for costs in the absence of a money judgment, unsuccessful parties would be allowed to resist the payment of costs. This would also apply where specific sums have been claimed and a defendant succeeds and does not have a counterclaim. He also pointed out that there are other means of execution, for example, charging orders.
- [9] Reference was made to section 51 of the **Judicature (Supreme Court) Act** and ***Gordon Stewart v Sloley Snr. and others*** [2016] JMSC Civ 50 in which Sykes J (as he then was) said: -

*“It is important to recall that an order for the payment of costs is a judgment debt within the meaning of section 51 of the JSCA and therefore enforceable like any other money judgment”.<sup>2</sup>*

[10] Mr. Beswick submitted that costs may be recovered on a writ of execution and any other interpretation of the rules would be absurd. Specific reference was made to rule 64.2 (3) of the **CPR** in support of that submission.

[11] With respect to the time when the Order for Seizure and Sale was issued, Mr. Beswick submitted that once it is accepted that the Bailiff has executed, the Court has no jurisdiction to set aside the Registrar’s order. Reference was made to ***Henzel Clarke v David Vincent*** [2013] JMSC Civ 15 in which George J stated: -

*“[18] I agree with Counsel for the Judgment debtor that “the moment a writ or warrant of execution has been levied the judgment debtor is divested of control of the seized chattel (even if the seized property remains in his physical possession) and control now passes to the bailiff. I also fully embrace the principle enunciated by Vaughn Williams L.J. in re A Debtor, Ex parte Smith [1902] 2 K.B. 260, where he said thus:*

*[19] ‘Seizure by the sheriff deprives the debtor of the power of selling his goods. The moment the sheriff takes possession the debt is pro tanto absolutely discharged not indeed finally, but so long as the state of things continues’. However it is my view that this principle must be subject to whether in fact the seizure is lawful. If the seizure is unlawful then the bailiff has no right to it. The judgment debtor would still retain control and his remedy might lie in damages but not in an opposition to a judgment summons brought by the Claimant in circumstances where the bailiff acts for these purposes as an agent/officer of the Court and not for the Claimant”.*

[12] Counsel stated that from the above case, it is clear that once the order is validly issued and is executed, it is spent. He submitted that it can’t be set aside once it has been executed unless it is irregularly obtained or fraudulent. He stated that in this case, there is no irregularity on the face of the Registrar’s order.

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<sup>2</sup> Paragraph 104

[13] Mr. Beswick also submitted that rule 65.12 of the **CPR** which speaks to payment being required within fourteen (14) days is a directive to the paying party. That is. It speaks to the time for compliance.

### **Defendant's response**

[14] Mr. Sheckleford submitted that ***Henzel Clarke v David Vincent*** (supra) can be distinguished on the basis that the order in that case had expired. He stated that in the case at bar, the order was issued prematurely. Counsel argued that execution could lawfully, only take place after the expiration of the fourteen (14) day period. He said that in the event that there is any danger that assets may be removed a party can apply for a Mareva injunction.

### **Discussion**

[15] Part 62 of the **CPR** sets out the procedure where a party is desirous of appealing against the decision of the Registrar. Rule 62.9 (1) states that the appeal in by way of a re-hearing. The appellant has complied with the procedure.

[16] The powers of the Judge hearing the appeal are set out in rule 62.8 of the **CPR**. They are as follows: -

*“(1) In relation to an appeal the judge may exercise any power that might be exercised by the registrar whose decision is being challenged.*

*(2) The judge may –*

*(a) give permission for a party to amend a notice of appeal*

*(b) strike out the whole or part of the notice to appeal;*

*(c) impose conditions upon which an appeal may be brought;*

*(d) affirm, set aside or vary any decision made or given by a registrar;*

*(e) give any decision which, in his or her opinion, ought to have been made by the registrar;*

- (f) *remit the matter for determination by the registrar;*
  - (g) *make an order for the costs of the appeal and the proceedings before the registrar.*
- (3) *The judge may exercise his or her powers in relation to the whole or any part of a decision of a registrar.”*

### **Whether an order for the payment of costs can be enforced by an Order for Seizure and Sale**

[17] Costs are a sum of money awarded by the Court to a litigant as compensation for the expense which he has incurred in the litigation.

[18] Rule 46.4 (1) of the **CPR** states that: -

*“A judgment creditor may recover on a writ of execution*

- (a) *the balance of any money judgment (including costs);*
- (b) *fixed costs in accordance with rule 65.3; and*
- (c) *interest on a money judgment.”*

[19] Rule 45.2 of the **CPR** states in part: -

*“A judgment or order for payment of a sum of money other than an order for payment of money into court may be enforced by-*

- (a) *An order for the seizure and sale of goods under Part 46;*
- (b) *A charging order under Part 48;*
- (c) *An order for attachment of debts under Part 50;...”*

[20] Counsel for the defendant/appellant has argued that a default costs certificate does not fall within the definition of a money judgment. The Default Costs Certificate which is at the centre of this dispute reads: -

*“The respondent/Appellant, United General Insurance, not having filed points in dispute is hereby **ordered to pay costs** in the sum of Eleven Million, Four Hundred and Eighty Four Thousand and*

*Seventy dollars (\$11,484,070) to Ballantyne, Beswick & Company Attorneys-at-law for the Applicant/Respondent, Marilyn Hamilton”.*

[My emphasis]

[21] The basis of that order can be found in ***Marilyn Hamilton v United General Insurance Company*** [2017] JMCA App 38 in which the Court of Appeal awarded costs to the respondent Miss Hamilton in respect of applications numbered 143 and 144/17. Such costs were to be taxed if not agreed. The Court of Appeal also authorised taxation of those costs although the matter was not at an end.

[22] There is no definition of the term “*money judgment*” in rule 46. However, I think it’s beyond dispute that costs are a sum of money. Rule 46.4 (1) (a) of the **CPR** permits the enforcement of a “*money judgment*” by way of a writ of execution. In addition, rule 45.2 (a) of the **CPR** states that an order for payment of money may be enforced by an order for seizure and sale.

[23] Section 51 (1) of **The Judicature (Supreme Court) Act** states as follows: -

*“Every judgment debt shall in the Supreme Court carry interest at the rate of six per centum per annum or such other rate per annum as the Minister may by order from time to time prescribe in lieu thereof, from the time of entering up the judgment, until the same is satisfied, and such interest may be levied under a writ of execution on judgment.”*

Subsection (2) states that the word “*judgment*” includes decrees or orders.”

[24] An order for costs would therefore in my view, fall within the meaning of a “*money judgment*”. To my mind, the purpose of the inclusion of the words “*including costs*” in rule 46.4 (1) (a) of the **CPR** is to make it abundantly clear that an order for costs is included in the definition of a “*money judgment*”. Any other interpretation would be absurd and contrary to the overriding objective of dealing with cases fairly.

[25] In this regard, reference is made to the judgment of Batts J in ***Marilyn Hamilton v United General Insurance Company Ltd*** [2018] JMCC Comm 21 where in speaking to this issue, he said: -

*“The rules are to be construed in accordance with the overriding objectives. These objectives are in no way advanced by a construction which bars enforcement by seizure and sale of a default costs certificate which is independent of a money judgment...”*

*It is apparent that the rule is indicating that a money judgment is to be seen as meaning a judgment for money as well as one for costs”.*<sup>3</sup>

- [26] I have also found the judgment of McDonald-Bishop J (as she then was) in ***Branch Developments Limited t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited*** [2014] JMSC Civ. 40, to be quite helpful. The learned Judge said: -

*“[31] It is settled on good and accepted authority that an order for payment of costs to be taxed is a judgment debt within the meaning of section 51(1) of the Act. In **Hunt v R.M. Douglas (Roofing) Ltd** [1990] 1 AC 398, the House of Lords made it abundantly clear that a judgment for costs to be agreed or taxed is to be treated in the same way as judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment, no further order being required. According to their Lordships, a judgment debt can be construed for the purpose of section 17 of the 1838 Judgment Act (UK) [our section 51 (1)] as covering an order for the payment of costs to be taxed. It follows from this line of reasoning, therefore, that interest is payable on costs ultimately ascertained from date of judgment until payment.*

*[32] It means too that the award of costs to the defendant in this case, even without more, would have stood as a judgment debt to be satisfied by the claimant...”*

- [27] In ***Hunt v R.M. Douglas (Roofing) Ltd*** (supra), Lord Ackner stated the position in the following way: -

*“For the sake of completeness I should add that [counsel for the respondents] strongly argued that an order for payment of costs to be taxed cannot be a judgment debt within s 17 of the 1838 Act because until taxation has been completed there is no sum for which execution can be levied. This point appears to have been raised in the **Erven Warnink** case and disposed of at the end of the judgment*

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<sup>3</sup> Paragraph 8

*on the basis that the courts have accepted since its enactment that s 17 does apply to such a judgment and accordingly the law has gone too far for that argument [see [1982] 3 All ER 312 at 320]. I agree. This acceptance is because a judgment for costs to be taxed is to be treated in the same way as a judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment,- no further order being required. A judgment debt can therefore in my judgment be construed for the purpose of section 17 as covering an order for the payment of costs to be taxed.”<sup>4</sup>*

[28] In the circumstances, it is my ruling that the Default Costs Certificate may be enforced by an order for seizure and sale.

### **Whether the Order for Seizure and Sale was issued prematurely**

[29] Rule 65.12 of the **CPR** states as follows: -

*“A party must comply with an order for the payment of costs within 14 days of –*

- (a) The date of the judgment or order if it states the amount of those costs; or*
- (b) If the amount of those costs (or part of them) is determined in accordance with rule 65.10 (basic costs) or rule 65.13 (taxation-general), the date of the certificate which states the amount.”*

[30] Based on the above, the defendant was required to pay the sum specified in the default costs certificate within fourteen (14) days of March 12, 2018. As stated previously, the Order for Seizure and Sale was issued by the Registrar the very next day.

[31] On that day the claimant’s Attorneys-at-Law wrote to the defendant’s Attorneys-at-Law indicating that they are required to comply with the order for payment of costs

within fourteen (14) days. They provided their banking information to “*facilitate payment*”.

[32] The general rule is that a judgment debt becomes due from the date when the judgment is pronounced.<sup>5</sup> Therefore, a party is required to comply with a judgment or order immediately, unless the judgment or order gives some other date for compliance.<sup>6</sup> Whilst the order of the Registrar does not give a date for compliance, rule 65.12 of the **CPR** gives the paying party, fourteen (14) days in which to comply with the order. The order of the Registrar is to be read in conjunction with this rule. It means therefore, that the Order for Seizure and Sale was issued before the expiry of the time fixed for compliance.

[33] I have found the case of ***Cruickshank v Moss*** [1861-73] All ER Rep Ext 1558 to be quite instructive in relation to this issue. In that case, the plaintiff issue execution on the same day that he taxed his costs. Prior to execution being levied, the defendant attempted to pay the costs to the plaintiff’s Attorneys but the payment was refused. A levy was made, and the defendant paid the amount under protest, and applied to set aside the writ of *feri facias*. Willes J set aside the writ of *feri facias* on the ground that it was an “*abuse of the practice of the court*” and ordered the plaintiff to pay the costs of the application.

[34] In ***Smith v Smith*** (1874) L.R. 9 Exch. 121, Bramwell B. expressed the following view: -

*“Where there is a judgment you may issue execution, not because there is a default, but because the debt is due as soon as judgment is signed.*

*Nevertheless, the party obtaining the judgment must wait a reasonable time; the observations of Bramwell, B., in the case cited [Perkins v. National Assurance and Investment Association 26 L. J. (Ex.) 182] shew the inconvenience and injustice which a*

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<sup>5</sup> CPR rule 42.8

<sup>6</sup> CPR rule 42.9 (a)

*contrary rule would produce. To issue execution suddenly where no special circumstances justify it amounts to an abuse of process which the Court will restrain.”<sup>7</sup>*

- [35] In our jurisdiction, the receiving party in my opinion is required to wait until the fourteen (14) days have elapsed before attempting to enforce the order for payment in the default costs certificate. Rule 65.12 of the **CPR** is mandatory. In the event that the paying party does not comply, he or she will have to face the proverbial music.
- [36] In the circumstances, I agree with counsel for the appellant/defendant that the issue of the Order for Seizure and Sale was premature.
- [37] There is however, another twist to this case. Execution has already taken place. In fact, counsel for the claimant in his letter to the Registrar of the Court of Appeal dated March 14, 2018, stated: -

*“We write to confirm our oral advice to you that the Kingston bailiff Mr. Augustus Sherriah has executed the Order of Seizure and Sale which we obtained from the Supreme Court on Tuesday 13<sup>th</sup> instant pursuant to the Default Cost certificate obtained on March 12, 2018 in relation to the instant matter App. Nos. 143 & 144 of 2017. Accordingly, the Order for Seizure and sale can now neither be set aside as it is spent, nor execution stayed as it has been completed.”*

#### **Whether the order for seizure and sale can be set aside after execution**

- [38] The appellant seeks a reversal of the order of the Registrar. The wrongful issue of the Order has in my view, caused the execution to be irregular.
- [39] In ***Henzel Clarke v David Vincent*** (supra) George J ordered the return of a boat that had been seized using an expired Order for Seizure and Sale.

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<sup>7</sup> Pages 122 - 123

[40] There is no dispute that the moneys were owed. The appellant acted expeditiously in filing the appeal as this was done on March 15, 2018 (two days after the Order for Seizure and Sale was issued and three days after the issue of the Default Costs Certificate).

[41] The Registrar in my view, erred in issuing the order for Seizure and Sale one day after the issue of the Default Costs Certificate. Although it may be argued that the horse has gone through the gate, the fact that the Order for Seizure and Sale was issued prematurely cannot be ignored.

[42] Where an execution is irregular due to non-compliance with the **CPR** the order for seizure and sale can be set aside. Non-compliance does not nullify the proceedings or any step taken or order made unless ordered by the Court. Rule 26.9 of the **CPR** states: -

*“(1) This rule applies only where the consequences of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*

*(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders.*

*(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*

*(4) ....”*

[43] Execution of the Order for Seizure and Sale was stayed by the order of Batts J on May 14, 2018 on condition that the defendant pays the sum of one million six hundred thousand dollars (\$1,600,000.00) into court. There is therefore, no imminent danger.

[44] In the circumstances it is ordered as follows: -

(1) The Order for Seizure and Sale is set aside.

- (2) Costs are awarded to the appellant, such costs to be taxed if not agreed.
- (3) Application for special costs certificate is refused.
- (4) Leave to appeal is refused.