IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 02246/2004

BETWEEN	ALLAN LYLE	CLAIMANT
AND	VERNON LYLE	DEFENDANT

Ms. Tasha McDonald instructed by Lyn-Cooke Golding & Company for Claimant

Mr. George Traile instructed by Phillips Traile & Company for Defendant

Heard: May 10, 2005

Sinclair-Haynes, J

Mr. Allan Lyle (claimant) is the son of 74-year-old Vernon Lyle (defendant) who is presently very ill. His extensive list of illnesses includes Alzheimer's. On September 22, 2004, Mr. Allan Lyle sued his father for the sum of $4,800,000.00 with interest in the sum of $384,000.00. The defendant was served with the proceedings on September 25, 2004. Mrs. Evadney Lyle, the defendant's wife, on November 12, 2004, filed a defence, which was outside the time prescribed by the Civil Procedure Rules (CPR), 2002.

The defendant did not obtain the consent of the claimant to file the defence out of time; nor was the leave of the court sought as required by the CPR. The defence was signed by the defendant's wife who had no *locus standi* so to do. She was merely armed with a limited Power of Attorney, which did not authorise her to defend the matter.

Claimant's claim

It is the claimant's claim that in October 1988 whilst he resided in the USA, he remitted the sum of US$100,000.00 to his father to purchase a house for him. Upon his

return to Jamaica in October 2003 he discovered that his father did not purchase the house. He demanded the return of his money.

On July 6, 2004, Mr. Gordon Brown, the defendant's attorney wrote to the claimant on the defendant's behalf and acknowledged that the sum of US$80,000.00 was owed to the claimant by the defendant. The defendant failed to honour his obligation to pay.

The claimant has now applied to the court for the following orders:

a. summary judgment;
b. that the defence ought to be struck out or dismissed;
c. that judgment ought to be entered for the claimant.

The applications were made on the following grounds, *inter alia:*

i The defendant has no real prospect of defending the claim:

ii The defence discloses no reasonable grounds for defending the claim. The defendant must prove unequivocally that at the precise moment the debt was acknowledged by the defendant on July 2004 he was a mentally disordered person who was incapable of understanding what he was doing and the claimant was aware of his mental incapacity.

iii The acknowledgement of the debt on July 6, 2004 was not procured by any undue influence on the claimant because his attorney-at-law, Mr. Gordon Brown, represented the defendant. The defence does not disclose the circumstances under which a plea of *non est factum* can be successfully upheld.

iv. The defence was filed and served out of time without the claimant's or the court's consent. It was filed pursuant to a limited Power of Attorney in favour of Evadney Lyle, the defendant's wife, that did not authorise her to defend the suit.

I will first consider the ground advanced by the claimant that the defendant's defence was filed in contravention of the CPR and that Mrs. Lyle was not authorised to defend the matter.

The Law

The CPR Rule 10.3(1) states:

> "The general rule is that the period for filing a defence is the period of 42 days after the date of service of the claim form."

The defendant's defence was filed outside of the prescribed time.

Rule 10.3(5) states:

> "The parties may agree to extend the period for filing a defence specified in paragraphs (1) (2) (3) or (4)."

Rule 10.3 (9) states:

> "The defendant may apply for an order extending the time for filing a defence."

The defendant did not comply with the requirements of the rules.

In determining whether to dismiss the defence on the ground that it was filed in breach of the rules, I must be cognizant of the overriding objective of enabling the court to deal justly with cases. In so doing, some important considerations include ensuring that the case is dealt with expeditiously and fairly and the need to allot resources to other cases (See Rule 1.1).

In acceding to the claimant's request, would I be dealing justly, fairly and expeditiously with the matter? On the other hand, should I allow the defendant added time to file his defence, would that amount to the proper allocation of the court's limited resources? In attempting to do justice between the parties, I will consider the following:

a. whether the delay by the claimant amounts to an abuse of process;

b. whether the delay will prevent the defendant from getting a fair trial; or

c. whether the defence has a realistic prospect of success.

Ms. Tasha McDonald submitted that the defendant filed no affidavit which explained the reason for the delay in filing the defence. However, that factor is unimportant. Had the defendant applied to the court for permission to enlarge the time to file the defence, his failure to file an affidavit would not have affected the application.

Rule 11.6 (1) states:

(a) "The general rule is that an application must be in writing."

The court, by virtue of Rule 11.6 (2) (b) has the discretion to dispense with the requirement for the application to be made in writing.

Rule 11.9 (1) states:

> "The applicant need not give evidence in support of an application unless it is required by -
>
> a. a rule;
>
> b. a practice direction; or
>
> c. a court order."

Rule 10.3(9) does not impose the requirement that the applicant must give evidence in support of the application for an order to extend the time for filing a defence.

However, no application as required by Rule 10.3(9) was made prior to the filing of the defence. The rules were entirely ignored. It appears that the rules were ignored as a result of the sheer ignorance of the requirements of the rules. It is trite, however, that ignorance of the law is no excuse.

The comments of Smith JA in **Norma McNaughty v Clifton Wright et al**. Civil Appeal No. 20/2005 delivered May 25, 2005 at page 12 enlightens as to our Court of Appeal's position with regards the non-compliance of the rules:

> "Nonetheless, I am constrained to repeat what Court of Appeal has said *ad nauseam* namely that orders or requirements as to time are made to be complied with and are not to be lightly ignored. No court should be astute to find excuses for such failure since obedience to the orders of the court and compliance with the rules of the court are the foundations for achieving the overriding objective of enabling the court to deal with case justly.

(See also **Keith O'Connor v Paul Haufman et al** Civil Appeal No. 33/2002 delivered April 7).

Lord Lloyd in **UCB Corporate Services Ltd. v Halifax (SW) Ltd.** (unreported 6th December 1999) stated:

> "It would indeed be ironic if as a result of the new rules coming into force, and the judgment of this court in **Biguzzi** case, judges were required to treat cases of delay with greater leniency than they would have done under the old procedure. I feel sure that that cannot have been the intention of the Master of the Rolls in giving judgment in the **Biguzzi** case. What he was concerned to point out was that there are now additional powers which the court may and should use in the less serious cases. But in the more serious cases striking out remains the appropriate remedy when that is what justice requires."

Although the defendant's failure to comply with the requirements of the rules should not be regarded lightly, it was *per se,* not very serious. The delay cannot really be considered to have been inordinate or contumelious. The claimant has not provided any evidence that the defendant's failure to file the defence has resulted in any prejudice to him nor is there any evidence that the said failure amounts to an abuse of process: (See

Nasser v The United Bank of Kuwait [2001] All ER D 368 and **Habib Bank Ltd v Jeffex and Another** (2000) The Times, 5th April). Should he then be shut out of the seat of justice because of his non-compliance with Rules 10.3 (5) and 10.3(9)?

In determining whether to allot a share of the court's limited resources to this case, I must consider whether the defendant who is *non compos mentis* has a real prospect of defending the claim successfully. In furtherance of that consideration I asked Mrs. Evadney Lyle repeatedly if she was able to counter the fact that monies were sent to the defendant by the claimant. Her response was that she could not as she was not present when the monies were allegedly remitted. She also stated that she was not present with the defendant when the instructions were given to Mr Gordon Brown, the defendant's attorney. As a result of her answers, it is therefore clear that she is not in a position to disprove the claimant's case and is therefore unable to prove the allegations contained in the defence that the letter written by Mr. Gordon Brown on July 6, 2004 was not the defendant's deed and that he was forced to sign his name.

In the circumstances, even if I had been mindful to exercise my discretion to allow the defendant's defence to stand, Mrs. Lyle, through her own admission, could not prove her allegations.

Further, Mrs. Lyle has not disputed the origin and veracity of the following letters which her attorneys-at-law wrote on her behalf:

a. Letter dated December 16, 2003 which was written by her attorney-at-law, Mr. Gordon Brown, to the claimant's attorney in which she agreed to settle the defendant's indebtedness to the claimant.

b. Letter dated February 10, 2004 written on behalf of Mrs. Lyle by her attorneys in which she offered to pay the sum owed within five days.

c. Letter dated February 16, 2004 which was written by her attorneys-at-law, Clark Robb & Company, to the claimant's attorney-at-law which she requested that the claimant waived the payment of interest on the sum of $80,000.00.

Nor has she questioned the authenticity of a letter dated the 6th July 2004 in which the defendant confirmed his instructions to Mr. Gordon Brown.

In light of her confessed ignorance as to the allegations contained in the defence and the above-mentioned reasons, I conclude that the defendant has no real prospect of successfully defending the claim.

Re: Summary Judgment

Part 15.2 of the Supreme Court of Jamaica Civil Procedure Rules states:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (b). the defendant has no real prospect of successfully defending the claim or the issue."

In **Swain v Hillman** [2001] 1 All ER 91 Lord Woolf considered Rule 24.2 of the English Civil Procedure Rules, which is identical to ours and remarked:

> "Under part 24.2 the court now has a very salutary power, both to be exercised in a claimant's favour or where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences, which have no real prospect of being successful. The words "no real prospect of being successful or succeeding," do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or as Mr. Bidder submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."

An application for summary judgment is, however, inappropriate where there are important disputes of facts. On an application for summary judgment the applicant must satisfy the court of the following:

> "1 All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.
>
> 2 Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
>
> 3. There must be no real prospect of oral evidence affecting the court's assessment of the facts".

(See **S v Gloucestershire County Council and L v Tower Hamlets London Borough Council** (2000) The Independent 24th March (C A).

Mrs. Evadney Lyle has clearly demonstrated to the court that she lacks the requisite knowledge to dispute the claim and to sustain defences of undue influence and *non est factum*.

Lord Woolf, in **Swain v Hillman** enunciated:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24, in so doing he or she gives effect to the overriding objective contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position, likewise, if a claim is bound to succeed, a claimant should know as soon as possible."

In any event, Mrs. Evadney Lyle has no *locus standi* to defend the matter on behalf of her husband as she was not authorised by Power of Attorney to do so.

Mr. Traile indicated that he wished to make an application under the Mental Health Act. Such an application, in light of the foregoing would be pointless.

In the circumstances:

1 The defendant's defence is hereby struck out.

2 Judgment for the claimant in the sum of $4,800,000.00 with interest in the sum of $384,000.00.