

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2007 HCV 03502

BETWEEN	KRISTIN SULLIVAN	CLAIMANT
AND	RICK'S CAFÉ HOLDINGS INC	DEFENDANT
	T/A RICK'S CAFÉ	

IN OPEN COURT

Manley Nicholson instructed by Nicholson Phillips for the claimant

Shaun Henriques for the defendant

March 29, 30, 31, 2011

**WHETHER UNLESS ORDER IN EFFECT - APPLICATION TO STRIKE OUT
CLAIM - INTERPRETATION OF COURT ORDER**

SYKES J

1. This case has raised the issue of whether an unless order made by Evan Brown J (Ag) on May 11, 2010 was extended by another order made by the same judge on May 14, 2010 and was in effect on January 31, 2011. If the answer to this is yes, then the claim was struck out as of January 31, 2011. Mr. Shaun Henriques submitted that the unless order was extended. Mr. Manley Nicholson contends that it was not. In the alternative, Mr. Henriques

made an application to strike out the claim on a number of grounds. Mr. Nicholson opposed the application.

2. This is the context of the application. In May 2006 Mrs. Kristin Sullivan, the claimant, and her husband came to Jamaica for a visit. The couple journeyed to the famed West End of Negril to Rick's Café which is justifiably world famous for its ambience. The romantics can enjoy the magnificent sunset, with their favourite drink in hand, as they listen to the pounding of the Caribbean Sea on the feet of the cliffs. Rick's Café Holdings Inc (Rick's Café), the defendant, is a company incorporated in the State of Delaware in the United States of America but trading under a partnership known as Rick's Café.
3. Mrs. Sullivan alleges that on May 11, 2006 she went to Rick's Café and jumped off a cliff into the waters below. Her much anticipated splash into the warm waters below followed by a swim back to shore quickly turned from joy to pain. She suffered a broken sternum which has now healed. She has brought this claim for compensation alleging that the café was a promoter of the cliff jumping activities and it was in breach of its duty to her under section 3 (2) of the Occupier's Liability Act. This breach, she says, led to her injury. In her quest for compensation, she filed this claim in 2007.

The history

4. The claim went for mediation in 2008. The mediation failed and thereafter the matter came for case management before Mangatal J. On July 24, 2008, her Ladyship made a number of orders including:
 1. trial is fixed before a Judge only for three (3) days on 4, 5 and 6 November 2009;
 - ...
 -
 5. pre-trial review fixed for 19 June 2009 at 11:30 am for $\frac{1}{2}$ hour.

5. On June 19, 2009 at the pretrial review, Gayle J made a number of orders of which the most important were these:

1. orders made at case management conference on July 24, 2008 extended to 31 July 2009;
2. pre-trial review adjourned to 23 September 2009 at 11:00am for $\frac{1}{2}$ hour;

6. On September 23, 2009 when the second pre-trial review was held Campbell J made the following important order:

1. Skeleton arguments, list of authorities and core bundle be filed and served on or before 28 October 2009.

7. On October 5, 2009, twelve days after the second pre-trial review, Mrs. Sullivan files an application asking for, among other things:

1. vacating the trial dates of November 4 - 6;

...

4. permission be granted to file and serve additional witness statements not later than November 30, 2009;

5. permission to have named witnesses participate in the trial by video link or affidavit evidence.

8. The grounds for this application were said to be that:

1. the claimant is unable to attend trial on the dates set;
2. the claimant is unable to comply with the court's orders in time for the trial date;
3. additional witnesses have become available.

9. The trial failed to get off the ground on November 4. The minute of order of Morrison J dated November 4, 2009 stated that the matter was adjourned to a date to be fixed by the Registrar. It was also noted that the Supreme Court file was not located.

10. Rick's Café had filed an application to strike out on November 13, 2009, after the November trial dates had passed.

11. On May 11, 2010, the application came before Evan Brown J (Ag) who, after hearing both sides, ordered:

1. the claimant's statement of case stands struck out unless all the orders made by Mr. Justice Campbell at the adjourned pre-trial review on the 23rd September 2009 are complied with on or before 11:00am on the 14th May 2010. Matter adjourned to 14/5/2010 at 11:30am for $\frac{1}{2}$ hour.

12. On May 14, 2010, Evan Brown J (Ag) made these orders:

1. trial set for 29 - 31 March 2011;

2. defendant's skeleton arguments and list of authorities to be filed on or before 3 September 2010;
3. time within which to file and serve core bundle extended to 31 January 2011.

The submissions

13. Mr. Henriques strongly urged that Evan Brown J (Ag) must have extended the unless order because that was the only order which was in view on May 14. On May 14, Mrs. Sullivan was not in full compliance. In effect, Mr. Henriques' point was that the claimant was made the subject of an unless order on May 11 because the claimant had failed to get her bundle and other things ready for the November 2009 trial dates and had not remedied the situation on May 11. Thus when his Lordship extended time on May 14, 2010 to January 31, 2011 it was the time for compliance with the unless order that was extended because his Lordship made only an unless order. Inferentially from submissions of Mr. Henriques, the omission to use the word 'unless' in the May 14 order was not significant because when one looks at the order against the background of the May 11 order, Evan Brown J (Ag) could not possibly have intended to do anything else but extend the May 11 unless order.
14. Mr. Nicholson, on the other hand, contends that the terms of the May 14 order do not use the words 'unless order' and so there is no legitimate basis for reading the May 14 order as if those words were there. In other words, Mr. Nicholson is sticking to the literal text of the words used and omitting the context.

Resolution

15. In the time available the main cases found on interpretation of court orders were those dealing with consent orders which the law has now settled in Jamaica that they are contracts and the principles of contractual interpretation apply to them. However, there have been statements from judges of the highest eminence, judicially and extra judicially, and academic writers that indicate it is legitimate to take into account the context in which the document was written even if there is no ambiguity arising from the text which is to be interpreted. This approach represents a significant shift in judicial opinion. Perhaps it would be more accurate to say, the rediscovery of the position taken by Lord Blackburn over one hundred years ago in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743. More will be said about this case below. What is now considered the old view is found in *Codelfa Construction Propriety Limited v State Rail Authority of New South Wales* 149 CLR 337, 352 where Mason J held:

The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

16. This view, as will be shown below, has given way, in England, to the purposive interpretation approach which has been applied to all sorts of documents, from contracts to statutes. This approach, it is said, emphasises context and not just the text.

17. Even Mason J was prepared to concede that in certain circumstances the view he espoused above is unable to resolve a situation in which two or more plausible interpretations are up for consideration. His Honour indicated the solution for this problem at page 352:

Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting.

18. The court is aware that it is interpreting a court order but the point being made is that the conceptual approach to the interpretation of documents has undergone change and *Codelfa* (a contract case) is being used purely to illustrate the former view of the interpretation of documents of which a contract is but one type. Court orders are, from the stand point of interpretation, just another type of document.

19. In the *River Wear* case Lord Blackburn said at page 763:

My Lords, it is of great importance that those principles should be ascertained; and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to

which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

20. This passage from Lord Blackburn occurs at the point at which his Lordship is discussing the principles of statutory interpretation and is seeking to set out the principles applicable to the interpretation of a statute. However, his Lordship developed a broader major premise by placing statutory interpretation in the wider category of written instruments. Therefore Lord Blackburn's exposition above is not restricted to statutes but applies to all written instruments. This is confirmed by the fact that at page 764 his Lordship referred to wills and contracts after referring to pleadings in defamation and concluded that the principles apply across the board to all types of written instruments. Of course, constitutions are a class apart with unique considerations which have to be considered separately. This opinion of Lord Blackburn is certainly consistent with what is called the modern trend which we now know, at least from Lord Blackburn, was always there but was lost. The modern view is more like a renaissance than a completely new development.
21. The interpretation of a formal written court order, like any other written document which is intended to convey meaning, is a quest for the meaning of the actual words used in the context in which they appear and not the meaning of the words divorced from its context. The approach to interpretation is objective. The interpreter is not trying to find the subjective intention of the judge who made the order but rather what a reasonable reader (who may be judge, lawyer, or layman since orders are often directed at laymen) in the same context in which the judge found himself or herself would understand the order to mean. The reason for this is that orders are often directed to parties other than the immediate litigants and those persons must be able as reasonable persons to interpret

and understand what the order is saying especially if it is directed at them. Until set aside or varied the order stands and must be obeyed and in order to obey the order the readers must be able to give the order an interpretation in keeping with an objective understanding since an enquiry into the subjective intention of the judge who made the order may be impossible if the judge is no longer available.

22. As was pointed out by Donald Nicholls in his article, '*My Kingdom For a Horse: The Meaning of Words*', L.Q.R. 2005, 121(OCT), 577-591, 579, '*The phrase "eats shoots and leaves" has a different meaning depending on whether the context is the eating habits of pandas or the lifestyle of Wild West outlaws.*' This underscores the importance of context. It has been recognised that regardless of the document that one is interpreting, while dictionaries may give the meaning of word, the dictionaries usually have more than one meaning and the most appropriate meaning to be adopted in any given situation will be influenced more by the context in which the word appears than by anything else. Words standing by themselves convey very little but if used in a manner intended to communicate, it is the context which gives the full meaning of the intended communication. This is why Lord Hoffman was able to say in *Investor Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913 (in the context of contractual interpretation), 'the meaning of words is a matter of dictionaries and grammars; the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean.'

23. It has now been said that it is no longer necessary for an ambiguity to be established before the interpreter can turn to surrounding circumstances. This view has been applied in the field of statutory interpretation. It was Lord Steyn in *R (on the application of Westminster City Council) v National Asylum Support Services* [2002] W.L.R. 2956, 2958 who held that context is important to statutory interpretation and there need not be an ambiguity' before the surrounding circumstances can

be taken into account'. This view represents the current approach to the interpretation of documents. Of course, the court needs to be cautious lest the new approach is permitted to rewrite documents under the guise of interpretation.

24. Lord Steyn, writing extra judicially, stated that the purpose of interpretation is not the meaning of words but rather the 'contextual meaning of the language of the text, ie what the words would convey to the reasonable person circumstances as the parties were.' His Lordship also noted that there was a shift away from literalism to purposive interpretation. The learned Law Lord also made the vital point that interpretation 'is an exercise involving the making of choices between competing feasible interpretations' (Lord Steyn, *The Intractable Problem of the Interpretation of Legal Texts*, in S. Worthington (ed) *Commercial Law and Commercial Practice*, 2003, Oxford: Hart, 123, 124 - 126).

25. In his article '*Common Sense Principles of Contractual Interpretation (And How We've Been Using Them All Along)*' 23 *Oxford J. Legal Stud.* 173, 177 - 178 Adam Kramer stated:

If the interpreter only processes the text, she can get little more than the linguistic meaning of the text out of the interpretative process. However, by harnessing, and then processing, more information than merely the text, more meaning can be extracted at the other end of the interpretative process. The other information is the 'context' (meaning 'with the text'). Contextual information about the communicator and the world allows the interpreter to deduce the communicator's purposes, and the communicator's beliefs about the world and the

way it normally works. As we shall see, such information is important in supplementing or replacing the text's linguistic meaning.

Of course, the communicator does not have control over context and so does not design the context directly; however, he designs the text given the context within which it will be understood. Thus the text allows the communicator to incorporate the context or, alternatively, to exclude parts of the context or to change them (by disabusing the interpreter of assumptions as to the communicator's beliefs or purpose).

26. This court is of the view that ideas expressed by the academic writers and the learned judges apply to court orders. A court order cannot be divorced from its context. The judge has no control over the context, that is, the circumstances that have given rise to the need for the parties to seek judicial resolution to the issues that have arisen between them. What the judge has control over is the text (the court order) which now appears in the context. The interpretative process cannot be restricted to just the bare text. The judge, as communicator, through the court order must make certain assumptions. One of them is that the persons reading his text are reasonable and will use the context to resolve any difficulty in understanding the text.

27. The time has now come for us judges to admit that in times past when we spoke of the 'clear and plain meaning' or 'the obvious meaning' or 'the unambiguous meaning', we were giving the impression that the language under interpretation was utterly incapable of having any meaning other than the one we gave to it. The real position is that often times the language is

capable of bearing a range of meanings but the choice settled on by the courts is the one which in all the circumstances appears to be the best. All of this is to say that it cannot be said that Mr. Nicholson's position is beyond the pale. The language of the order is indeed capable of bearing his interpretation but in the final analysis the context suggests to this court that Mr. Henriques' position is more acceptable.

28. The contextual information in the present case is that Evan Brown J (Ag) was confronted with an application for striking out made by Rick's Café. There was resistance by Mrs. Sullivan. On May 11, when the matter first came before his Lordship, Mrs. Sullivan was not fully compliant with orders made by Campbell J on September 23, 2009. It appears that Evan Brown J (Ag) sought the middle ground by making an unless order. The matter was set down for May 14 to see how far along Mrs. Sullivan was in complying with the order. On this date Mrs. Sullivan had filed two of the three documents ordered to be filed by Campbell J. This left the third document. Mrs. Sullivan was being placed under pressure to comply and this was made very clear by the unless order and the short adjournment between May 11 and 14. Of the three documents the core bundle is vital. It is an essential bundle in the trial process. The core bundle is that which contains the material 'the trial judge will need to pre-read or to which it will be necessary to refer repeatedly at the trial' (rule 39.1 (6) (d) of the Civil Procedure Rules). It seems unlikely that his Lordship intended to relax the pressure on Mrs. Sullivan. What he wanted was full compliance. He extended the time but kept her under pressure with the unless order.

29. In this context, it seems to the court that Evan Brown J (Ag) on May 14 was using the text (the court order) to extend the time for compliance with his previous order which was an unless order. Thus when January 31, 2011 came and went without full compliance, the claim was struck out. I am compelled to agree with Mr. Henriques.

30. In light of this court's decision on the primary submission of Mr. Henriques, the court does not find it necessary to go on to consider the alternate position which was that in the event that the court finds that the claim was not struck then it should be struck out now.

Conclusion

31. The decision of this court is that on a proper interpretation of Evan Brown J's (Ag) order of May 14, 2010, Mrs. Sullivan's claim against Rick's Café was struck out on January 31, 2011. The question of costs is reserved to the hearing of the application for relief from sanctions.