IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV 4340

BETWEEEN ANWAR WRIGHT CLAIMANT

AND ATTORNEY GENERAL OF JAMAICA DEFENDANT

Mrs. M. Taylor-Wright for the Claimant instructed by Taylor-Wright & Co.

Mr. H. Mc Dermott and Miss C. Barnaby for the Defendant instructed by the Director of State Proceedings

Heard: March 15 and June 10, 2010

Master Simmons

1. This is an application by the Defendant pursuant to Rules 13.3 and 13.4 (1) of the ***Civil Procedure Rules, 2002 (C.P.R.)*** to set aside the judgment in default of acknowledgment of service entered on the 2nd day of December, 2009. The application is supported by the Affidavit of Carol Barnaby dated the 8th December 2009.

Chronology of the events

2. On the 21st August, 2009, the claimant filed an action seeking the delivery up a Toyota Coaster Motor bus bearing registration # PD 5567 and damages for detinue, trespass or conversion. The claim form

and the particulars of claim were served on the Director of State Proceedings at 3:30 p.m. on the same day. On the 5th day of October, 2009 the claimant filed a Notice of Application for Court orders seeking the court's permission to enter judgment in default of acknowledgment of service against the defendant. This application was made five (5) days after the expiry of the time within which the defendant was permitted to file an acknowledgment of service. Notice of this application was served on the defendant on the 16th October, 2009. The matter was heard on the 1st December, 2009 before Rattray J. who after hearing submissions from both the claimant and the defendant granted leave to enter the judgment in default of acknowledgement of service. The defendant was also given permission to file an acknowledgement of service by 4:00 p.m. on the 2nd December, 2009. The defendant complied with the order. The default judgment was entered on the 2nd December, 2009 and served on the defendant on the 8th December, 2009 together with the Order of Rattray, J. On that same day, the defendant filed a notice of application to set aside the default judgment. On the 11th December, 2009 the bus was released to the claimant. An amended application to set aside the default judgment was filed on the 31st December, 2009.

Rules 13.3 and 13.4

3. In order for this application to succeed the defendant must demonstrate that the requirements of this rule have satisfied.

Rule 13.3 of the ***C.P.R.*** states:-

> "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.
>
> (2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> (b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.
>
> (3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

Rule 13.4 states that an application to set aside a judgment may be made by a person affected by the judgment. The rule also requires that

the application be supported by affidavit evidence. A draft defence must also be exhibited to the affidavit.

Real prospect of success

4. Counsel for the defendant has submitted that it has a real prospect of successfully defending the claim.

5. Mr. McDermott argued that in order for the claim to succeed the claimant must prove that the police officers acted outside of their authority and without reasonable and probable cause when they took the defendant's bus to the pound for "safekeeping". He referred to the draft Defence which is exhibited to the affidavit of Carole Barnaby, in an effort to demonstrate that the actions of the officers were both lawful and justified. The defence contains an admission that the claimant's bus was impounded for "safekeeping" on the 13th August 2009. The explanation given is that both the driver and the conductor abandoned the bus, after the driver was requested to pull over and hand over his driver's license to the police officers. This it is said necessitated its removal as it was blocking the bus bay. It is also admitted that a letter of demand and complaint from the claimant's attorney-at-law was received by the Director of State Proceedings.

6. With respect to the removal of the bus for "safekeeping", counsel sought to rely on section 22(1)(iv) of the ***Road Traffic Act*** which empowers the police *"to do all that is necessary to prevent a congestion of traffic and to provide for the safety and convenience of the public."* It was submitted that that it is a matter of evidence whether the driver of the claimant's bus had breached the rules for buses using the bus bay. It was also stated that the police officers had no other option but to impound the vehicle as there was no one in authority to whom the bus could be handed over.

7. Counsel also submitted that in order for a claim in detinue to succeed the owner must address the demand for the return of the chattel to the person in actual possession. In this regard, it was stated that the letter to the Director of Litigation requesting the return of the bus did not constitute such a demand as the said Director did not have the bus in his possession. It was also stated that in order to ground a claim in detinue there must be an "unjustifiable" refusal" by the person in possession of the chattel to return it to its owner.

8. The claimant, in his affidavit in opposition to the application, denies that the bus was abandoned by the driver and the conductor. Mrs. Taylor-Wright also submitted that the letter of demand was properly

sent to the Attorney General's Chambers as they are the attorneys-at-law for the State and the officers were acting as agents or servants of the State. She indicated that the letter also requested information on the location of the bus and there had been no response up to the time when the application for leave to enter judgment was filed. She emphasized that the bus was only returned after the default judgment was entered.

9. Mrs. Taylor-Wright also submitted that there is no provision in law, to impound a public passenger vehicle for safekeeping. She stated that a vehicle could only impounded in specified circumstances under the ***Road Traffic Act*** and the ***Transport Authority Act*** where it is alleged that an offence had been committed**.**

10. Against the background of the admission that the bus was kept for a period after demand was made for its return, the claimant asserts that the defence has no real prospect of success.

Law

12. In order to succeed in its application, the defendant must first satisfy the court that there is a real prospect of successfully defending the claim. The test as to whether there is a real prospect of success has been described as being akin to that required for the entry of summary

judgment. Rule 13.3 (1) of the ***C.P.R.*** is similar to Part 13.3 (1) (a) of the ***English Civil Procedure Rules, 2002***. The English rule has been described in the ***Civil Procedure (White Book)*** as a "…re-statement of the principles laid down by the Court of Appeal in ***Alpine Bulk Transport*** **Co** ***Inc v. Saudi Eagle Shipping Co Inc*** [1986] 2 Lloyd's Rep. 221 and reflects the test for summary judgment….It is not enough to show an 'arguable' defence; the defendant must show that it has 'a real prospect of successfully defending the claim'…" Counsel for the defendant referred to the case of ***Swain v. Hillman*** [2001] 1 All ER 92 in which it was stated that the defendant must have *"a 'realistic' as against a 'fanciful' prospect of success".* Reference was also made to ***International Finance Corporation v. Utexafrica S.P.R.L.*** [2001] EWHC 508, in which Moor-Bick, J. underscored the importance that must be attached to all judgments. The learned Judge stated:-

> *"A person who holds a regular judgment even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason."*

13. It is my view that Rule 13.3(1) seeks to ensure, that in keeping with the overriding objective ***"...to deal with cases justly"*** a

litigant is not deprived of the benefit of his judgment "*without good reason".*

14. It must therefore be determined whether the draft defence satisfies the test.

15. With respect to detinue, the claimant must prove that the bus was wrongfully taken and that it was not returned within a reasonable time of a demand being made by its owner. In the case of conversion, there must be in addition, an intention to exercise control in a manner that is inconsistent with the claimant's ownership of the bus. In ***Smith v. Ingram & anor.*** Claim No. 2005HCV00723, delivered on the 28th September, 2009 Mangatal, J. stated that *"...detention as a remedy has largely fallen by the wayside in most cases."* The learned judge went on to quote ***Bullen & Leake & Jacob's Precedents of Pleadings,*** 13th edition, page 953. The passage reads:-

> *"The distinction between detinue and conversion used to be that with the former mere possession adverse to the rights of the person entitled to possession was sufficient and it was unnecessary to show any intention to deal with the goods in a way inconsistent with those rights. In practice, however, a*

demand by the person with possessory title followed by an unjustified refusal to delivery up was treated as a conversion, thus rendering detinue largely otiose before its abolition in 1977."

16. Whilst it is clear that the bus was not impounded as a consequence of any offence being committed, assuming that the bus was indeed abandoned, it must be considered whether the police could reasonably have left it unattended at the bus park. Mrs. Taylor-Wright suggested that since they were concerned about the safety of the bus it could have taken to the police station instead of the pound.

17. It is my view that the police could be accused of negligence if they left the bus unattended in the bus park. In such circumstances, it is arguable that the pound was a more secure facility for the storage of the vehicle than a police station and as such the actions of the police were not unreasonable.

18. The crucial matter for consideration is the length of time it took for the bus to be returned to the claimant.

19. The only explanation offered for not releasing the bus until the 11th December 2009 is that the letter of demand should have been sent

to the police and not their attorneys-at-law. Counsel for the defendant's submission that it is a matter of evidence whether the driver was acting in accordance with applicable rules does not take the matter much further as that information would only assist with respect to the period between the 13th August, 2009 (the date of seizure) and the 14th August 2009 (the day when the letter demanding the release of the bus was delivered to the Attorney General's Chambers).

20. In light of the fact that the bus was not seized in connection with the commission of any offence it is my view that it ought to have been released within a reasonable time of the demand for its return. The delay of approximately four (4) months appears to be sufficient to ground the claim for detinue if not conversion. The fact that the letter of demand was sent to the Attorneys-at-law for the State is in my view, quite sufficient. Having received that letter, the Director of Litigation had a duty to investigate the matter and advise his client as to the proper course of action. Instead there was silence until December 2009 when the claimant was advised that he could collect his bus.

21. With respect to the claim for trespass, it must be proved that there was a wrongful physical interference with the bus. I have already dealt with the submissions of counsel for both the claimant and the defendant in respect of the reasons advanced for taking the bus to the pound.

Timeliness of the application

22. It is not disputed that there was no undue delay in filing the application to set aside the judgment.

Explanation for failure to file an acknowledgment of service

23. Counsel for the defendant stated that the delay filing an acknowledgment of service was due to inadvertence on the part of counsel in the Attorney General's Chambers. Mr. McDermott asked the court to exercise its discretion in favour of the defendant in spite of this, and stressed that the primary issue for consideration in these matters is whether the defence has a real prospect of success.

24. Mrs. Taylor-Wright in response argued that the inadvertence of counsel was not a good explanation for the defendant's failure to file its acknowledgment of service. In support of this argument she cited the case of ***Ken Sales & Marketing Limited v. James &***

company (a firm) Supreme Court Civil Appeal No. 3/05 delivered on the 20th December 2005. In that case, the application to set aside was made promptly but there was a delay of approximately one month in filing the acknowledgment of service due to *"inadvertence and certain procedural problems ..."* in the attorney's office. The Court of Appeal held that the reason advanced was not *"a good explanation for failure to file an acknowledgment of service"* in time.

25. In this matter, the defendant did not file an acknowledgment of service until approximately three (3) months after the service of the claim form and particulars of claim. In fact, they did so with the permission of the court, after the matter was heard by Rattray, J. In keeping with the ruling of the Court of Appeal, I find that the defendant has not provided a good explanation for its failure to file an acknowledgment of service within the time prescribed by the ***C.P.R.*** This ruling is not fatal to the defendant's application as the primary consideration is whether the defence has a real prospect of success. The issue of whether a good explanation has been given for the failure to file an acknowledgment of service is one of the

factors that must be considered by the court in the exercise of its discretion.

Conclusion

26. In this matter the claimant is seeking damages for detinue, conversion or trespass in respect of the detention of his bus. These are alternative claims. The draft defence in as much as it contains an admission that the bus was kept for some time after the demand was made for its return does not have a real prospect of success in respect of the claim for detinue. The only issue to be resolved appears to be the quantum of damages to be awarded to the claimant. In the circumstances it is ordered as follows:-

    i. The application to set aside the judgment in default of acknowledgment of service is refused;

    ii. Costs of this application to the claimant to be taxed if not agreed.

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