IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION

CLAIM NO. 2009 HCV 2875

BETWEEN	ANWAR WRIGHT	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	DEFENDANT

IN CHAMBERS

Marvalyn Taylor-Wright for the claimant

Tasha Manley for the defendant

APPLICATION TO EXTEND TIME WITHIN WHICH TO FILE DEFENCE - APPLICATION FOR PERMISSION TO ENTER JUDGMENT - RULE 10.5 OF THE CIVIL PROCEDURE RULES - DETINUE

November 12 and 26, 2010

SYKES J.

1. There are two applications before the court. One is an application by the Attorney General to extend time within which to file a defence. The other is an application by the claimant for permission to enter judgment in default of defence against the Attorney General. The submissions being made in both applications overlapped to such an extent that both applications were heard together.

The allegations

2. Mr. Anwar Wright is a very upset man. He is perturbed by the behavior of the police; specifically, Special Corporal Bailey a member of the Island Special Constabulary Force. Mr. Wright is the owner of a Toyota Coaster motor bus ('the bus') bearing registration no. PD 5567. He alleges that the bus was seized by Special Corporal Bailey in the circumstances outlined below.

3. The pleaded claim is that on April 2, 2009, while the bus was on its lawfully assigned route and acting in accordance with the provisions of the Road Traffic Act and regulations, the bus was seized by the Special Corporal who told him, 'Mi only teck weh bus' and did not give tickets.

4. The claim also alleges that at the material time, the bus was never left unattended or abandoned and had not committed any breach of any relevant statute or regulation which would give the police any lawful authority to seize the bus.

5. It was also pleaded that the bus was seized at South Parade in the city of Kingston and at the time, it had no passengers and had ceased operations for the day. The chauffeur of the bus told the Special Corporal that the bus was being taken to the garage. The claimant's statement of case does not say where the bus was being kept.

6. At the time the bus was seized, no criminal charges were laid against any member of the bus crew and no breach of any law as indentified to bus crew. Mr. Wright claims that between April 2 and 7, 2009, the chauffeur attended upon the Darling Street Police Station on six (6) occasions beseeching to have the bus released, or that he be charged with a criminal offence so that he could go before the courts and have the bus released. The Special Corporal did nothing.

7. It was on the intervention of his attorney, that the chauffeur was finally charged and summoned to court. The attorney had contacted the Attorney General and it was only after this contact that the summonses were issued. The bus was eventually released on April 9, 2009.

8. The claimant specifically alleges that the Special Corporal explained to the Director of Litigation at the Attorney General's Chambers that the bus was seized because in the view of the Special Corporal it had gone off its assigned route when it entered Church Street which is to the east of South Parade. Mr. Wright is of the view that this latest seizure is directly connected to a previous claim he made against the police arising from another seizure by members of the Island Special Constabulary Force (***Wright v The Attorney General of Jamaica*** 2008 HCV 06023).

9. As can be seen from this narrative taken from the particulars of claim, the allegations made against the defendant were very specific and quite serious because it involved allegations of unlawful deprivation and detention of a profit earning chattel. The claim was filed on June 3, 2009 and served on the Director of State Proceedings on June 4, 2009.

10. The affidavit of Miss Carole Barnaby, attorney at law in the Attorney General's Chambers was filed in support of the application to extend time within which to file a defence, makes interesting reading. Learned counsel states that she was assigned the file on June 9, 2009 and by June 15, 2009, indicated by way of the acknowledgement of service that the Attorney General intended to defend the claim and did not admit any part of the claim.

11. On June 12, 2009, she wrote to the Commissioner of Police seeking instructions on the matter. The letter to the Commissioner was quite explicit. Miss Barnaby properly sent the claim form and particulars of claim to the Commissioner with a polite request to provide instructions so that a defence could be prepared. The Commissioner was explicitly told that the defence needed to be filed on or before July 18, 2009 which was the last date on which a defence could be filed as of right without seeking the permission of the court or an agreement from the claimant's attorney to extend time. Unfortunately, it appears that the police misread the letter. An Assistant Commissioner of Police wrote indicating that the matter was already dealt with and a file had been sent to a Ms Francis on March 27, 2009, and April 27, 2009. As it has turned out, the Assistant Commissioner was referring to the earlier claim.

12. On June 29, 2009, Miss Barnaby wrote again to the Commissioner of Police telling him that the Assistant Commissioner had addressed the incorrect claim. The Commissioner was even told that Mr. Wright had commenced two claims and the one in which she was interested was the one involving Special Corporal Bailey arising from an incident on April 2, 2009. She sent, unnecessarily, another copy of the claim form and particulars of claim. The Commissioner was reminded of the urgency because he was told, yet again, that the defence had to be filed on or before July 18, 2009.

13. The Commissioner did not respond to this second letter. The claimant filed, as he was entitled to do, an application for leave to enter default judgment against the defendant. The Attorney General was served with the application on October 6, 2009. Miss Barnaby swears in her affidavit that even before she got these documents she made innumerable calls to the Commissioner's office but her frantic pleas did not elicit any response. She might have well been speaking to the dead.

14. Miss Barnaby eventually received instructions but she does not say when they were received but what is not in doubt is that the instructions came well outside of the forty two days permitted by the rules to file a defence. Her affidavit closes with the statement that the omission to file a defence was not intentional but occurred because she had not received instructions on the matter that would have enabled her to file a defence.

The submissions

15. Mrs. Taylor-Wright was not impressed with Miss Barnaby's affidavit. She submitted that Miss Barnaby's affidavit does not indicate why no response from the police was forthcoming when (a) the claim and particulars were exceptionally specific, even alleging involvement by the Attorney General's Chambers before the claim form was even issued; and (b) the Commissioner was told on at least two occasions in writing which were followed up by telephone calls.

16. Jamaica, today, has an impressive telecommunication system. There are three mobile phone providers operating in the country. There is at least one of these

mobile service providers that supplies land line facilities as well. There is also a cable service provider which offers telephone services if one subscribes to its cable service. It is common knowledge that the Commissioner's office is less than five miles away from the Attorney General's Chambers. The Darling Street Police Station is less than ten miles from both the Commissioner's offices and the Attorney General's Chambers. On the face of it, there is no good reason why the Commissioner could not have provided the information in a timely way. The time has now come when the old excuse of not receiving instructions in time will no longer avail the Attorney General, especially in cases such as these which do not require any special preparation. The modern means of communication, which are available and affordable, must be used to transmit information in a speedy fashion. If property is seized by the police, the court, unless told otherwise, would like to think that the police officer effecting the seizure is required to make a record of the seizure and the reasons for it. The court would also like to think that the Commissioner has ready access to these records. On these premises, the court is unable to understand why a defence in cases like the present cannot be filed in forty two (42) days. Merely to say that one did not get instructions in the period is not a reason; it is a bald statement.

17. The Commissioner knew the specific allegations of the claimant. He knew (a) the date of the seizure; (b) the name of the police officer who seized the bus; (c) the name of the owner of the bus; (d) the registration number as well as the make of the seized bus; (e) the police station where the police man was located or where the bus was taken; (f) that the chauffeur was literally begging to be charged so that he could appear before the court in the shortest possible time. All these were stated in the claim form and particulars of claim. The urgency of the situation was brought to his attention.

18. The court has not been given any reason why with this high degree of specific information the Commissioner of Police failed to secure the information within the forty two days. There is nothing to say that Special Corporal could not be found or when contacted, declined to furnish the information. This is the modern age of semi-conductors, fibre optic cables, wireless transmission and handheld computers. The transmission of the instructions needed in this case did not require face to face contact with counsel for the Attorney General. It could have been transmitted, initially, by telephone, email and then followed by a signed statement

from the police officer. This case was not a complicated one that required cogitation of the kind that produced The Odyssey of Homer.

19. Mrs. Taylor-Wright cited the case of ***Peter Haddad v Donald Silvera*** S.C.C.A. No 31/2003 (delivered July 31, 2007) where his Lordship Smith J.A., albeit in the context of an application for extension of time to file the record of appeal, made this telling observation at pages 11 - 12:

> *The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objective of the rules. A question arises which has often been raised is whether a party who has substantially exceeded the time limit set by the rules for a step to be taken is entitled without proferring any reason for the delay to have the time extended if:*
>
> *(i) there is no evidence of likely prejudice; and*
>
> *(ii) the defaulting party gives an undertaking to pay any extra costs occasioned by his delay?*

20. The learned Justice of Appeal noted at pages 12 and 13:

> *As has been already stated the absence of a good reason for delay is not sufficient in itself to justify the court in refusing to exercise its discretion to grant an extension. But <u>some</u> reason must be profferred. ... The guiding principle which can be extracted ... is that the Court in exercising its discretion should do so in accordance with the overriding objective and the reason for the failure to act within the prescribed period is a highly material factor. (underlining in original)*

21. These principles are, in the opinion of the court, very relevant to this case. The court is reminded that the issue before the court is a pretrial application to extend time and to that extent is distinguishable from the case before Smith J.A. In the case before this court, not only did the defendant not apply for extension of time before the time period to file a defence passed but even when the application for leave to enter judgment was filed and served, the defendant did nothing until, February 2010. No explanation is given for this time lapse. This prompted Mrs. Taylor-Wright to submit that the defendant clearly is of the view that she has an unqualified right to an extension of time since she has not sought to furnish the court with any explanation for the various delays. The Attorney General has not even indicated when she received the instructions from the police.

22. Mrs. Taylor-Wright noted that in the ***Haddad*** case, the absence of proof of prejudice to the claimant and a promise to pay costs were not sufficient to move the Court of Appeal to grant an extension of time to file a record of appeal. In other words, the argument went, the pendulum has finally swung in favour of those litigants who do what is required of them. The old argument that costs are the great cure all has finally (we hope) breathed its last. Justice is no longer only about trying a case at any cost but trying a case at reasonable cost to the parties having regard to the sum involved and the technicality of the case. In other words, there is now proportionality in the rules. Justice now has in the forefront of her mind the view that unnecessary costs be avoided.

23. Miss Manley, while acknowledging that the affidavit was silent on the points mentioned by Mrs. Taylor-Wright, submitted that there was sufficient material to move the court to extend time. She noted the great efforts of Miss Barnaby which shows that the Attorney General was always serious about pursuing the defence. Indeed, the submission went, Miss Barnaby did all she could short of going herself to Darling Street or the Commissioner's office. All this may well be true but regrettably that does not provide an adequate explanation for the failure to file a defence within the required time and neither does it explain the failure to indicate when the instructions became available and what accounted for the delay in securing and filing the application for extension of time until some four months after the claimant applied for leave to enter default judgments. As Smith J.A. observed, the absence of a good reason is not necessarily fatal to applications for extension of time but a reason there must be.

24. Mrs. Taylor-Wright also took another point but this was in relation to the application to enter default judgment. As the court understood her submission, learned counsel submitted that the proposed defence is woefully inadequate because it does not meet the claimant's claim for detinue. The claimant has stated that on six occasions he, through the chauffeur, went to secure the release of the bus. In other words, the claimant made the demand for the return of the bus which was not returned until the intervention of his attorney.

25. The law relating to detinue is not in doubt. Detinue is a common law action for the recovery of a chattel *in specie* or its value, as well as damages for wrongful detention. The core of the action is wrongful detainer (and not wrongful taking) of specific personal property by the defendant regardless of how the defendant came into possession. To ground the tort, the claimant, in the usual case has to establish that (a) he has an immediate right to possession; (b) the chattel in question is in the possession of the defendant; (c) an unconditional demand was made and (d) the defendant refused to hand over the chattel without lawful excuse (see ***George and Branday Ltd v Lee*** (1964) 7 W.I.R. 275 (Court of Appeal of Jamaica) and ***Alicia Hosiery v Brown*** [1970] 1 Q.B. 195). There is also an additional point to be made in respect of law enforcement persons. In ***Francis v Marston*** (1965) 8 W.I.R. 311 (Court of Appeal of Jamaica), Lewis J.A. stated that while at common law the police undoubtedly have the power to seize and detain property which may be used as evidence of the crime, there was no power in the police to seize and detain property indefinitely. This position by the Court of Appeal of Jamaica was supported and extended by the Court of Appeal of England and Wales in ***Ghani v Jones*** [1970] 1 Q.B. 693, where Lord Denning held that while the police may take and seize property that may be evidence of the commission of a crime that did not authorise an indefinite detention. What the police are required to do is to keep the property either to be used as an exhibit in a pending trial, or on completion of the investigation, if it is determined that the property is not going to used for any purpose then it ought to be returned. It is clear law that the police are under an affirmative duty to return property not being used in any criminal proceedings or being kept for further examination. The failure to return the property when there is no reason to detain the property is a wrongful detention. The citizen then has double protection: the law of detinue is one limb of that protection and the second

limb is the affirmative duty of the police to return goods in the circumstances outlined by the Courts of Appeal of Jamaica and England and Wales.

26. It is against this background that the proposed defence is examined. Mrs. Taylor-Wright points out that the defendant alleges that the police had seized the bus because the claimant's chauffeur was using the bus in an unlawful manner (see para. 3 of proposed defence). The particulars of claim makes the specific allegation that it was the claimant's attorney at law who contacted the Attorney General's Chambers and it was after that intervention that any summons for a criminal offence was issued. It was after this intervention that the bus was returned. The proposed defence does not challenge any of these specific assertions save to say that 'the defendant neither admits nor denies' these averments.

27. The claimant also says that he made six (6) visits to the Darling Street Police Station to claim the bus. This specific assertion is not challenged save the usual denial. The claimant alleges that the police man told the Director of Litigation that the bus was seized because it went onto Church Street. The response to this pleading is interesting. It reads 'paragraph 6 of the particulars of claim are neither admitted nor denied and the claimant is put to proof of the matters therein.'

28. This court says that this style of pleading defences is no longer acceptable in light of the clear rules of the Civil Procedure Rules ('CPR') which say that a defendant must respond in either of the following ways: (a) admit the assertion; (b) deny for the reason that he does not know and wishes the claimant to prove or (c) deny because it is not true and set out a contrary version. There are no other legally permissible options (see rule 10.5). Defendants cannot hide behind a general denial. This rule applies in full measure to the Attorney General.

29. As Loughlin and Gerlis, authors of ***Civil Procedure*** (2nd), at page 187, make clear:

> *Prior to the introduction of the CPR, a defence could simply consist of bare denials of the allegations in the particulars of claim. Under the CPR the defendant has a positive burden to set out the basis and details of any denials. Therefore, if the defendant denies an allegation he must state his reasons for*

so doing .... If he intends to put forward his own version of events he must set it out in his defence ....

30. The editors of ***Caribbean Civil Court Practice*** (2008), at page 192, are of the same view. The editors have noted:

> *The defendant may not meet the claimant's particulars of claim with a bare denial; he must state which allegations he admits, which he denies (with reasons for so doing) and which allegations he is unable either to admit or to deny but nevertheless requires the claimant to prove.*

31. The defendant in the case of ***Elwardo Lynch v Ralph Gonsalves*** (St. Vincent and the Grenadines Civil Appeal No. 18 of 2005 (delivered 18 September 2006), found, to his chagrin, that 'not admitting', without more, that he made defamatory remarks will lead to the striking out of his defence. The striking out was upheld by the Court of Appeal. The message is clear. Non-admission, without more, is a dangerous strategy, fraught with danger and has potentially disastrous consequences.

32. All this led Mrs. Taylor-Wright to submit that the defence is sham because although it speaks to the seizure it fails to address the following material points: (a) that the police man gave a version to the Director of Litigation that is different from what is being put forward in the proposed defence; (b) the demand was made for the return of the bus six times between April 2 and April 7; (c) the bus was released only after the claimant's attorney contacted the Attorney General and; (d) the summons in relation to any alleged criminal offence was only issued at the insistence of the claimant's attorney. The court would not go as far as Mrs. Taylor-Wright, but nonetheless it is indeed odd that the proposed defence did not address these specific assertions in a direct way.

Resolution

33. The proposed defence joins issue with the claimant on the lawfulness of the initial seizure of the bus. However, as already pointed out, it matters not how the defendant came into possession of the chattel. The real point of this claim is wrongful detainer. The proposed defence does not indicate why the bus was kept

until April 9, 2009. The fact that the bus was eventually release and the chauffeur was eventually charged after intervention by the claimant's attorney tends to show that the detention of the bus was not necessary in order to prosecute the alleged offence. In other words, even if the initial detention was lawful the pleadings in the proposed defence do not show any lawful justification for the continued detention of the bus after the demand for its return was made. In detinue, assuming that the initial taking was lawful, the purpose of the demand is to indicate that there is now an interruption of the continuing possession that now requires a return of the chattel failing which the defendant is a risk of being sued in detinue.

34. No explanation or reason for the failure by the Commissioner to provide the instructions to the Attorney General in the required time has been put forward. Also, the proposed defence does not address the specific allegation that the claimant went for the bus no less than six times. There is no pleading in the defence directly addressing the allegation that the bus was detained for six days. As is well known, if the defendant omits to deal with particular allegations he may be taken to have admitted them. In the new dispensation, a bare denial without following the CPR in terms of what needs to be done if an allegation is denied may amount to an admission.

35. In light of these omissions, there is no need to extend time within which to file the defence because the proposed defence does not reveal that there is a real prospect of successfully defending the claim. The application to extend time to file defence is dismissed. The application to enter judgment is granted. The matter is to proceed to assessment of damages. Costs of both applications to the claimant.