

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. P.042 OF 2013

L.J. CONSTRUCTION LTD.

Appellant

AND

JANIS SOLOMON

Respondent

**PANEL: A. Mendonça, J.A
P. Jamadar, J.A.
N. Bereaux, J.A.**

**APPEARANCES: Ms. C. Bernard for the Appellant
Ms. D. Moore-Miggins the Respondent**

DATE OF DELIVERY: March 18th, 2013.

JUDGMENT

Delivered by A. Mendonça, J.A

1. On November 23rd, 2012 the Appellant commenced proceedings in respect of monies due and owing under a contract between the parties. The contract related to the construction of a building on land owned by the Respondent in Tobago. Among the relief sought by the Appellant was an injunction to restrain the Respondent from interfering with the Appellant's workmen in the performance of their duties and/or obligations under the contract.

2. It is not in dispute that the cause of action in this matter arose in Tobago. The claim form and statement of case were however filed at the court office in Port of Spain. This is contrary to rule 8.3 of the **Civil Proceedings Rules 1998** (the CPR). This rule provides as follows:

“8.3(1)The general rule is that a claim may be started in any court office of the High Court.

(2) However:-

- (a) any proceedings relating to land in Tobago or based on a cause of action which arose in Tobago must be started in the court office at Tobago; and*
- (b) practice directions may require that claims of a specified type must be issued in a particular court office.”*

The proceedings in this matter, in accordance with this rule must therefore have been started in Tobago.

3. The Appellant was apparently aware at the time of the commencement of the proceedings that they should have been started at the civil court office in Tobago. The reason he gave for filing the claim in Port of Spain is that he intended to make an application for an interim injunction and thought that such an application would have been heard more speedily if filed at the court office in Port of Spain. In our view the Appellant was misguided to have thought so. Where the application was filed would have made no difference to the timeliness in which it was heard. The merits of the explanation for not commencing this action in Tobago are, however, of no real relevance to this appeal.

4. The Respondent having been served with the claim form entered an appearance and made an application for an order that the claim be struck out by reason of the Appellant’s failure to comply with rule 8.3(2)(a). This was followed by an application by the Appellant to have the proceedings transferred from the Port of Spain court office to the Tobago court office.

5. The applications were heard by the Case Management Judge. She stated that the provisions of the CPR must be adhered to. In her view rule 8.3(2)(a) is clear. The proceedings should have been started in the court office at Tobago to be in conformity with the rule. Only then, and upon cogent evidence on affidavit, the Court may exercise its case management powers to transfer the matter to the Port of Spain office. It could not be the other way around: start the matter in Port of Spain and

then crave the court's indulgence to use its case management powers to regularize the position in conformity with the rule. The Judge was therefore of the view that the failure to comply with rule 8.3(2)(a) was fatal to the proceedings. In the circumstance the Judge struck out the claim. Insofar as the application to transfer the proceedings to Tobago was concerned, the Judge appeared not to have dealt with the application as no order was made on it. It would however follow that the Judge would have dismissed it.

6. The Appellant now appeals. Counsel for the Appellant submitted that the failure to comply with rule 8.3(2) is not a ground for striking out the Appellant's claim. The Court has the power to rectify the error and should have done so. Counsel for the Respondent on the other hand supported the Judge's ruling. Counsel emphasized the mandatory nature of rule 8.3(2)(a) and drew particular attention to the use of the word "must" in the rule, which, it was submitted, underlined the draftsman's intention to create an absolute and mandatory obligation on the part of litigants.

7. There is no doubt that rule 8.3(2)(a) is expressed in mandatory terms. It requires the proceedings relating to land in Tobago or based on a cause of action which arose in Tobago to be started in the civil court office at Tobago. In this case the cause of action arose in Tobago and it is common ground between the parties that the proceedings should have been started in Tobago. To commence the proceedings in the court office at Port of Spain is not in accordance with the rule. But what is the effect of failure to comply with the rule? The Judge thought that failure to comply with the rule was fatal to the proceedings and led inevitably to the striking out of the claim. I do not agree.

8. It is relevant to note that that rule is silent as to the consequences of the failure to comply with it. To ascertain therefore what is the effect of noncompliance the rules must be considered as a whole. There are two rules which in my view point inexorably to the conclusion that a failure to comply with the rule is not necessarily fatal to the proceedings.

9. The first is rule 26.1(1)(a). This rule gives the Court the power to transfer the whole or any part of any proceedings from one court office to another. The Judge was of the view that this power could be exercised only in relation to a matter that was started in Tobago in compliance with the rule. So that in her view the power was limited to transferring a matter from Tobago to Port of Spain and not the other way around. Rule 26.1(1)(a) however, is not so limited. It contains no such

restriction as the Judge sought to read into it and gives the Court the power to transfer the whole or any part of any proceedings from one court office to another.

10. The second rule is 26.8. This rule was not considered by the Judge. It is in my view clearly relevant. This rule is as follows:

“26.8(1) This rule applies only where the consequence 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 courts 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) The court may make such an order on or without an application by a party.”

11. The meaning of the rule is plain. It applies where the consequence of the failure to comply with a rule, practice direction or court order has not been specified by any rule practice direction, or court order. In such a case and where there has been a failure to comply with, inter alia, a rule the Court may, in the words of rule 26.8 (3), “make an order to put matters right”. Rule 26.8 therefore, in cases where the consequence of the failure to comply with any rule, practice direction, court order or direction is not specified, gives the Court a discretion to make an order to rectify the matter. In the exercise of that discretion the Court must take into account all relevant matters and must seek to give effect to the overriding objective (see rule 1.2(1)).

12. In this matter, as I mentioned earlier, the consequence of the failure to comply with rule 8.3(2)(a) is not specified in it, nor is the consequence spelt out in any other rule or practice direction, court order or direction. Rule 26.8 is therefore applicable and gives the Court a discretion to rectify the error and put matters right.

13. In my judgment therefore, on a proper construction of the rules the failure to comply with rule 8.3(2)(a) is not necessarily fatal and does not lead inevitably to the dismissal of the claim. The Court has a discretion to rectify the error and in the exercise of its case management powers in 26.1(1)(a) may order the transfer of the proceedings from one court office to another. The Judge,

however, being of the view that the breach of rule 8.3(2)(a) was fatal to the proceedings did not consider whether it was proper to exercise the discretion to transfer the proceedings to the Tobago court office and it now falls on this Court to do so.

14. Counsel for the Respondent only objection to the matter being transferred was on the basis of the construction of rule 8.3(2)(a). Her position was that once the proceedings were not commenced at the Tobago court office they should be struck out. Other than the construction of the rule, however, Counsel for the Respondent did not advance any reason why the proceedings should not be transferred. In fact from an affidavit filed on behalf of the Respondent, cogent reasons were given for the transfer of the proceedings to the court office at Tobago. According to the Respondent she lives in Tobago and her attorney is based in Tobago. It would be inconvenient and more costly if this matter were not transferred to Tobago. With respect to the Appellant, it is also represented by an attorney based in Tobago and was also desirous that the matter be transferred to Tobago. The transfer of this matter to Tobago would therefore not be to the prejudice or injustice of any of the parties and would save costs and expense and facilitate the parties dealing with their matter. It is also relevant that the Appellant gained no unfair advantage in starting this matter in Port of Spain. In the circumstances I can see no basis not to transfer the matter to the court office at Tobago where it should have been commenced.

16. In the circumstances this appeal is allowed. The matter is transferred to the court office in Tobago. The Respondent shall pay to the Appellant costs here and below which have been agreed in the sum of \$6,000.00.

A. Mendonça,
Justice of Appeal