REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA P 234-236 of 2017

BETWEEN

ANSA MERCHANT BANK LIMITED **APPELLANT**

AND

SARA SWAN **RESPONDENT**

PANEL: Ivor Archie, CJ
Judith Jones, JA
Peter Rajkumar, JA

APPEARANCES:

Mr. B. McCutcheon for the Appellant
Mr. A. Williams for the Respondent

DATE DELIVERED: 28th February, 2018.

I have read the Judgment of Jones, J.A. and I agree with it.

I. Archie
Chief Justice

I too agree.

P. Rajkumar
Justice of Appeal

JUDGMENT

Delivered by Jones, J.A.

1. This is an appeal from the decision of the judge to strike out three claims filed by the appellant ANSA Merchant Bank Ltd.

2. The facts are not in dispute. Prior to 28th April 2017 the appellant was represented by attorneys other than those now representing it. On 1st April 2016 three claims were filed by the appellant against four defendants including Sara Swan the respondent. The claim forms and statements of case were only served on two defendants: the respondent and the 3rd defendant.

3. With respect to the 3rd defendant there are pending applications for judgment in default of defence filed on 1st July 2016. The claims against the other two defendants were never served and have lapsed pursuant to part 8.13 of the Civil Proceedings Rules 1998 as amended ("the CPR"). The defendants, other than the respondent, need not trouble us any further in this appeal.

4. The claim forms and statements of case were served on the respondent on 4th April 2016. The respondent filed her defences on 27th July 2016 but did not serve them on the appellant until the 26th August 2016. On 26th September 2016 the appellant filed notices of withdrawal and discontinuance in all three claims. These notices were not served on the respondent. Part 38.3 of the CPR provides that discontinuance takes effect from the date of service of the notice of discontinuance. It is common ground on the appeal that in these circumstances the notice of withdrawal and discontinuance had no effect.

5. No notice fixing a case management conference ("CMC") was ever issued by the court office. Neither did the judge dispense with a CMC nor fix such a conference prior to 1st May 2017. On 29th March 2017 the respondent applied to have the notices of discontinuance set aside and a date fixed for the hearing of the issue of costs. This application came up for hearing on Monday 1st May 2017 the second working day after attorneys had come on record. On that date, after hearing arguments, the judge set aside the notices of discontinuance; ordered that the appellant pay the costs of the application and fixed a hearing on the issue of costs and a case management conference for the 25th May 2017. This order was subsequently perfected and has not been appealed.

6. At the hearing on 25th May the judge heard arguments on costs; ordered that the claimant pay to the respondent the costs of the applications in the sum of $2,500.00 each; directed that written submissions be filed on all legal implications with regards to the appellant's decision to reconsider the notices of discontinuance and adjourned the CMC and her decision to 17th July 2017.

7. In her written submissions in response to those filed by the appellant, the respondent submitted that the claims ought to be struck out on two grounds: pursuant to part 27.3(3) for a failure to apply for a case management conference within the time limited by the rule and, alternatively, pursuant to part 26.2 (1)(a) on the ground of failing to comply with a rule, that is, failing to comply with part 27.3(3). This was the first time that either of these two rules had been cited to the judge in this matter.

8. Without hearing further submissions, on 17th July, the judge gave an oral decision in which she determined that: (i) an application to fix a case management conference ought to have been made by the appellant by the 26th September 2016; (ii) 27th December 2016 was the last date by which the appellant ought to have applied for relief from the sanction of not applying to have a case management conference fixed; (iii) the notices of discontinuance filed on 26th September had no effect and therefore part 27.3 was unimpinged in its application and (iv) the appellant had failed to comply with that rule.

9. The judge accordingly struck out the claims against the respondent and ordered that the appellant pay the costs of the claims on a prescribed cost basis up to the stage of the case management conference; quantified those costs and the costs payable to the respondent on its application to set aside the notice of discontinuance and ordered the payment of those costs as quantified.

The judge's reasons

10. With respect to her order of 1st May the judge states:

> "1st May 2017, that was the hearing of the [respondent's] notice of application to set aside. On that day, an Order was granted, setting aside the Notice of Discontinuance with costs of the day to the [respondent]. The [respondent] had calculated the quantum of prescribed costs for the entire claim as well; however after extensive oral submissions by both sides, with no resolution no order was made. This was mainly because the [appellant's] change of position, were too lengthy to be considered in the time allotted, so an order was given that the issue of costs and a case management conference were set for May 25 2017."

11. With respect to the hearing of 25th May 2017 she states:

> "At this hearing, there was further argument, but the question as to what considerations were relevant to the issue of costs and whether, and if so, how the [appellant] could proceed with the claim, could not be determined within the timeframe of 15 minutes.

Accordingly the [appellant] was directed to file written submissions on all legal implications flowing from its decision to reconsider the prior decision it had made to end the matter by Notice of discontinuance."

12. With respect to the operation of part 27.3 the judge states:

"in the light of the provisions of CPR 38.5, the chronology and the admission by the [Appellant] that there was no service, the notice of discontinuance filed on 26th September 2016 was of no effect. Accordingly rule 27.3 that provides for a claim to be struck out if timelines for setting a case management conference are not met ……. is unimpinged in its application."

13. Later on in her reasons she states:

" The manner by which the [appellant] was seeking to have the court allow it to benefit from the [respondent's] application, thereby absolving itself from past failure to apply the CPR, was not in keeping with the overriding interest on dealing with cases justly, as mandated by CPR1.1. It was for this reason that, having set aside the discontinuance, I adjourned the matter for case management. This was done recognizing the extensive nature of case management powers under the CPR, and with a view to entertaining full submissions in writing on the way forward, regarding costs and other procedural implications.

In this regard, the submissions of the respondent pointing out the applicability of CPR 26.21 (a) were very useful. Under that rule the court may strike out a statement of case or part of a statement of case, if it appears to the court that there has been a failure to comply with a Rule, practice direction or with an order given by the court in the proceedings.

The court was invited by the [respondent] to apply this rule and I quote…. "having regard to the fact that the claimant has yet to file for any sort of relief from the sanction of failing to apply for a date to be fixed for the case-management conference."

It is my view that the approach, as submitted by the [respondent] is the appropriate order to be made, in my completing the disposition of their notice of application, as it will allow for the issue of costs, which was the sole remaining matter that they---that is the [respondent] who brought this application, and that is why we are here---wanted to be resolved, to be determined as well.

There is no application pending before the court. Accordingly my decision will be that the claims are struck out as against the [respondent] with prescribed costs to be paid by the [appellant] in all related claims."

The reference by the judge to CPR 26. 21 (a) is clearly a reference to part 26.2 (1)(a).

14. From the reasons given by the judge two points become clear. Firstly her decision to fix a CMC was a conscious decision made by her. The judge gives two explanations for this decision. According to her the appellant's behavior was not in keeping with the overriding interest of dealing with cases justly, as mandated by CPR1.1; and fixing a CMC allowed her to exercise the extensive case management powers available to her under the CPR. This she thought was necessary so as to receive submissions from attorneys and, presumably, come to a decision "on the way forward, regarding costs and other procedural implications." It is clear therefore that as far as the judge was concerned there was a valid exercise of her jurisdiction to fix a CMC.

15. Secondly her decision to strike out the claims was not pursuant to the automatic striking out under part 27.3(4), but rather in the exercise of her power under part 26.2(1)(a). The judge's rationale being that up to that time the appellant had failed to make the necessary application pursuant to part 27.3 (3) and therefore failed to comply with a rule thereby bringing part 26.2 (1)(a) into operation. In doing so she specifically rejected the respondent's argument that the claims were liable to be struck out pursuant to part 27.3 in favor of his alternative argument that the claims be struck out pursuant to part 26.2(1)(a).

The relevant rules

16. **Part 27.3 of the CPR** states:

"(1) The general rule is that the court office shall fix a case management conference immediately upon the filing of a defence to a claim other than a fixed date claim form.

(2) Where there are two or more defendents and at least one of them files a defence, the court office shall fix a case management conference-

(a) when all the defendants have filed a defence; or

(b) when the period for the filing of the last defence has expired,

whichever is sooner.

(3)If the court does not-

(a) dispense with a case management conference under rule 27.4(1) and

give directions under rule 27.4(2); or

(b) give notice of a case management conference within-

(i) 14 days of the filing of a defence, where there is only one defendant;

(ii) 14 days of the filing of the last defence, where there are two or more defendants; or

(iii) 14 days of the expiration of the period for the filing of the last defence,

where there are two or more defendants,

the claimant shall within 28 days of the relevant period identified in subparagraph (b) apply for a date to be fixed for the case management conference.

(4)If the claimant does not so apply, the claim shall be automatically struck out.

(5)The claimant may apply for relief within 3 months from the date of the service of the defence from the sanction imposed by paragraph (4).

(6)In considering whether the court grants relief, the court shall have regard only to whether the defendant has suffered any prejudice and rule 26.7 shall not apply.

16. The cumulative effect of part 27.3 (3),(4) and(5) is that, in the absence of a CMC being fixed or dispensed with within a certain time, computed from the date of

the filing of the defence, a failure of a claimant to apply to have a CMC fixed within 28 days of that period renders the claim automatically struck out subject only to the judge's power to grant relief from that sanction and fix a date for a case management conference: **Rainforest and another v National Gas Company of Trinidad and Tobago P 186 and 190 of 2016.** In Rainforest there was no dispute as to the effect of the rule the issue was whether the rule applied on the particular facts of that case.

17. **Part 26.2 (1)(a)** permits a judge to strike out a claim if there has been a failure to comply with a rule, practice direction or with an order or direction given by the court in the proceedings. This is the rule applied by the judge.

18. It is common ground that the time for the appellant to have applied to have applied for a case management conference had long passed and so had the time limited by part 27.3(5) for making the application for relief from the sanction of dismissal contained in the rule.

What is the effect of the order of the judge fixing a case management conference

19. The appellant submits that there having been no appeal of the order of the judge fixing a CMC that order, having been perfected, must stand and, in the circumstances, this court cannot go behind that order. In support of this submission the appellant cites the case of **Isaac v Robertson [1985] 1 AC 97**. According to the submission the court by its own order therefore cured any defect that had previously existed and any application for relief from sanctions was rendered otiose.

20. The only argument presented by the respondent in this regard is that pursuant to a rule, part 27.3, the claims had been automatically struck out therefore the judge had no jurisdiction under the rules to make the orders made by her. According to the respondent in the instant case the court was limited in its jurisdiction by the automatic application of the sanction for non-compliance with a rule. The respondent submits therefore that the judge had no jurisdiction the matter having

been determined previously by the automatic application of part 27.3 (4) as a result Isaac v Robertson is rendered otiose and cannot be relied on by the appellant.

21. **Isaac v Robertson** was an appeal to the Privy Council out of St. Vincent and the Grenadines. It concerned the application of a somewhat similar rule. This rule provided that a cause or matter be deemed altogether abandoned and incapable of being revived if certain steps had not been taken within a year of the date of the last proceeding or the filing of the last document. Despite the fact that no step had been taken or document filed within the period prescribed by the rule an interlocutory injunction was granted by the judge. No application was made by the defendant to set aside the order. The plaintiff subsequently applied to have the defendant committed for contempt for failing to obey the order.

22. The judge dismissed the application on the basis that the order was a nullity since the cause was deemed to have been abandoned pursuant to the rule. The claimant appealed. The Court of Appeal allowed the appeal on the basis that, although the order ought not to have been made and the defendant would have been entitled to succeed if he had applied to have it set aside, he had not applied to set it aside and he was in contempt in disobeying it. The defendant appealed to the Privy Council. In dismissing the appeal and affirming the decision of the Court of Appeal the Law Lords determined that it was well established that an order made by a court of unlimited jurisdiction must be obeyed unless and until it has been set aside by the court.

23. While accepting that the operation of the rule was a matter of practice for the local courts Lord Diplock stated:

> " ….the only, but crucial, difference between the judge and the Court of Appeal being that the former held (erroneously) that the rule operated ipse jure to render the interlocutory injunction and order which the court was obliged upon its own initiative to treat as having never been made; whereas the Court of Appeal held(rightly) that the rule entitled the defendant as defendant in the action to apply for an order setting aside the interlocutory if he elected to make such an application. The rule, which is for the benefit

of the defendants, is not one which the defendant is under any compulsion to rely. It may be in his interest that the action should proceed….."

24. In the case of **The Official Receiver CA No 91 of 2015** our Court of Appeal had to consider a similar question: whether a trial judge could on his own motion, and in the absence of any valid application, discharge an ex parte order made by him in circumstances where that order had already been perfected. In coming to the decision that it was not open to the judge to discharge the order I stated:

> "Of course, in treating with the question of whether the order is a nullity or not, a distinction must be made here between a decision made without jurisdiction and the wrongful exercise of jurisdiction. The former refers to a decision that no judge may make the latter to an error correctable by a court of appeal. In the instant case the judge seemed to think that he had no jurisdiction to make the order. We think he was wrong. In our opinion, if the judge went wrong in making the ex parte order, it was merely a wrongful exercise of his undoubted jurisdiction conferred by the Act to order a public examination."

25. In that case regard was had and reliance placed on the Privy Council decision of **Strachan v Gleaner Co Ltd and Another (2005) 66 WIR 268.** In that case the issue was whether a judge had the jurisdiction to set aside an order of another judge of concurrent jurisdiction as being a nullity.

26. Lord Millett delivering the advice of the Board had this to say:

> **"[25]** The distinction between orders which are often (although, in their lordships' view, inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the court has a discretion to correct, and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside 'ex debito justitiae'. The leading example is *Craig v Kanssen* [1943] 1 KB 256, where the proceedings were not served on the defendant at all. The Court of Appeal held that the proceedings were a nullity which the defendant was

entitled as of right to have set aside. Unfortunately, Lord Greene MR expressed the view that the court of first instance had an inherent jurisdiction to set aside an order made in such proceedings and that it was not necessary to appeal from it. But this was expressed in cautious terms, was obiter, and has since been doubted. Moreover, Lord Greene left open the question, on which there was clear authority and which would seem to be highly relevant, whether the order had sufficient existence to found an appeal. Their lordships respectfully think that he was mistaken…..

[28] An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."

27. Later in the judgement Lord Millett states:

"**[32]** The Supreme Court of Jamaica, like the High Court in England, is a superior court of unlimited jurisdiction, that is to say it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided, after argument, that he has jurisdiction; more often (as in the Padstow case) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error, nor does a judge of co-ordinate jurisdiction have power to correct it.

> **[33]** In the present case Walker J held he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside." [1]

28. As we have seen in this case there has been no appeal of the order of 1st May 2017 fixing a CMC. In any event it has not been suggested in the submissions before us, nor can it be validly submitted, that a judge of the High Court does not have the jurisdiction to fix a CMC. Even in the face of part 27.3(4) a judge has the power to reinstate a matter which has been automatically struck out pursuant to part 27.3(4). Indeed part 27.3 (5) recognizes that there is an residual power in the court to fix a CMC despite the automatic striking out of the claim pursuant to part 27.3(4). By the rule the jurisdiction is exercisable upon an application for relief within 3 months by the claimant and the claimant satisfying the judge that there is no prejudice to the defendant.

29. In addition Part 26.1(1)(d) gives a judge the power to extend the time for compliance with any rule and part 26.1(1)(w) specifically gives the judge the ability to take any step, give any other direction for the purpose of managing the case and furthering the overriding objective. Indeed, by her reference to the overriding objective and her extensive case management powers as her justification for fixing the CMC, it would seem that the judge had this very rule in mind.

30. I am satisfied therefore that, in any event, the judge had the jurisdiction to make an order fixing a CMC even after the expiration of the period identified in part 27.3(4). The submission of the respondent that the jurisdiction of the judge was limited by the automatic application of the sanction for non-compliance is

[1] At page 279

therefore incorrect. The issue here was not whether the judge had the jurisdiction to fix the CMC but whether, given the rules, the judge wrongly exercised her undoubted jurisdiction.

31. In accordance with the decisions of the Privy Council in both **Isaac** and **Strachan** and our decision in the Official Receiver the forum to challenge this wrongful exercise of jurisdiction was on appeal or, in limited circumstances, by an application to set aside the decision. In this case an application to set aside the order does not arise and there has been no appeal of the decision. The order having been perfected the parties are bound by it. Indeed not only was the order perfected but it was acted upon. Both parties appeared at the CMC and the adjourned hearing of the CMC without objection. Indeed the respondent sought and benefitted from an order for costs in her favour up to the stage of the CMC.

What should a Court of Appeal do in these circumstances?

32. Ultimately the judge struck out the claims because the appellant had failed to comply with part 27.3. Throughout the hearings the judge seemed concerned because the appellant had failed to file any application. Indeed at the point of her indicating how she proposed to dispose of the claims reference was made by her to the fact that there was no application by the appellant pending before the court. The judge does not specify the nature of the application anticipated. It clearly could not have been an application to set aside the notice of discontinuance because she had already set this aside on 1st May.

33. It would seem, from her acceptance of the argument of the respondent that she ought to have regard to the fact that the appellant had as yet failed to file any sort of relief from the sanction of failing to apply for a date to be fixed for a case management conference, that the judge was anticipating an application for relief from the sanction imposed by rule 27.3(4). The problem with the judge's determination is that such an application was rendered unnecessary by her order of 1st May. In accordance with part 27.3 (5) the relief to be granted was the reinstatement of the claims and the fixing of a case management conference which ultimately would have determined how the court would proceed with the

claims. This is exactly the effect of her order of 1st May. According to the judge this was necessary so as to receive submissions from attorneys and, presumably, come to a decision "on the way forward, regarding costs and other procedural implications."

34. The question for our determination here therefore is whether in all the circumstances, and in particular in the light of the order of 1st May 2017, the judge was correct in dismissing the claims because of the failure of the appellant to comply with part 27.3 of the CPR. In arriving at her decision to strike out the claims the judge made two errors: (i) she failed to appreciate that her order of the 1st May was an existing and valid order the effect of which was to grant the appellant relief from the sanction imposed by part 27.3 (4); and (ii) she failed to give the appellant the opportunity of addressing her on the effect of the two rules, part 27.3 and part 26.2(1) raised by the respondent in her submissions.

35. The effect of these errors is that the order of the judge dismissing the claims and granting the respondent's costs of the claim cannot stand. Accordingly the appeal is allowed and the matter remitted back to the judge for further management.

36. The decision in this case is not one to which this Court has come to lightly. It flies in the face of the basic principles of efficiency and case flow management entrenched in the CPR. Ultimately however this case turns on its particular facts and in particular the principle that an order made by a court of unlimited jurisdiction stands until set aside.

Judith Jones

Justice of Appeal