



# In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: No. 8

HOME DESIGN DEVELOPMENT CONSTRUCTION LTD

**Appellant**

- and -

JUDITH SMITH

**Respondent**

**EX TEMPORE JUDGMENT**

(in Court)

*Appeal from Magistrates' Court-refusal to restore claim dismissed for failure by plaintiff to appear- abuse of process-delay compounded by failure by plaintiff to supply further and better particulars of claim-application of overriding objective to proceedings in Magistrates' Court*

Date of hearing: July 6, 2016

Mr. Jaymo Durham, Amicus Law Chambers, for the Appellant  
Ms. Kim Wilson, Wilson & Co, for the Respondent

## **Introductory**

1. In this matter the Appellant appeals against the decision of the Magistrates' Court (Wor. Tyrone Chin) dated 30<sup>th</sup> September 2015, refusing to restore a claim that had been struck out on 27<sup>th</sup> January 2014 when the Plaintiff failed to appear.

### **The statutory jurisdiction of the Magistrates' Court**

2. The jurisdiction to strike-out or dismiss for failure to appear at trial arises from Order 15 rule 3 of the Magistrates' Court Rules, which provides as follows:

***“15/3 Non-appearance of plaintiff***

*If the plaintiff does not appear the court shall, unless it sees good reason to the contrary, strike out the suit (except as to any counterclaim by the defendant), and make such order, including an order as to costs, in favour of any defendant appearing, as seems just:*

*Provided that, if the defendant shall admit the claim to the full amount claimed, the court may, if it thinks fit, give judgment as if the plaintiff had appeared.”*<sup>1</sup>[Emphasis added]

3. The application which was heard on 30<sup>th</sup> September 2015 was made under Order 15 rule 6, which provides as follows:

***“15/6 Relisting of causes struck out***

*Any suit struck out under this Order may, by leave of the court, be replaced on the cause list, on such terms as to the court may seem fit.*

4. Those traditional rules, which derive from the original enactment of the Rules in 1973 have, with effect from 1<sup>st</sup> January 2014, been supplemented by the Overriding Objective, which has been incorporated in Order 1A of the Magistrates' Court Rules in identical terms to that found in the Supreme Court Rules. The governing principle is that the Rules have the overriding objective of enabling the Court “*to deal with cases justly*”. And “*justly*” includes under 1A/1(2) (d) ensuring that a case is dealt with “*expeditiously and fairly*”.
5. Order 1A/3 provides significantly as follows: “*The parties are required to help the Court to further the overriding objective*”.

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<sup>1</sup> Order 15/3 confers the same power in relation to a trial date or such other date to which the matter was adjourned on the return day as Order 8/2 (which I mistakenly cited in my oral judgment).

## **The Appellant's claim as Plaintiff in the Magistrates' Court**

6. The claim in the Magistrates' Court was commenced by Ordinary Summons dated the 17<sup>th</sup> April 2013 and the Particulars of Claim stated as follows:

*"The Plaintiff's claim is for \$15,330 the balance due for contractor services supplied to the Defendant, the costs of collection and/or damages, the Defendant having been previously supplied with proof. And the Plaintiff claims costs and interest."*

7. It is common ground that on 12<sup>th</sup> July 2013, the Magistrates' Court ordered the Plaintiff to serve further and better particulars of the claim within 30 days and the defendant was to file a Defence within 30 days thereafter. That Order was never complied with. On the same date the Court listed the matter for trial in Court 3 on 28<sup>th</sup> and 30<sup>th</sup> January 2014 at 9.30am. The matter seemingly came on, for reasons which are unclear, on 27<sup>th</sup> January 2014 when neither the Plaintiff nor its attorney appeared. The Learned Senior Magistrate as he now is (Wor. Juan Wolffe) noted that the Plaintiff had failed to supply further and better particulars and dismissed the claim and awarded costs to the Defendant.
8. Thereafter the next step the Plaintiff seemingly took was to write to the Court requesting the Court to restore the matter by letter dated 16<sup>th</sup> April, 2015. The letter to the Court stated as follows:

*"We act for Home Design & Development, Plaintiff's [sic] in the above captioned matter.*

*The above captioned matter was adjourned sine die with liberty to restore. We therefore, request that this matter be relisted on the next available court date.*

*We look forward to hearing from you soon."*

9. It is unclear on what basis the Plaintiff's attorneys believed that the matter had simply been adjourned. But the facts speak for themselves. The matter was listed for trial in January 2014 and the matter was not promptly pursued thereafter. The next step taken by the Plaintiff was in April 2015. Thereafter, there was seemingly some confusion as to the basis on which the case lay. But by July 2015 it was common ground, and the plaintiff understood when the matter was mentioned, that the case had in fact been dismissed. And as a result a hearing was fixed for 30<sup>th</sup> September, 2015 for the application to restore the matter to be heard.
10. That application was heard after over two years after the 30 days fixed for supplying further and better particulars ordered on 12<sup>th</sup> July 2013 had expired. That Order had

still not been complied with and the Plaintiff did not proffer to the Court a copy of the relevant particulars with a view to demonstrating the Plaintiff's serious intent of pursuing the action with due diligence. Nor did the Plaintiff put before the Court any affidavit evidence explaining why no action had been taken between the date when the action was dismissed, 27<sup>th</sup> January 2014, and the date when the request to restore the matter was made, 1<sup>st</sup> April, 2015. Nor was there any material put before the Court to explain the reasons why, for over two years, the Order for further and better particulars had not been complied with.

11. Instead the application appears to have been made on the basis that the application was not an abuse of process, as the Defendant contended, and in effect, as Mr Durham argued in the course of the present appeal, the Plaintiff had an absolute right to be heard irrespective of how the Plaintiff chose to conduct the litigation. Ms Wilson's main argument, as recorded by the Learned Magistrate was that in all the circumstances the application was an abuse of process.

### **The merits of the appeal and the applicable governing principles**

12. The appeal has been founded on two grounds:

- (1) The Learned Magistrate erred in failing to consider that pursuant to the Magistrates' Court Rules 1973 Order 15/6, the Court has a discretion to relist the on the cause list any matter struck out as a result of the Plaintiff's failure to appear and consequently, failed to properly exercise his discretion;

- (2) The Learned Magistrate erred in failing to provide any reasons for the exercise or lack of exercise of his discretion.

13. It does appear that, at some point, the Defendant's counsel contended that the only remedy for the Plaintiff was to appeal the dismissal and that he had no right to apply to set it aside. But the record is clear that the argument on 30<sup>th</sup> September 2015 was whether or not the Court should grant the Plaintiff's application to restore the case. The Defendant's counsel clearly argued that that application should be refused because, in all the circumstances, it was an abuse of process to seek to restore the matter at the date when the application was being made. The Learned Magistrate said this in refusing the application:

*“On 12<sup>th</sup> July 2013 this matter was mentioned with both counsel present. The Court ordered at that time for Plaintiff to serve Further and Better Particulars within 30 days and Defence to be filed 30 days later. Trial was set down for 28<sup>th</sup> and 29<sup>th</sup> January 2015 but the following [sic] was date*

*stamped 27<sup>th</sup> January 2015. This was already viewed by both parties on 3<sup>rd</sup> July 2015.*

*The fact that the Plaintiff did not serve Further and Better Particulars also compounds the issue for the Plaintiff.*

*The Court rules that it does not support Mr. Durham's application and affirms that the case is dismissed...Costs of 4250 ordered for today."*

14. It seems to me to be self-evident that the Learned Magistrate accepted the submission of Ms Wilson that the application was an abuse of process. The Learned Magistrate must have:

- (a) had regard to the fact that there was a delay of some 15 months, between the matter being dismissed after the Plaintiff, on any view, knew that the matter should have been tried and the Plaintiff asking for the matter to be restored; and
- (b) taken into account as an aggravating factor the failure of the Plaintiff, at that juncture for a period in excess of two years, to comply with an Order which was designed to progress the litigation by facilitating the Defendant filing a Defence to a properly particularised claim.

15. In these circumstances, it seems to me, it is impossible to fairly conclude that the Learned Magistrate either failed to consider the exercise of a discretion to restore and/or erred in failing to give reasons for the exercise or lack of exercise of his discretion.

16. The Appellant's counsel did put before the Court two authorities. The first was the English Court of Appeal decision in *Flannery and Another-v- Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, which supports the proposition that failure to give reasons can constitute grounds of appeal. That principle is well-recognised by this Court, and essentially operates in favour of an appellant where it is impossible to discern from the decision of the Magistrates' Court what the reasons were. In the present case it is quite obvious that the Learned Magistrate accepted the submissions of counsel for the Respondent in the Court below to the effect that the litigation in question had been conducted in an abusive manner and that the Court should accordingly decline to exercise its discretion in favour of the Plaintiff below on those grounds.

17. The second authority that was relied upon was the case of *Costello-v- Somerset County Council* [1993] 1 WLR 256, where the English Court of Appeal (i) dealt with the principles applicable to applications to dismiss an action for want of prosecution,

and (ii) considered the importance of the plaintiff's right to be heard and the need to take into account prejudice to the defendant before granting that relief.

18. Reliance on that authority reveals a fundamental misconception about the nature of task before the Learned Magistrate and the nature of the application the Plaintiff was making. The Plaintiff was not in the position of a defendant seeking to strike out a claim that was validly before the court and, therefore, having to demonstrate that the plaintiff should not be permitted to pursue his claim because of extreme prejudice to the defendant. The Plaintiff was in the position of having to demonstrate to the Magistrates' Court that justice required that, despite three defaults on the Plaintiff's part (failure to appear, allowing the action to lie fallow for 15 months and ignoring an Order to supply further and better particulars for over two years), the Plaintiff should be allowed to pursue its claim.
19. The proposition that courts should give so much deference to the right of a claimant to be heard that they should ignore defaults of a type and scale which occurred in this case, without even being persuaded by evidence put before them, in my judgment cannot be accepted and would undermine the efficiency of civil litigation in the Magistrates' Court. The reason why the Overriding Objective was incorporated in the Magistrates' Court Rules was because of a general concern that litigation at that level, (which is high-volume and involves ordinary citizens for whom the costs of litigation can be quite heavy and burdensome) should not be subjected to delays and inefficiencies because proceedings in the Magistrates' Court are not treated as seriously as proceedings in this Court.

### **Adjudication**

20. And so the burden on the Appellant in this case was ultimately to demonstrate the Learned Magistrate failed to exercise his discretion in a proper way by either considering irrelevant matters, or by failing to consider relevant matters. And so, having rejected the substantive grounds of appeal, I am bound to conclude that there is no basis disclosed for disturbing the decision of the Learned Magistrate and no justification for this Court finding that the decision of the Magistrates' Court was not properly open to it. And so for those reasons the appeal is dismissed.

[After hearing counsel]

21. Costs summarily assessed in the amount of \$750 are awarded to the Respondent.

Dated this 6<sup>th</sup> day of July, 2016

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IAN RC KAWALEY CJ