[2015] JMCA App 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 57/2008

APPLICATION NOS 72 & 73/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN	**WAYNE REID** **JENTECH CONSULTANTS LTD**	**APPLICANTS**
AND	**CURTIS REID**	**RESPONDENT**

Ransford Braham QC and Mrs Sacha Vaccianna Riley instructed by Vaccianna & Whittingham for the applicants

Paul Beswick, Miss Carissa Bryan and Kayode Smith instructed by Ballantyne Beswick & Co for the respondent

16, 18 June 2014 and 23 January 2015

PANTON P

[1] These applications are for the discharge of an order of McIntosh JA made on 8 May 2014, and the grant of a stay of execution of a judgment entered on 30 April 2008 in the Supreme Court presided over by Roy Anderson J. The respondent is contending that McIntosh JA was correct in ruling that there is no appeal in existence from the

Supreme Court judgment, so the Court of Appeal is not in a position to grant a stay of execution. However, the applicants have placed two alternatives before us if we agree that there is no appeal in existence: we are being asked to either allow the purported notice and grounds of appeal filed on 11 June 2008 to stand, and so be regarded as properly filed, or grant an extension of time for filing notice and grounds of appeal.

Brief history of the proceedings

[2] The applicants were sued by the respondent for libel, and conspiracy to interfere with the respondent's contract of employment with Cable & Wireless Jamaica Ltd. The libel was allegedly contained in a report prepared by the applicants and submitted to Cable & Wireless Jamaica Ltd. The claim for libel was heard by Roy Anderson J and a special jury while the other aspect was tried by the judge sitting alone. The jury found in favour of the respondent on the libel suit and on 30 April 2008 awarded him damages of $7,000,000.00. However, it was not until 30 September 2011 that the claim for conspiracy was determined; and that determination was in favour of the applicants. So, the position is that the respondent has an award of damages for libel to collect, but his conspiracy claim against the two applicants failed.

[3] The applicants filed a notice of appeal against the decision of the special jury on 11 June 2008. In that notice, they claim that the learned judge made several errors in that he failed to make certain rulings, and to give the jury appropriate directions in law. An application for stay of execution of the judgment was filed in 2008 but, to quote McIntosh JA, there were "several adjournments for one reason or another". Eventually,

an amended re-listed application filed on 14 March 2014 was placed for hearing before McIntosh JA in Chambers. Mr Paul Beswick, attorney-at-law for the respondent raised a preliminary point before the learned judge of appeal who upheld it. The applicants are seeking to overturn that ruling of McIntosh JA.

[4] The preliminary point was to the effect that there was no valid appeal, so there was no foundation for the hearing of an application in respect of an appeal. Rule 1.11(i)(c) of the Court of Appeal Rules provides that notice of appeal is to be filed at the registry within 42 days of the date when the order or judgment appealed against has been served on the appellant. The judgment was perfected and served on 30 October 2013. This meant that both sides had 42 days after 30 October 2013 to file an appeal, that is, up to 11 December 2013. The applicants did not file an appeal during the period, but the respondent did.

[5] The learned judge expressed full agreement with Mr Beswick's submission, and held that the notice of appeal filed on 11 June 2008 is not in compliance with the time frame specified in rule 1.11(i)(c), and was therefore "incapable of supporting an application for a stay of execution". She received assistance, she said, in determining the matter from the principles enunciated in the cases **Cole's Farm Store Ltd v China Motors Ltd** [2012] JMCA App 8 and **Evanscourt Estate Co Ltd v National Commercial Bank Jamaica Ltd** SCCA No 109/2007, Application No 166/2007 – delivered on 26 September 2008.

Is there a valid appeal?

[6] Mr Ransford Braham QC, on behalf of the applicants, submitted that the interpretation contended for by the respondent is untenable, as a "prospective appellant on whom no order was served or could be served would not be entitled to apply for a stay of execution pending an appeal". In Mr Braham's view, the purpose of the Court of Appeal Rules is to facilitate the timely bringing of appeals, and the efficient and speedy disposal thereof; so, the filing of an appeal 42 days after service of the order is the outside limit for bringing an appeal. The filing of an appeal before the service of the judgment or order does not defeat the legislative purpose – it enhances it, he said. According to him, the interpretation that McIntosh JA has put on the instant rule will result in "unreasonable impractical, unfair and absurd consequences". He submitted that an entire class of persons would be excluded from the right of appeal, that is, those on whom a judgment or order need not be served – for example, where the proposed appellant is the party on whose claim the order or judgment was made.

[7] Mr Braham conceded that although the right to appeal appears unlimited, "some limitation is permitted whether in legislation or in rules". However, he relied on a decision of the Eastern Caribbean Court of Appeal in submitting that the limitations "must pursue a legitimate aim in the public interest and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": **George Blaize v Bernard La Mothe and The Attorney-General of Grenada** [HCVAP 2012/004 – delivered 9 October 2012]. That case dealt with the constitutionality of a rule that restricted a defendant's participation in assessment

proceedings after the entry of a default judgment. The rule had prevented such a defendant from cross-examining the witnesses or making submissions. It was quite rightly declared unconstitutional.

[8] Mr Beswick submitted that the applicants "were misconceived" in filing the notice of appeal and the application for a stay of execution before the serving of the judgment order. There is no proper appeal before the court, so the reliefs sought therein ought to be dismissed, he said.

[9] In respect of the type of case that was before Anderson J, rule 1.11(1) of the Court of Appeal Rules states that the notice of appeal "must be filed at the registry and served in accordance with rule 1.15 – … within 42 days of the date when the order or judgment appealed against was served on the appellant". It is clear that the order or judgment being appealed must be served on the appellant, and thereafter the notice of appeal is to be filed within 42 days of such service. If the notice of appeal is filed prior to the service of the order or judgment, it would be in clear violation of the plain words of the rule.

[10] In **Evanscourt**, Smith JA pointed to the ineffectiveness of a notice of appeal that was filed by a party prior to the receipt of leave to appeal in a situation where leave was required. The **Evanscourt** case bears some resemblance to **Edgehill and Others v Christie** [2012] JMCA Civ 16 where it was held that a fixed date claim form, filed prior to the grant of leave to apply for judicial review, was invalid as there had been non-compliance with the rule that requires the claim to be made within 14 days of

receipt of the order granting leave. In **Cole's Farm Store**, Brooks JA expressed the opinion that service of the order or judgment on an appellant was a critical factor in determining the time for filing and serving a notice of appeal.

[11] Nothing has been advanced to show that either Smith JA or Brooks JA was wrong in the views they expressed in the cases on which McIntosh JA relied. In any event, McIntosh JA was correct in her own interpretation and application of the words in rule 1.11(1)(c). On the basis of the interpretation, it is clear that the applicants have failed to comply with the requirements of the rule. Consequently, there is no valid appeal in place.

Extension of time to file appeal

[12] There being no appeal pending, the question arises as to whether time should be extended to permit the filing of an appeal. This is within the discretion of the court, as provided for in rule 1.7 which contains the court's general powers of management. Rule 1.7(2)(b) reads: "Except where these Rules provide otherwise, the court may – extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".

[13] In this case, the applicants were quite eager to file an appeal. They were procedurally wrong in how they went about it. They have not reneged from their intention to pursue an appeal against the award which, with interest, is now a substantial sum. In the circumstances, it would not be just to deny them the

opportunity to do so, notwithstanding the fact that much time has passed since the entry of the judgment. It is convenient to order that the notice of appeal that was filed on 11 June 2008 be regarded as having been filed on the date of the delivery of this judgment.

Stay of execution – submissions and decision

[14] The question now is whether there should be a stay of the execution of the judgment. Mr Braham submitted that the facts in respect of the libel suit presented a "classic qualified privilege situation" which was not addressed by the learned judge. The issue of malice was also not addressed. In addition, Mr Braham said, the learned judge failed to rule whether the words complained of were capable of bearing the defamatory meaning relied on by the respondent. He quoted from Gatley on Libel and Slander, 10th edition paragraph 34.3 in support of this point. He further contended that each of the 12 grounds of appeal was sufficiently forceful to warrant the setting aside of the jury's verdict. The grounds that have been filed are as follows:

> "a) That the learned Judge erred in failing to consider and to make a ruling and to advise the jury upon the question of law of whether there was any, or any sufficient evidence of the facts in issue fit to be left to the jury for consideration.
>
> b) That despite an application being made by the Appellants, the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law of whether the words and statements complained of were capable of bearing the meaning attributed to them by the Respondent or any other defamatory meaning.

c) That the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law as to whether there was any evidence to be submitted to the jury that the words complained of would be understood by reasonable persons to refer to the Respondent.

d) That the learned Judge erred in failing to make a ruling and to advise the jury on the question of law as to whether the report entitled "Investigation of Projects for Cable & Wireless (Jamaica) Limited" was made on an occasion of qualified privilege.

e) That the learned Judge erred in leaving it to the jury to determine the question of law of whether the report complained of was given on an occasion of qualified privilege. (page 36 of Notes of Evidence dated April 30, 2008).

f) That the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law as to whether there was any or any sufficient evidence from which malice could be reasonably inferred.

g) That the learned Judge erred in failing to specify which (if any) evidence was relevant to a finding of malice.

h) That the learned Judge erred in failing to find that the report entitled "Investigation of Projects for Cable & Wireless (Jamaica) Limited" was in fact made on an occasion of qualified privilege and that there was no or no sufficient evidence of malice.

i) That the learned Judge erred in failing to make a ruling and to advise the jury upon the question of law as to whether the facts as proved constituted a publication.

j) That the learned Judge erred in failing to withdraw the case from the consideration of the jury.

k) The verdict of the jury is manifestly unreasonable and perverse.

l) The award of damages in the sum of $7,000,000.00 is manifestly unreasonable and excessive."

[15] In the circumstances, the applicants are seeking a stay of execution of the judgment until the determination of the appeal. They have pointed to the fact that the respondent also has an appeal pending, and have suggested that both appeals be heard together in the interest of time and in consideration of the resources of the court. The applicants have also suggested that if the court were to grant a stay, there could be a condition for the payment into an interest bearing account of a portion of the judgment debt. They said that a formula had been agreed earlier with the respondent (that is, shortly after the trial) as regards the amount to be paid into the account. At the time of the agreement, the amount was calculated at $2,000,000.00. Today, submitted the applicants, that sum would be $3,857,000.00.

[16] Mr Beswick submitted that there should be no stay of execution, given the time that has passed since the judgment and the fact that the applicants had not filed and pursued a proper appeal. He also urged the court to consider that the respondent, being over 80 years old, does not have the energy and resources to deal with appellate proceedings in this matter. It is not known how this will affect the respondent's own appeal. In addition, he submitted that the applicants had no real prospect of success on appeal.

[17] We are not happy that the proceedings have been before the court for such a long time. However, the court has to be guided by the relevant principles in relation to each application, whatever its age or the age of the parties. The overriding principle is that justice has to be done. In the instant case, there is a serious complaint that the learned judge did not make appropriate rulings and did not give the necessary directions to the jury. If that is shown to be so, it would be unjust for the respondent to have received a monetary award arising from a flawed trial process.

[18] The area of law that has given rise to the challenge by the applicants is not one that is free of difficulty, taking into consideration how judges have dealt with it over the years. There are certain principles that are settled, but it is not unknown for mistakes to be made by judges all over the Commonwealth in the application of those principles. The law reports show this. The relevant principles under consideration are as follows:

a) it is for the judge to decide whether words are capable of bearing a defamatory meaning, and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it;

b) whether a defendant was actuated by malice is a question of fact for the jury;

c) whether there is evidence of malice is a question of law for the judge;

d) it is for the judge to determine whether an occasion is privileged and therefore to decide whether the defendant was under a duty to make the communication that has given rise to the action.

[19] The respondent has exhibited, through Miss Carissa Bryan, attorney-at-law, portions of the transcript of the summation by the learned judge. Whereas it may be argued that he gave adequate directions in respect of items (b) and (c) above, the transcript does not give that satisfaction in respect of items (a) and (d). In a case of this nature, it would have been critical for the judge to determine and state clearly whether the occasion was privileged, and whether the applicants were under a duty to make the communication. There is nothing to rebut the applicants' allegation that the judge did not do so.

[20] In the circumstances, the appeal is one that has prospect of success. Given this finding, and taking into consideration the earlier agreement between the parties, it is appropriate to order a stay of execution of the judgment on condition that the applicants make a deposit of $5,000,000.00 in an interest-bearing account in a reputable institution in the names of the attorneys-at-law pending determination of the appeal.

Co-operation

[21] The Supreme Court has been tardy in supplying the relevant documents. However, the documents before us do not explain why the parties have not co-operated to put before the court the transcript of the proceedings (or the relevant parts thereof) which seems to be available, and to arrange for case management to be followed by the listing of the matter for hearing. There is no need in an appeal of this nature for every sentence that was transcribed at the trial to be placed before the appellate court. Relevance and brevity are important. They assist in speedy disposition of matters.

Furthermore, the rules of court anticipate co-operation at every step of the way by the parties involved in litigation. It is hoped that the parties will see wisdom in working together with a view to disposing of the appeals as soon as possible.

DUKHARAN JA

[22] I agree with the reasoning and conclusion of the learned President, and there is nothing more that I can add.

MANGATAL JA (Ag)

[23] I have read in draft the closely reasoned judgment that has been written by the President. I agree with it and have nothing to add.

PANTON P

ORDER

1. The application to discharge the order of McIntosh JA made on 8 May 2014 is refused.

2. The notice of appeal filed on 11 June 2008 is deemed to have been filed today.

3. Application for a stay of execution of the judgment of the special jury delivered on 30 April 2008 is granted until the hearing of the appeal; on condition that the appellants deposit the sum of $5,000,000.00 in an interest-bearing account in a reputable institution in the names of the attorneys-at-law for the parties.

4. Half costs of the applications to the respondent to be agreed or taxed.