[2019] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 111/2016

MOTION NO 12/2018

BEFORE: THE HON MISS JUSTICE PHILLIPS P (AG)
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**PATRICK ALLEN**	**APPLICANT**
AND	**THERESA ALLEN**	**RESPONDENT**

Lemar Neal instructed by Nea|Lex for the applicant

Joseph Jarrett instructed by Joseph Jarrett & Company for the respondent

11, 12 February and 8 March 2019

PHILLIPS P (AG)

[1] This is an application by way of notice of motion for conditional leave to appeal to Her Majesty in Council from the judgment of this court delivered on June 8 2018, which dismissed the appeal from the order of Wint-Blair J (Ag) (as she then was), who upheld the orders made by F Williams J (as he then was) on 8 May 2015.

[2] The application was also seeking an order that execution of the judgment be stayed pending the outcome of the appeal to Her Majesty in Council.

[3] The matter commenced with a fixed date claim form filed 15 June 2012, in which the respondent claimed an interest, under the Property (Rights of Spouses) Act (PROSA), in property located at Brown's Town, Ewarton, in the parish of Saint Catherine, recorded at LNS 4530 Folio 143, and registered under the Facilities for Title Act. She claimed that she had solely financed the project. The applicant had denied that she had any interest in the property. Any monies that she had paid were paid as a gift to him.

[4] The parties were referred to mediation. They agreed that he had an interest of 65% and she had one of 35%. The mediator's report to the court indicated that the parties had arrived at full agreement. The Supreme Court registry had issued a notice of appointment to approve the mediation settlement. However, on the date appointed to hear the application, the applicant and his attorney were absent from court. F Williams J having satisfied himself that the application had been properly served, proceeded with the application in their absence, and made an order in terms of the mediation agreement and report. The applicant thereafter applied to set aside that order on the basis that there were further matters to be discussed, mainly the mortgage payments. Wint-Blair J (Ag), who heard the application, refused to do so.

[5] The applicant appealed. On 8 June 2018, the appeal was dismissed by a majority. The orders made by the majority of the court (Phillips and McDonald-Bishop JJA, with Edwards JA (Ag) dissenting) are set out below:

> "1. The appeal is dismissed.

2. The order made my F Williams J is hereby amended to add 'by consent'. All orders made by F Williams J remain.

3. The attorneys-at-law for the parties are to sign the order made by F Williams J within 14 days of the date of this order, failing which, the order shall be filed in the registry for sealing, be sealed, and thereafter implemented by the respondent as an order of the Supreme Court.

4. The stay of execution of the order made by F Williams J on 8 May 2015, granted by Wint-Blair J (Ag) on 23 November 2016 is discharged.

5. Costs both here and in the court below to the respondent to be agreed or taxed."

The applicant therefore filed thus notice of motion pursuant to sections 110(1)(a) and 110(2) of the Constitution of Jamaica (the Constitution).

[6] The applicant relied on several grounds in respect of the application. I have endeavoured to summarize them, as follows:

1. Pursuant to section 110(1)(a) of the Constitution, the appeal in the matter was as of right, being a final decision in a civil proceedings over the value of $1,000.00.

2. Pursuant to section 110(2) of the Constitution the applicant can pursue an appeal with leave of this court, if the court is of the opinion that the questions involved are of great general and public importance.

As this appeal falls into that criterion, the appeal ought to be determined by Her Majesty in Council.

3. The questions referred to in no 2 above are set out below as to whether:

"(i) on a true interpretation of Parts 74.12 and 42.7 of the Civil Procedure Rules, an agreement reached at mediation is evidence from which the court can make a consent order without any further actions by the parties;

(ii) on a true interpretation of Parts 74.12 and 42.7 of the Civil Procedure Rules, litigants who are sent to mandatory mediation and having reached an agreement, they are deemed to have automatically consented to a court order being made once the report on the mediation is filed at court;

(iii) an Attorney-at-Law can be compelled by the court to sign a consent order on behalf of his client where he has no instructions to do so;

(iv) on a true interpretation of Parts 74.12 and 42.7 of the Civil Procedure Rules, the court can make a consent order in the absence of a party and/or his counsel by relying on the content of an agreement reached at mediation;

(v) the requirements in Rule 42.7(5) are matters of form and not substance so much so that the absence of the words 'by consent' and the absence of the signature of a party and/or his attorneys-at-law from an order, does not affect the order being made by consent.

(vi) the [Civil Procedure] Rules which are procedural by nature were intended to reverse or have reversed the well-established common law position in relation to consent orders."

[7] The applicant relied on a further ground, that is, that if the stay of execution was not granted, the appeal would be rendered nugatory, as the respondent could dispose of the property in order to obtain her share of the proceeds, and he would be ruined. Additionally, there was no certainty of recovering those funds once the premises had been sold by the respondent, especially since the respondent did not reside in Jamaica, and had given a power of attorney to Miss Jacinth Baker to pursue legal proceedings on her behalf. The respondent would not be prejudiced by the grant of the stay. It would merely postpone her right to enforce the judgment, should she succeed in the appeal.

[8] Mr John Clarke, counsel for the applicant, filed an affidavit sworn to on 29 June 2018, in support of the application. In that affidavit, he referred to the majority judgment of the Court of Appeal delivered on 8 June 2018. He maintained the position that the appeal was one which would lie as of right to Her Majesty in Council. He restated the questions set out in the application, and attached the "Certificate of Result of Appeal" issued by the court pursuant to rule 2.18(1) of the Court of Appeal Rules (CAR).

[9] The applicant also swore to an affidavit on 16 July 2018, in support of the application, with particular reference to the stay of execution of the judgment. He referred to the grounds of the application, and emphasized his concern that if the stay of execution was not granted, the possibility of the sale of the property loomed large, and once the respondent had enforced the judgment and possibly disposed of the property, and taken her share of the proceeds, he would be ruined, as there was no

certainty of his recovering what the respondent would have obtained upon enforcing the judgment. Additionally, he reiterated that the stay of execution would not cause her any prejudice.

Submissions

[10] Counsel for the applicant indicated that the appeal was one that lay as of right to Her Majesty in Council. He argued, that using the "application approach", which is well recognised in these courts as the way to discern whether an order is an interlocutory or final order, whichever order had been made by Wint-Blair J or by this court, the matter would have been at an end, so the order was therefore a final one. He said that in dismissing the appeal, the court had "...basically affirmed the existence of a consent order which brought the matter to an end. All that remained is for the consent order to be enforced in the ordinary way as if it were a judgment of the court". Counsel stated that even if the Court of Appeal had allowed the appeal, the matter would still be at an end, as the mediation agreement would still remain, but would have to be enforced by separate action as the previous action would have come to an end by the compromise. Counsel said, as the claim related to property with a value in excess of $1,000.00, the appeal was clearly one as of right.

[11] At the hearing of the notice of motion, counsel was asked by this court to address the principles emanating from the recent decision of the Judicial Committee of the Privy Council, in **Meyer v Baynes** [2019] UKPC 3, a case from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda). In keeping with that request, counsel for the applicant submitted further written submissions which

acknowledged that the Court of Appeal retained control over further appeals to Her Majesty in Council as of right. He indicated that this control allowed the Court of Appeal to "police" these applications in order to consider whether the proposed appeal raises a genuinely disputable issue.

[12] Counsel for the applicant also maintained that the order of the court was a final one, as whichever way the application before the Supreme Court was determined, it would have been dispositive of the claim "through the court system", as the claim "would have merged into either the consent order or the mediation agreement". He insisted that the questions posed, particularly those numbered 1, 3 and 6, raised important issues dealing with novel areas of civil procedure, which had produced a decision of the highest court in Jamaica that had not been unanimously reached. He insisted that if the applicant succeeded, the consent order would be set aside, and the respondent would have to decide whether to commence a fresh action to enforce the mediation agreement, or return to mediation to resolve any outstanding issues. These matters, he said, demonstrated that the appeal raised genuinely disputable issues.

[13] Mr Joseph Jarrett, counsel for the respondent objected to the application on several grounds. He indicated that the appeal did not raise any issues of great general or public importance. The applicant's rights, he submitted, had not been infringed as he had not been deprived of any interest in the property but had been accorded a 65% interest in the same. He posited that the potential costs to pursue an appeal to the Privy Council far outweighed any value of the property.

[14] Counsel for the respondent also asserted that the applicant has no realistic prospect on appeal to Her Majesty in Council since:

(i) the mediation agreement was signed by the applicant and will remain irrespective of the outcome of the appeal;

(ii) the order of F Williams J was in the exact terms of the mediation agreement;

(iii) there were no outstanding issues which required further deliberations at mediation or the intervention of the court;

(iv) the allocation of 65% interest in the property instead of equal shares, illustrates that account was taken of the mortgage payments;

(v) the mediation agreement was signed by the parties and the mediator dated 24 February 2015, and represented the final report without any unfinished business; and

(vi) the mediation report stated that the parties had arrived at a final agreement and does not support the applicant's contention at all.

[15] Counsel for the respondent also asserted that since notice containing the date for making the formal order had been properly served, F Williams J was entitled to

make the consent order in the absence of the applicant and his attorneys-at-law. Counsel for the respondent further argued that the failure to consent was of no consequence as the order follows the mediation agreement to the letter. The action taken after the signing of the mediation agreement was in full compliance with rule 74.12 of the Civil Procedure Rules 2002 (the CPR), and the court was bound to make an order in compliance with the report pursuant to rule 74.11 of the CPR. He invited the court to make note of the fact that the applicant's then counsel had commenced implementation of the order which confirmed that there were no outstanding issues. Any defects in the order were cured by virtue of section 10 of the Judicature (Appellate Jurisdiction) Act.

[16] The respondent's counsel finally asserted that the applicant failed to establish that a different order would have been made had they been present before F Williams J. He also asserted that the fact that the respondent resides abroad is of no consequence since there is a signed mediation agreement which allows the registrar to execute all the necessary documents to effect a sale and transfer of the property. In all these circumstances he stated that the judgment of the Court of Appeal was arrived at after careful deliberation on all the relevant issues, and there is no reasonable prospect of it being overturned on appeal.

Discussions and analysis

[17] It is well acknowledged and accepted that the application for conditional leave to appeal to Her Majesty in Council can be made pursuant to sections 110(1) and (2) of the Constitution. Those provisions read as follows:

"110. (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-

(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and

(d) such other cases as may be prescribed by Parliament.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament."

[18] There are also several authorities which have assisted in the interpretation to be accorded those sections. With regard to section 110(1)(a), the application approach is to be utilised in order to ascertain whether the order can be considered an interlocutory one or is a final order. Utilising that approach, if whichever way the matter is decided

the application before the court would come to an end, then the order is final. However, if on either situation the matter will not end but will continue in the process, then the order made is interlocutory, and even if the matter in dispute is of the value of $1,000.00 and upwards, or the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of $1,000.00 or upwards, the appeal will not lie to Her Majesty in Council as of right.

[19] The law lords have brought further clarity to this particular section in **Meyer v Baynes**, as the Board in considering the interpretation of sections similar to section 110(1), with regard to the threshold requirement that had to be met, stated that the real question was whether the Court of Appeal retained any control over a further appeal. The Board noted that the issue had arisen in several cases, and Lord Kitchin on behalf of the Board, referred in particular to the decision of the Board in **A v R (Guernsey)** [2018] UKPC 4, an appeal from the Court of Appeal in Guernsey. In **A v R (Guernsey)**, Lord Hodge, in giving the decision of the Board, explained that an appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. He stated further in paragraph 8 of that judgment:

> "Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court has power to make sure there is a genuinely disputable issue within the category of cases which are given leave to appeal as of right. Thus in *Alleyne-Forte* A-G [1997] 4 LRC 338 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (at 343)

> 'An appeal as of right, by definition means that the Court of Appeal has no discretion to exercise. All that is required, but this *is* required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case...'"

[20] Lord Kitchin indicated that the above reasoning equally applied to the appeals from the Eastern Caribbean Supreme Court (Antigua and Barbuda), and I would not hesitate to agree that the above dictum is equally applicable to appeals to the Privy Council from Jamaica. I readily accept the guidance from the law lords that the "Court of Appeal has the right to police applications of this kind and to consider whether any proposed appeal raises a genuinely disputable issue".

[21] In the instant case, in spite of the valiant effort made by counsel for the applicant, I find that I am compelled to say that I see no genuinely disputable issue in the matter before us that requires consideration before Her Majesty in Council. This can be seen on the basis of the examination of the questions involved in the appeal, as in my opinion, they are not of any great general or public importance or otherwise.

[22] There have also been several authorities which have dealt with and given clarity to the interpretation of those words in section 110(2) of the Constitution. In **The General Legal Council ex parte Elizabeth Hartley v Janice Causewell** [2017] JMCA App 16, McDonald-Bishop JA, in giving the judgment of the court, canvassed some of the recent relevant cases from this court on the subject, and set out certain

principles distilled therefrom. I am grateful for the comprehensive analysis given in that case and can only do justice to the same if I repeat them here as follows:

> "i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
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> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.
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> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.
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> iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.
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> v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.
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> vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.
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> vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.
>
> viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise." (paragraph [26])

[23] In the instant case, the applicant has failed to persuade me that the questions are of great general and public importance. The judgment of this court was quite detailed and comprehensive. It included a synopsis of the raison d'être for the development of mediation as an important and useful amendment to the CPR. The rules were promulgated pursuant to the power given the Rules Committee of the Supreme Court established under the Judicature (Rules of Court) Act. The rules are not intended to, nor do they attempt to reverse the well-established common law position in relation to court orders. The rules therefore have modified the previous practice that existed through the common law, and set out a procedural path for the agreement to be enforced by way of a consent order of the court.

[24] Part 74 of the CPR deals with the mediation regime. This was introduced as an alternate method of dispute resolution, being court-driven, and is a method by which parties now have the opportunity to resolve their disputes timeously, and avoid very protracted expensive civil litigation. Part 74 sets out in detail how the mediation regime is to operate, and interacts with Part 47, which deals with judgments and orders, as parties who resolve their issues by way of settlement expect to obtain the fruits of their agreement expeditiously. There is clear interplay between Parts 74 and 47 of the CPR as it was intended that they operate together.

[25] In this case, the process was followed to the extent that the parties participated in the mediation; arrived at an agreement; signed the same; their attorneys witnessed it; the mediator signed it; the report was prepared and signed by the mediator; and signed by the attorneys representing the parties. The report was filed. The learned judge made an order in terms of the mediation agreement and the mediation report. It was clearly a consent order made pursuant to the mediation agreement and the mediation report. There is no question that the parties had consented to the matters that were represented in the consent order made by the court, which was evidenced by their respective signatures on the agreement.

[26] The attorneys are not being compelled by the order of the Court of Appeal to sign the consent order. The order on its face discloses that. It provides as an alternative that, if they failed to do so, the order would be filed and sealed and thereafter implemented as an order of the Supreme Court. The absence of the parties in the circumstances was therefore not of any consequence, as the consent order must reflect the agreed terms of the mediation agreement. In fact, there is no provision in the CPR requiring the parties to attend court for the approval of a mediation settlement, and that is consistent with the fact that the signature of the parties, though required on the mediation agreement, is not required on the consent order.

[27] It is also significant in this matter that the applicant is not contending that the mediation agreement was arrived at through any misapprehension or procured by fraud. He has not sought to have the mediation agreement itself set aside. What is therefore clear is that if the applicant were to succeed before the Privy Council, the

mediation agreement would still be extant. The mediation report signed by the mediator stated that the parties had reached full agreement. The applicant's position that he could then decide whether to: (i) file a fresh action to enforce the mediation agreement, or (ii) return to mediation to resolve additional matters, is not in my opinion sustainable as an argument worthy of debate before the law lords.

[28] The effort to obtain an order to return to mediation to address additional matters seems to me to be what this application is all about. Having failed before F Williams J, Wint-Blair J (Ag) and in the Court of Appeal by a majority, the applicant seems bent on obtaining an order in relation to matters that have been settled, even though not pleaded. This is not in my opinion what was envisaged by section 110(2) of the Constitution.

[29] Indeed, the questions posed by the applicant arise, as he stated, from the dissenting judgment of the court. That too is not acceptable as the questions must arise from the decision of the court, or it will not be regarded as one based on the judgment of this court, worthy of serious debate.

[30] Additionally, the matters discussed in the application before us were not important questions on any serious issue of law. Although the interpretation of certain provisions of the CPR will ultimately bind all litigants, it is my view that this case really turns on its own particular facts, and this court is best able to discern and determine procedural matters. The matter ought not in any event to be taken to the Privy Council to see what the law lords would make of it. The dicta in all the cases have frowned on

that approach. It must be one of some great and general importance to some area of practice procedure and administration of the law and the public interest. There is nothing of that nature in this case.

[31] Bearing in mind the position I have taken, I do not think that it is necessary to address the issue of the stay of execution of the judgment. In my view, section 6 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, would permit the application to be made, as the judgment on appeal does require the applicant to do an act, firstly to facilitate the signing of the consent order thereafter payment of the respondent's interest in the premises. However, given the circumstances, and the order I propose to make, such an order would no longer have to be considered or determined.

[32] In the light of all of the above, I would dismiss the application with costs to the respondent to be taxed if not agreed.

STRAW JA

[33] I have read in draft the judgment of my learned sister Phillips P (Ag). I agree with her reasoning and conclusion and have nothing to add.

FRASER JA (AG)

[34] I too have read in draft the judgment of the learned President (Ag). I agree with it and have nothing to add.

PHILLIPS P (AG)

ORDER

The application for leave to appeal to Her Majesty in Council is refused. Costs to the respondent to be taxed if not agreed