[2012] JMCA App 40

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO 70/2011

APPLICATION NO 256/2012

BETWEEN HAROLD BRADY APPLICANT

AND THE GENERAL LEGAL COUNCIL
(Ex parte, Alva Langley and Rarane Langley) RESPONDENT

Submissions filed by Henlin Gibson Henlin for the applicant

Submissions filed by Myers Fletcher and Gordon for the respondent

24 December 2012

(Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] The applicant, Mr Harold Brady, failed in his bid to have this court set aside the decision of the General Legal Council (the Council) to impose a sanction against him, as an attorney-at-law in practice in this country. His appeal was dismissed and consequently the Council filed a bill of costs claiming the sum of $1,328,604.00 in respect of its legal fees and expenses incurred in connection with the appeal. Mr Brady

failed to file his points of dispute in respect of the bill of costs within the prescribed time and, as a result, the registrar of this court, on 19 November 2012, properly issued a default costs certificate in the sum mentioned above.

[2] Mr Brady now seeks to set aside the default costs certificate and asks that the points of dispute document, which was filed on 23 November 2012, be permitted to stand. His application asserts that:

(1) the delay in filing the document was due to oversight;

(2) the delay in filing was not long;

(3) the amount claimed by the bill of costs is unreasonable and it would be oppressive to allow it to stand.

In addition to that application Mr Brady also seeks a stay of the execution of the bill of costs pending the outcome of an appeal to Her Majesty in Council, which appeal he seeks to pursue.

[3] The Council resists the application on the bases that there is no jurisdiction to grant a stay of the execution of the bill of costs and that no evidence has been given to allow the exercise of a discretion to set aside the bill of costs. According to the attorneys for the Council, since the application for the stay has not been made as part of Mr Brady's motion for permission to appeal to Her Majesty in Council, the jurisdiction of the court "in relation to appeals to the Court of Appeal does not allow it [to] make an order in terms" of that sought by Mr Brady.

[4] As their second major point, the Council's attorneys-at-law submitted that there was no legal basis for granting a stay of execution where the issue is the payment of costs. They cited, in support of that position, the case of **Jamaica Flour Mills Limited v West Indies Alliance Insurance Company Limited and Others** (1997) 34 JLR 244.

[5] Thirdly, the attorneys-at-law argue that a single judge of this court has no authority to grant the order requested by Mr Brady "given the use of the term "the Court" in [the Civil Procedure Rules] CPR 65.22, as amended, and [the Court of Appeal Rules] CAR 1.18(3)". In support of the latter submission, the attorneys-at-law cited the decision of Phillips J in **The Attorney General of Jamaica v John McKay** [2011] JMCA App 26.

[6] The attorneys-at-law who filed the application on behalf of Mr Brady have refuted the submissions of the Council's attorneys-at-law, and submitted that the cases cited were distinguisable from the instant case.

The law

[7] I agree with Mr Brady's attorneys-at-law that **The Jamaica Flour Mills** case is distinguishable from the facts of the instant case. The point, which this court accepted as being valid, in **The Jamaica Flour Mills** case, was that an "order for costs...is not one which requires 'the appellant to pay any money or do any act', as is specified in rule 6 of The Jamaica (Procedure in Appeals to the [sic] Privy Council) Order in Council

1962". In the instant case, Mr Brady has been ordered to pay the amount of the taxed costs.

[8] Despite that finding, I find that Mr Brady's application for a stay of execution "pending the outcome of the appeal to Her Majesty in Council" is, nonetheless, premature. This is because there is, as yet, no appeal to the Privy Council in place. His application for a stay ought to be made at the time of the application for permission to appeal to the Privy Council. At that time, Mr Brady would have known whether permission has been given.

[9] Were it not for the order that I shall make below, I would have, in order to minimise the costs involved, adjourned this aspect of the application for hearing when the motion for permission to appeal is set to be heard. Such an order is however unnecessary as a result of the discussion which will follow.

[10] I have recently had the opportunity to consider the powers of a single judge of this court with respect to applications to set aside default costs certficates. It was my finding then, and I am still of opinion, that a single judge of this court may consider and grant an application to set aside a default costs certificate. It is a power that this court has in order to control its own process (see **Rodney Ramazan and Another v Owners of Motor Vessesl (CFS Pamplona)** [2012] JMCA Civ App 37). I therefore cannot agree with the Council's attorneys-at-law on the issue of jurisdiction. The case of **The Attorney General of Jamaica v John McKay** is distinguishable from the instant case as this is not an application for permission to appeal.

[11] Rule 65.22, to which the Council's attorneys-at-law referred, is the starting point of the assesment of Mr Brady's application. The rule states:

> "65.22 (1) **The paying party may apply to set aside the default costs certificate**.
>
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it." (Emphasis supplied)

For the purposes of this judgment, Mr Brady is the paying party and the Council is the receiving party.

[12] The question that remains is whether Mr Brady has satisfied the requirements to have the default costs certificate in this case, set aside. The authorities seem to suggest that the certificate may be set aside for "good reason". It would seem that in considering whether good reason exists, the court should consider, at least:

(1) the circumstances leading to the default;

(2) whether the application to set aside was made promptly;

(3) whether there was a clearly articulated dispute about the costs sought;

(4) whether there was a realistic prospect of successfully disputing the bill of costs;

There is an overlap between these considerations and those in respect of applications for relief from sanctions. Rule 2.20(4) of the CAR requires a consideration of the principles of relief from sanctions applies in circumstances such as these. The rule states:

"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."

In my view, an application to set aside a default costs certificate easily qualifies as an application for relief.

Application to the instant case

(a) Was the application made promptly?

[13] The deadline for filing the points of dispute was 16 November 2012. Mr Brady filed his points of dispute document on 23 November 2012 but the default costs certificate was issued by this court on 19 November 2012, that is, before he filed.

[14] His present application was filed on 12 December and, based on an exhibit attached to his affidavit, filed in support of the application, the Council's attorneys-at-law would have served him with the default costs certificate either on or before 4 December 2012. Giving him the benefit of the uncertainty as to the exact date of service, I find that Mr Brady made the application promptly.

(b) Was the application supported by evidence on affidavit?

[15] Mr Brady did support his application with an affidavit.

(c) Is there a good explanation for the failure?

[16] At paragraph 4 of his affidavit in support, Mr Brady deposed that his points of dispute document "was prepared and ready for filing but due to oversight in [his] office it was not filed and served until November 23, 2012". He did not elaborate on how the "oversight" was occasioned. Despite the sparse nature of the explanation, I would not

consider it fatal to the application. It also communicates the concept that the default was not intentional.

(d) Has the applicant generally complied with other orders, rules and directions?

[17] There is no indication of any previous delay or default by Mr Brady in carrying out any of the orders, directions or rules of this court.

(e) Was the default the applicant's or that of its attorneys-at-law?

[18] Mr Brady's affidavit seems to indicate that he had direct control of the conduct of the matter, through the auspices of his firm Brady & Co. He does not seek to throw the blame for the default on anyone else. That, by itself, does not prohibit him from securing relief.

(f) Can the default be remedied within a reasonable time?

[19] The document has already been prepared and filed. All that is required is an order allowing it to stand as filed.

(g) How soon can the taxation be held?

[20] The taxation is not likely to be unduly delayed if this application were granted.

(h) What effect would the granting of relief or not have on each party?

[21] Granting the relief would delay the payment of the costs to the Council. If, however, Mr Brady is correct in his assertion that the bill of costs is "exhorbitant and does not represent a reasonable estimate of the costs incurred" by the Council's attorneys-at-law, then it would be appropriate to set aside the certificate.

(i) Is there a real prospect of success in having the claimed costs reduced?

[22] Unfortunately, Mr Brady has not set out in his affidavit, the basis on which he had arrived at the assertion that the bill of costs is exhorbitant. A perusal of his points of dispute document mainly asserts that the "time charge" for carrying out the tasks is unreasonable. He does, however, point to the fact that the attorneys-at-law have charged for the time spent by more than one attorney-at-law perusing the same documents. This could amount to be a duplication of some of the charges. In the absence of authorisation from this court for such an approach, it would seem that Mr Brady has clearly articulated points of dispute and does have a realistic prospect of success in attacking the bill of costs.

(j) What do the interests of the administration of justice demand?

[23] The interests of the administration of justice consider would not be severely prejudiced by granting this application.

Conclusion

[24] Based on all the above, I hold that the application to set aside the default costs certificate ought to be allowed.

Order

[25] (1) The default costs certificate, issued herein on 19 November 2012, is set aside.

(2) The applicant's points of dispute document, filed herein on 23 November 2012, is permitted to stand as filed.

(3) The respondent's bill of costs shall be taxed by the registrar of this court, and the applicant shall be allowed an opportunity to participate in the taxation proceedings and, in particular, in respect to his points of dispute.

(4) Costs of the application to the respondent. Such costs are to be taxed if not agreed.