[2014] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 25/2011

APPLICATION NOS 44 AND 65 /2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**JULIET BROWN**	**1ST APPLICANT**
AND	**ORVILLE ONIEL BLACK**	**2ND APPLICANT**
AND	**HENRY MONCRIEFFE**	**RESPONDENT**

Miss Dorothy Lightbourne QC instructed by Lightbourne & Hamilton for the applicants

Mrs Ingrid Lee-Clarke Bennett and Miss Ayodeji Bernard instructed by Pollard Lee Clarke & Associates for the respondent

19, 20, 22 May and 6 June 2014

MORRISON JA

[1] I have had the pleasure of reading in draft the judgment prepared by Mangatal J (Ag) in this matter. I am in complete agreement with it and have nothing to add.

DUKHARAN JA

[2] I too have read in draft the judgment of Mangatal J (Ag) and agree with her reasoning and conclusion.

MANGATAL JA (Ag)

[3] On 22 May 2014, after considering arguments in respect of two applications heard by this court on 19 and 20 May 2014, we made the following orders:

> "(1) The application for extension of time filed on 28 April 2014 is refused.
>
> (2) The application to strike out the Notice of Appeal dated and filed 24 February 2011, filed on 19 March 2014 is granted.
>
> (3) Costs of both applications are awarded to Mr Henry Moncrieffe to be taxed if not agreed."

At that time we promised to put our reasons in writing at a later date. These are our reasons.

[4] The application which was first in time was that of Henry Moncrieffe ("the respondent") filed 19 March 2014. This application ("the striking out application") sought the following orders:

> "1. That Notice of Appeal dated and filed 24th February 2011 is struck out.
>
> 2. That the Notice of Application dated 9th February 2012 and filed February 10, 2012 is struck out.
>
> 3. Costs to the Applicant."

[5] Numerous grounds were stated for making the striking out application, among them being the following:

> " …
>
> 4. That on 2nd December 2010, the Hon. Mr Justice D.O. McIntosh granted leave to the Respondents to appeal the

Court's refusal of an application by the Respondents… and the Respondents having obtained said leave proceeded to file and serve a Notice of Appeal on the 24th of February 2011 in breach of Court of Appeal Rules 2002, Rule 1.11(1)(b);

5. That the Notice of Appeal having been filed outside of the period … and the Respondents having not obtained an extension of time for the filing and service of the …Notice of Appeal, that no appeal lies before the Court and the Notice of Appeal is a nullity being void *ab initio*;

…

7. That there has been inordinate delay on the part of the Respondents which has amounted to and is amounting to prejudice to the Applicant;

8. That the Respondents' Notice of Appeal and Notice of Application for Court Orders amount to an abuse of process and affects [sic] the just disposal of the matter;

9. Pursuant to the Overriding Objective and the Inherent jurisdiction of the Court;"

[6] The second application is that of Juliet Brown and Orville Oniel Black ("the applicants") filed 28 April 2014. That application ("the extension of time application") appears to have been prompted by the striking out application. It sought the following orders:

"1. That the time for filing Notice and Grounds of Appeal be enlarged to the 24th day of February 2011, the date on which it was filed.

2. That the Notice and Grounds of Appeal filed be served on the Respondent's Attorneys-at-law within three (3) days of this Order."

[7] A number of grounds for this application were stated, among them being the following:

"…

3. That the delay in filing the Notice and grounds of Appeal was due to inadvertence and an oversight on the Appellants/Applicants' part during the period when the offices of their Attorneys was [sic] undergoing staff changes.

…

5. That pursuant to the Court of Appeal Rule 1.11(2) the court may extend the time for filing the Notice and Grounds of Appeal."

[8] Given the nature of the applications and their interrelationship, we took the view that, although the striking out application was the earlier of the two filed, the extension of time application should be dealt with first.

Background

[9] It is useful to set out the background to this matter. The claim was filed by the respondent in the Supreme Court in May 2006. The respondent averred that he was a pedestrian who was injured whilst walking along Lodge main road in Saint Mary on 4 August 2003, when the second applicant so negligently and/or deliberately and/or willfully drove the first applicant's vehicle and caused it to collide with the respondent.

[10] The applicants filed a defence in December 2006, in which they denied liability for the accident and for the respondent's injuries.

[11] On 14 March 2008, a number of case management orders were made, including the following:

"1. Standard disclosure to take place on or before 15th August 2008.

2. Inspection to take place on or before 29th September 2008."

[12] At the pre-trial review on 10 March 2009, D. McIntosh J made a number of orders, including the following unless order concerning the applicants:

> "Defendant [sic] is hereby permitted to comply fully with all Case Management Conference orders made on the 14th day of March 2008 by the 24th day of March 2009 or the Defendants' case to stand as if struck out."

[13] On 30 June 2009, the respondent's Attorneys-at-law having taken the view that the applicants had failed to comply with the unless order, filed a "Request for Entry of Judgment Without Trial After Striking Out" pursuant to rules 26.3 and 26.5 of the Civil Procedure Rules, 2002 ("the CPR"). As required by rule 26.5, the respondent certified a number of matters, including the following:

> "…
>
> vii. The defendants have not complied with the unless order made by the Honourable Mr Justice Donald McIntosh on the 10th day of March 2009.
>
> viii. The non compliance relates to a failure to comply with the order for Standard Disclosure and by virtue of that the order for there to be inspection.
>
> ix. The Defendants have failed to disclose having not served the Claimant with a list of documents.
>
> …
>
> xi. The claim is for damages for personal injury as such the amount of damages ought to be assessed by this Honourable Court."

[14] Judgment was entered by the deputy registrar in favour of the respondent for damages and interest to be assessed, and with costs.

[15] On 5 August 2009, the applicants filed an application for relief from sanctions, which asked for certain orders including the following:

> "1. That pursuant to Rule 26.8 of the Civil Procedure Rules 2002 as amended, the Applicants be granted Relief from sanctions for allegedly failing to comply with the Unless order made on the 10th day of March, 2009.
>
> 2. That the claim bearing no. 2006 HCV01833 be relisted and placed on the trial list and be treated as a priority and given an early trial date …" (underlining emphasis provided)

Some of the stated grounds on which the order was being sought are as follows:

> "(i) The applicants did in fact comply with all Orders made at Case Management Conference contrary to the determination made by the Deputy Registrar and the Applicants puts [sic] the Respondent to strictly prove its[sic] own compliance
>
> (ii) That if the Court finds that the Applicants have not complied such non compliance was not intentional.
>
> (iii) The Applicants have a good explanation for failing to comply with the Case Management Conference Orders and same was not due to any willful act, default and/or omission on the part of the Applicants
>
> (iv) The Applicants has [sic] generally complied with all other orders, Rules and practice directions.
>
> (v) The Applicants have complied with all the Orders at Case Management Conference.
>
> (vi) The granting of the foregoing orders would not substantially prejudice the Claimant in the conduct of his case.
>
> …" (underlining emphasis provided)

[16] Rules 26.8(1), (2) and (3) of the CPR, which provide for relief from sanctions, state:

> "Relief from sanctions
>
> (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that-
>
> (a) the failure to comply was not intentional;
>
> (b) there is a good explanation for the failure; and
>
> (c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.
>
> (3) In considering whether to grant relief, the court must have regard to-
>
> (a) the interests of the administration of justice;
>
> (b) whether the failure to comply was due to the party or that party's attorney-at-law;
>
> (c) whether the failure to comply has been or can be remedied within a reasonable time;
>
> (d) whether the trial date or any likely trial date can still be met if relief is granted; and
>
> (e) the effect which the granting of relief or not would have on each party.
>
> …"

[17] Notwithstanding the fact that rule 26.8 (1) states that an application for relief from sanctions must be made promptly and should be supported by an affidavit, the applicants did not file an affidavit in support of the application until 19 April 2010. This was an affidavit sworn to by the attorney-at-law who then had conduct of the matter, Mr Sheldon Codner, headed somewhat inappropriately (given the length of time that had elapsed), "Affidavit of Urgency". This was followed by the affidavits of the first and second applicants respectively which were not filed until 23 November 2010. It should be noted that throughout these affidavits, the affiants erroneously insisted that there had in fact been compliance with the case management orders.

[18] On 2 December 2010, the application, which was vigorously opposed, came on for hearing before McIntosh J. The learned judge refused the application and granted leave to appeal.

[19] On 27 January 2011, the respondent filed a notice of assessment of damages and a date was set for assessment on 25 February 2011.

[20] On 24 February 2011, a mere day before the date fixed for the assessment, the applicants filed a notice of appeal.

[21] On 26 February 2011, the assessment of damages was adjourned to 27 April 2011 and the order of the Supreme Court noted that a notice of appeal had been filed. On numerous other dates, viz, 27 April 2011, 12 July 2011, and 6 February 2012, the assessment of damages was adjourned, due to the fact that the applicants had filed the notice of appeal. The respondent's attorneys-at-law stated that on 25 June 2012, they

filed yet another re-issued notice of assessment of damages but to date they have not been able to secure a date for the assessment.

[22] On 8 May 2012, an application by the applicants for a stay of proceedings, filed 10 February 2012, application no 23/2012, came on for hearing in chambers in the Court of Appeal before Harris JA. On that occasion the application was adjourned, with Her Ladyship expressly noting that the applicants were to make an application for leave to appeal out of time and to extend the time for appeal.

The applicants' arguments

[23] Learned Queen's Counsel Miss Dorothy Lightbourne submitted that the application for relief from sanctions was made promptly after it came to the attention of the applicants that judgment had been entered against them. She stressed the fact that the notice and grounds of appeal were filed out of time due to inadvertence and an oversight during the period when the applicants' attorneys' offices experienced significant staff changes. She referred to the English decision in ***Salter Rex & Co v Ghosh*** [1971] 2 All E.R. 865 and cited the dictum of Lord Denning where he stated at page 866 that: "We never like a litigant to suffer by the mistake of his lawyers". Reference was also made by Miss Lightbourne to the decision in ***Jamaica Public Service Company Limited v Rose Marie Samuels*** [2010] JMCA App 23.

[24] It was submitted that the defendants had nothing to disclose in their list of documents and that the respondent was therefore not prejudiced by the non - service of the list of documents. Further, that the only documents that the list of documents

referred to were the pleadings, which were all already in the possession of the respondent's attorneys-at-law.

[25] In submitting that the learned judge failed to have proper regard to the provisions of rule 26.8(3) when considering the application for relief from sanctions, Miss Lightbourne relied upon this court's decision in ***Hyman v Matthews & Matthews*** SCCA No 64/2003, delivered 8 November 2006.

The respondent's arguments

[26] The respondent's counsel Miss Bernard made comprehensive and detailed submissions. She submitted that leave to file an appeal had been obtained but that the time limit imposed by the rules had not been complied with. There being no extension of time granted prior to the filing of the notice of appeal, with the consequence that the appeal was filed out of time, counsel submitted that it is trite law that no appeal exists. She relied upon this court's decision in ***NCB v Jamaica International Asset Services Ltd*** [2013] JMCA Civ 9. She submitted that where there is no valid appeal before the court, the notice of appeal filed should be struck out, with costs to the respondent. Reliance was placed on this court's decision in ***Gaynair v Negril Beach Club Ltd*** [2012] JMCA Civ 25.

[27] Miss Bernard submitted that the court ought to be guided by the criteria set out in ***Leyman Strachan v Gleaner Company Ltd v Dudley Stokes***, (Motion No 12/1999 - judgment delivered 6 December 1999), as cited in the very recent decision of

this court in ***Alcron Development Ltd v Port Authority of Jamaica Ltd*** [2014] JMCA App 4.

[28] Miss Bernard in her affidavit in support of the striking out application, filed 19 March 2014, and in her wide-ranging oral submissions, took the court through the various proceedings and the history of the matter. This course was adopted by counsel to bolster her argument that the applicants have been guilty of inordinate and inexcusable delay. Given that the order of McIntosh J was made on 2 December 2010 and that he on the same date granted permission to appeal, rule 1.11(1) (b) required that the notice of appeal be filed within 14 days of that date. Indeed, she points out that in excess of three years elapsed before the application for an extension of time was filed. It was submitted that additionally no good reason has been given for the delay.

[29] Importantly, it was submitted that the appeal does not have a real chance of success, as by the applicants' own admission, they have not complied with the case management orders. Indeed, Mrs Lee-Clarke Bennett, who supplemented the submissions by Miss Bernard, made the salient point that at no time in the affidavits that were before the learned judge nor in the submissions did the applicants acknowledge that they had not complied with the case management orders. Counsel further indicated that she is to date unable to trace receipt of the applicants' list of documents and thus is saying that up to now that list has not been served on the respondent. The court was asked to find that in the circumstances, the application to

extend time ought to be refused, and further, it was argued that the court should strike out the notice of appeal.

[30] It was further submitted that the respondent, who was injured in a road traffic accident over 10 years ago, will be severely prejudiced if the application for extension of time were to be granted, given the lapse in time and inordinate delay.

Discussion

[31] In ***Leymon Strachan v Gleaner***, Panton JA (as he then was) set out the principles that will guide the court in considering the application to extend time as follows (at page 20):

> "The legal position may therefore be summarized thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation, must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a time table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> iv) the degree of prejudice to the other parties if time is extended.
>
> (3) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[32] During the course of argument, it was conceded by Miss Lightbourne that there had been inordinate delay in this matter. In this court's view that was an eminently reasonable concession by learned Queen's Counsel, who was not herself involved in this matter until the later stages herein. There has been delay at essentially every stage, notably the notice of appeal being filed well outside the 14 day period, and an application for an extension of time not being filed until over three years after the filing of the notice of appeal. Further, this application was filed just short of two years after the application for a stay came on for hearing before Harris JA and at which time the applicants should have been left in no reasonable doubt that an application to extend time was required. In my judgment, the delay has been inordinate and inexcusable. There have been numerous incidents of inadvertence and tardiness that when taken together, have compounded the problem and effects of delay. Whether through inadvertence of counsel or administrative bungling, the episodes of such default take the matter well outside the situation that the court in ***Salter Rex*** alluded to when it indicated that courts do not like litigants to suffer for the faults of their lawyers.

[33] However, perhaps more importantly, in my view it is plain that the appeal has no real chance of success. The application for relief from sanctions was not made promptly, and there was no good explanation for the failure. This is clear because throughout the matter, the applicants and/or their attorneys-at-law appear to have operated under the mistaken belief that an order for standard disclosure is fulfilled when a list of documents is filed, without it being served. They remained quite unrepentant and indeed, even accused the respondent's attorneys-at-law of being

careless in not checking the court file properly in which event they would have observed that the applicants had filed the list of documents. It is only at the stage when the application for extension of time was filed that it was finally conceded (and even in that event, not in a clear and resounding way), that there had been non-compliance, given that the list of documents was not served - see also this court's decision in ***H. B. Ramsay & Associates Ltd et al v Jamaica Redevelopment Foundation Inc.*** [2013] JMCA Civ 1, and paragraphs 17-25 of the Privy Council's decision in the ***Attorney General v Universal Projects Ltd*** [2011] UKPC cited in ***H. B. Ramsay***.

[34] It bears pointing out that the main objective of disclosure is to bring to the attention of the other party the documents upon which one intends to rely and to give advance notice of the material documents within the control of the party providing disclosure. Advance notice is generally given or fulfilled by serving a list of documents on the other side. Thus, to simply file a list of documents and not serve it on the other side can be of little if any utility. If the list of documents sets out documents, then (subject to claims for a right to withhold disclosure), the next stage in the process is inspection. In the inspection process, the other party can either request copies of the documents appearing on the list or can attend at the disclosing party's office and physically inspect the relevant documents. It is not accurate to state that there would be no prejudice to the other side in not being served with a list that does not set out any documents. This is because the fact that there are no documents material to the case is itself valuable information that will assist the other side in knowing what is, or is not, the format or nature of the evidence to be presented against them.

[35] It should in addition be noted that although McIntosh J did on 2 December 2010 grant the applicants leave to appeal his ruling, as Morrison JA indicated in ***JPS v Samuels***, at paragraph 29, this is obviously not a conclusive factor when it comes to this court at a different stage of the proceedings, assessing whether there is merit or a real chance of success on appeal. Indeed, that this is so can readily be deduced from the fact that the grant of permission to appeal by a judge of the Supreme Court in relation to an interlocutory decision can itself be the subject of an appeal - see the decision of this court in ***Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies*** SCCA 103/2004 delivered 25 May 2005.

[36] It is also plain that the respondent has already been prejudiced and would be further prejudiced if an application were to be made to extend the time for an appeal in this matter. Indeed, the appeal could only be concerned with and address the material that was before the learned judge. The appeal would have only a fanciful chance of success because there was no sound and proper basis upon which McIntosh J could have exercised his discretion to grant relief from sanctions. This is quite unlike the circumstances in the ***Hyman's*** case where this court found that the applicant for relief from sanctions had provided a reasonable excuse and it was shown that the failure to comply was not intentional, and was due to mere inadvertence. In the circumstances of this case to extend the time would be gravely unfair and indeed, it would in my view have an oppressive effect on the respondent.

[37] Before leaving this matter I must comment that it has been handled in a perplexing way on behalf of the applicants. This is certainly the case in respect of the stages prior to the filing of the application for extension of time in April this year. It is lamentable that a matter in court should be managed in such a cavalier way that a judgment falls to be entered without trial on its merits because of a fundamental misconception as to what is involved in an elementary matter such as standard disclosure. This is particularly so in relation to a matter such as the present one, involving as it did a road traffic accident where there are usually triable issues of fact. At the end of the day, the judgment was entered simply because a list of documents, although filed, has not been served, and because the applicants' counsel failed to recognize, much less remedy, that relatively simple default. However, that is not a fault that can be visited on the respondent. Dealing with a case justly involves a balancing act, and the matter must be viewed in the round, with fairness being meted out to all parties concerned. This involves in this case bearing in mind all that has transpired, and the relative positions of the parties as the matter unfolded over time, and against the backdrop of inordinate and inexcusable delay on the part of the applicants.

[38] Learned Queen's Counsel Miss Lighbourne has ably and valiantly sought to advance points in favour of the applicants' application. Indeed, one can see that her office has encountered some unfortunate and somewhat unusual difficulties in trying to mend and sort through this matter. However, despite those efforts, I am of the view,

for the reasons discussed above, that the application filed by the applicants on 28 April 2014, should be refused. As there would now be no valid appeal before the court, I agree with counsel for the respondent that the notice of appeal should be dismissed. It is for these reasons that we made the order set at para [3] above.