[2012] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 44/2006

APPLICATION NO 27/2012

BETWEEN	**CARIBBEAN STEEL COMPANY LTD**	**APPLICANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**RESPONDENT**

Ransford Braham QC, Mrs Suzanne Risden-Foster and Mrs Trudy-Ann Dixon-Frith instructed by Grant Stewart Phillips and Co for the applicant

Mrs Sandra Minott-Phillips and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

20 March and 10 April 2012

IN CHAMBERS

BROOKS JA

[1] On 2 November 2011, this court granted Caribbean Steel Company Limited (hereinafter called "the applicant"), conditional leave to appeal to Her Majesty in Council. The conditions imposed required the applicant to pay the sum of $1,000.00 for security for costs and to prepare the record of appeal for transmission to the Privy Council. The applicant should have complied with the conditions by 2 February 2012.

[2] It paid the sum but failed to complete the record of appeal within the specified time. On 15 February 2012, the applicant filed the present application asking that the

time to file the record of appeal be extended. It asserts that the completed record is now ready and has already been filed with the registrar of the court.

[3] The respondent, Price Waterhouse, has opposed the application on the basis that this court has no jurisdiction to grant an extension of time. The essence of the objection to the application is that, it having been filed after 2 February 2012, and the conditions not having been fulfilled, the provisional approval has lapsed. There is, therefore, the respondent asserts, no appeal in existence, in respect of which, the court can make an order.

[4] For this application, the issue for determination is whether a single judge of this court has the jurisdiction to grant an application for extension of time to file the record of appeal, where the application has been filed after the expiry of the original period allowed for filing the record. I shall outline the submissions for both sides and thereafter make my analysis.

The applicant's submissions

[5] Mr Braham QC, on behalf of the applicant, pointed out that the time stipulation, with which the present application is concerned, is one, which was imposed by the court. This is in contrast to the condition concerning the provision of security, which had been imposed by the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (hereafter called "the Order in Council"). He submitted that the court, therefore, has the power to extend the time, which it had itself imposed.

[6] Learned Queen's Counsel relied heavily on the judgment of the Court of Appeal of Trinidad and Tobago in the case of **Reid v Charles and Another** (1987) 39 WIR 313. That court decided that it was open to the court to extend the time allowed for the preparation of the record. It also held that a single judge of the Court of Appeal could properly order the extension.

[7] Mr Braham was faced, however, with the decision of **Smith v McField** (1968) 10 JLR 555, to the effect that until all the conditions are fulfilled, no appeal is pending. The consequence of that finding is that once the conditional leave had lapsed due to the expiry of the time allowed, that time could not be extended. Learned Queen's Counsel asked me to find that, in respect of this point, the reasoning in **Reid v Charles and Another** was to be preferred to that in **Smith v McField**. He boldly submitted that I was not obliged to follow **Smith v McField** in this regard. Mr Braham argued that the point, which was to have been decided in Smith v McField, concerned the non-payment of the sum for security. The comment in that case concerning the lapse of the conditional leave should, therefore, on his submission, be treated as going beyond what was necessary for deciding the application, which was before it, and was, therefore, *obiter dictum*.

[8] Based on those submissions, Mr Braham asked me to find that the decision in **Reid v Charles and Another** and that in the Privy Council case of **Roulstone v Panton** (1979) 33 WIR 238, were definitive on the point. He urged me to find that this court, and in particular, a single judge thereof, has the jurisdiction to extend the time within which to file the record of appeal.

The respondent's submissions

[9] Mrs Minott-Phillips, in response, argued that the respondent's position was that there was, in fact, no "appeal pending before Her Majesty in Council in circumstances where a condition precedent imposed by [this court] has not been fulfilled". However, Mrs Minott-Phillips candidly accepted that "[h]ad the application for extension of time been filed, and possibly heard, before the expiry of the time, [the respondent] would not have a complaint".

[10] She pointed out that the present application was filed some two weeks after the expiry of the time allowed for satisfying the conditions. In that regard, learned counsel relied heavily on the point made in **Smith v McField** that until all the conditions have been fulfilled, no appeal is pending.

[11] It was her submission that, based on the decision of this court in **Smith v McField**, there was no authority to extend the time originally allowed on the grant of conditional leave. She sought to distinguish the other cases cited by Mr Braham and submitted that the decision in **Smith v McField**, being a decision of this court, should be preferred to that of a court outside of this jurisdiction. She cited the cases of **Chas E Ramson Ltd and Another v Harbour Cold Stores Ltd** SCCA No 57/1978 (delivered 27 April 1982) and **Golding and Another v Simpson-Miller** SCCA No 3/2008 (delivered 11 April 2008), in support of her submissions.

The analysis

[12] I should state at the outset of this analysis that I am grateful to counsel on both sides for their industry in providing me with the relevant material and for the clarity of their respective presentations. Their efforts have resulted in the issue being narrowed to that which has been identified above.

[13] In my view, there are three questions raised by the submissions. The first is whether the grant of conditional leave gives rise to an appeal. The second is whether the grant of conditional leave irretrievably lapses upon the expiry of the time allotted for the preparation of the record. The third is, where the court is entitled to grant an extension of time, whether a single judge may grant that extension.

[14] In addressing these questions, it would be best to first state that which is beyond controversy. The permission given, pursuant to the provisions of the Order in Council, is at first, conditional. There are usually two aspects to the conditional grant. The first (paragraph (a)), concerns the payment of money as security for the prosecution of the appeal and for the payment of costs. The second (paragraph (b)), concerns the preparation of the record of appeal. I shall, for completeness, set out below the relevant portion of section 4 of the Order in Council.

> "Leave to appeal to Her Majesty in Council in pursuance of the provision of any law relating to such appeals shall, in the first instance, be granted by the Court only-
>
> (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the

> Court in a sum not exceeding £500 sterling for the due prosecution of the appeal...
>
> (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose."

[15] Where the appellant fulfils the conditions imposed, it may then apply for final leave to appeal. There is no dispute that where an appellant fails to comply with the condition concerning the payment of the sum for security for the prosecution of the appeal, the permission to appeal lapses. It has been long accepted that there is no jurisdiction in this court to extend the time for compliance. That is the force of the decision in **Smith v McField**. In that case, Luckhoo JA said, at page 557 H:

> "I am of the view that neither the Court nor a judge thereof is empowered to extend the period of time **within which security for the prosecution of an appeal to Her Majesty in Council may be made** beyond a period of 90 days from the date of the hearing of an application for leave to appeal to Her Majesty in Council…" (Emphasis supplied)

[16] The rationale behind that decision is that the time allowed in the order, with regard to the payment of the security, is authorised by the Order in Council. At page 557 E, Luckhoo JA explained the principle thus:

> "The Court, or a judge thereof, is precluded by the provisions of para (a) of s. 4 from granting a period exceeding 90 days to an applicant for leave to appeal to enter into good and sufficient security for the due prosecution of an appeal."

Their Lordships, in **Roulstone v Panton**, specifically approved that reasoning and decision.

[17] The difference, between the effect of paragraphs (a) and (b) of section 4, is that the conditions imposed, pursuant to paragraph (b), are conditions, which are imposed by the court and not by the Order in Council. The court, therefore, has the authority to adjust those latter conditions. The distinction between the two paragraphs of section 4, in this regard, was recognized in **Allahar v Katick Dass** (1910 - 1916) 2 Trinidad and Tobago Report 36, where the fact situation was similar to the instant case. In refusing an application to rescind the grant of conditional leave to appeal, the judge who gave the decision of the Court of Appeal of Trinidad and Tobago said, in part, at page 37:

> "This Court is precluded by the Order in Council...from granting a longer time than three months for giving security, but no limit of time is imposed as to the time to be allowed by the Court within which the appellant shall take the necessary steps for procuring the preparation of the record. **This Court can in my opinion extend the time limited by them for the performance of the conditions imposed on the appellant but can not extend it beyond three months for the giving of security**; to hold otherwise would entail a great hardship on the appellant if for any reason it was impossible for him to take the necessary steps for the purpose of procuring the preparation of the record within the time limited. **If it were necessary, I should be prepared to extend the time for taking the necessary steps**...." (Emphasis supplied)

[18] In **Roulstone v Panton**, their Lordships in the Privy Council, in considering an Order in Council crafted in very similar terms to that in issue in the instant case, also recognised the distinction between the two conditions. In respect of the second condition, their Lordships held that the Court of Appeal could re-fix the period allowed

for compliance with that condition. The relevant portion of their Lordships' judgment is set out at page 239 d - f:

> "In their Lordships' opinion there is a crucial distinction between the two types of condition. In the one case [paragraph (a)] there is a maximum period of 90 days laid down by the Order in Council, and clearly the court has no jurisdiction to alter the Order in Council by extending that period; and it was so held by the Court of Appeal of Jamaica under parallel provisions of the Jamaica [Order in Council]: see **Smith v McField**...But it is left at large for the court to determine what period is to regulate the condition under [paragraph (b)] and **their Lordships see no justification for holding that there is no jurisdiction to re-fix the period, either expressly or implicitly**, **on or before granting final leave**." (Emphasis supplied)

[19] I now turn to the first of the three questions identified above, namely whether the grant of conditional leave gives rise to an appeal. In **Smith v McField**, Luckhoo JA, after identifying the two stages of the appeal to the Privy Council, namely, the conditional grant of leave and the final grant, went on to say at page 557 D:

> "When the conditions imposed under s. 4 are fulfilled, an appeal comes into being; the appeal is not perfected, however, until final leave to appeal is granted. **Until all [of the] conditions imposed under s. 4 are fulfilled, no appeal comes into being and therefore, until then, no appeal is pending**." (Emphasis supplied)

[20] The court in **Reid v Charles and Another** declined to follow that reasoning. I, with respect to the decision in **Smith v McField**, am inclined to prefer the reasoning of the court in **Reid v Charles and Another**, concerning this point. Firstly, as was pointed out in the latter case, there is a shift in nomenclature from section 3 of the Order in Council, where, before permission to appeal is granted, the party seeking leave

is referred to as "the applicant", but after conditional leave is granted, that party is referred to as "the appellant". Secondly, section 14 of the Order in Council refers to an appeal being in existence, "at any time prior to the making of an order granting" final leave to appeal. The section states:

> "An appellant who has obtained an order granting him conditional leave to appeal may, at any time prior to the making of an order granting him final leave to appeal, **withdraw his appeal** on such terms as to costs and otherwise as the Court may direct." (Emphasis supplied)

[21] I find that the section implicitly contemplates an appeal being in existence, despite the fact that the conditions for the grant of leave have not yet been fulfilled. Even if it is argued that the appeal exists only so long as the time for compliance has not expired, that argument impliedly accepts that **Smith v McField** is not correct in stating that no appeal is pending until the conditions are fulfilled.

[22] I also accept that it was the failure of the appellant to pay the security, with which the court had had to contend in **Smith v McField**. I agree with Mr Braham's submission that the opinion in that case concerning paragraph (b), dealing with the other conditions is *obiter dictum.* I, therefore, find that I may follow the reasoning and decision of the court in **Reid v Charles and Another** and rule that, on the first question, the grant of conditional leave does give rise to an appeal.

[23] The second question is whether the grant of conditional leave irretrievably lapses upon the expiry of the time allotted. This was the issue raised by the major thrust of Mrs Minott-Phillips' submissions. Learned counsel argued that once the application for

extension was made after the time specified in the grant of conditional leave, the leave had expired and there was no basis upon which the court could, thereafter, adjust that period.

[24] In respect of this question, I now have to consider the case of **Golding and Another v Simpson-Miller**, cited by Mrs Minott-Phillips, in advancing her submission, last mentioned. In **Golding and Another v Simpson-Miller**, Smith JA, in considering the issue of a grant of leave to apply for judicial review, pursuant to part 56.4 of the Civil Procedure Rules (CPR), said at page 15 of his judgment:

> "Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim form for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute."

Smith JA went on to say at page 20:

> "It seems to me that under rule 56.4 (12) the consequence of failure to make a claim for review within the prescribed time is that the leave will lapse – it will become invalid."

[25] That reasoning is attractive, but, with respect to Mrs Minott-Phillips' commendable presentation, I do not think that it takes the matter any further. In my view, the position set out in rule 56.4 (12) is the equivalent of paragraph (a) of the Order in Council, that is, it is the instrument rather than the court which has prescribed the condition. As the cases, considered above, have shown, different considerations apply when it is the court that establishes the condition.

[26] By contrast, in the context of paragraph (b), it is noted that in **Roulstone v Panton** their Lordships stated that a court, after granting conditional leave, had the jurisdiction to re-fix the period it had stipulated in respect of paragraph (b). Their Lordships stated that this could be done "on or before granting final leave". It may be argued that, in saying that the adjustment could be made at the time of granting final leave, their Lordships may have contemplated that the application for the extension of that time could be made after the time originally allotted. That finding would be consistent with their Lordships' view that it is for this court to "regulate the condition" it imposed, in respect of the preparation of the record. I accept, however, that the quotation is not definitive on that point.

[27] In juxtaposing the authority of the court to extend time, which was recognised by their Lordships in **Roulstone v Panton**, against the principle that failure to meet a condition automatically terminates the conditional grant, I have found assistance in rule 1.7 of the Court of Appeal Rules (CAR). Rule 1.7(2)(b) expressly gives the court the power to:

> "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**." (Emphasis supplied)

In applying this rule to the principle expressed in **Roulstone v Panton**, that the court may "re-fix the period, either expressly or implicitly", I find that the court may do so even if the application so to do, were made after the time had expired. As the condition concerning paragraph (b) is an order of the court, it falls within the ambit of rule 1.7(2)(b). I, therefore, cannot agree with Mrs Minott-Phillips on this major point in

her submissions. I find that the grant of conditional leave is not irretrievably lost upon the expiry of the time allotted in respect of paragraph (b). The court may, upon a meritorious application, extend the time within which to comply with the condition concerning the preparation of the record.

[28] I now address the third question, raised by Mrs Minott-Phillips' submissions. It is whether the authority of the court to regulate that condition is given, by section 5 of the Order in Council, to a single judge of the court. In other words, does a single judge's general authority, "in respect of any appeal pending…to make such order and to give such other directions", extend to these circumstances?

[29] In this regard, Mr Braham argued that where there is a failure to comply with the condition concerning the preparation of the record, section 5 of the Order in Council permits a single judge of the court to hear and grant an application to extend the time to comply with that condition. Section 5 states:

> "A single judge of the Court shall have power and jurisdiction-
>
> (a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;
>
> (b) generally **in respect of any appeal pending before Her Majesty in Council**, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:
>
> Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges

> which may include the judge who made or gave the order, directions or decision." (Emphasis supplied)

[30] On this point, I gratefully adopt the opinion of the court in **Reid v Charles and Another** that the authority is given to a single judge of the court. The headnote accurately reveals the court's decision:

> "That although the Court of Appeal had fixed a period within which certain steps in relation to the record had to be taken under section 4(b) of the Order in Council…**it was open to the court at a later date to extend the time allowed and that such extension could properly be made…by a single judge of the Court of Appeal** under section 5 of the Order in Council as an appeal was 'pending' from the time when conditional leave to appeal was granted…" (Emphasis supplied)

[31] Mrs Minott-Phillips sought to distinguish **Reid v Charles and Another** and the other cases cited by Mr Braham. I do not accept that they are materially distinguisable. Although it is not clear whether the application for extension of time was made in **Reid v Charles and Another** before the time allowed had expired, it is to be noted that the grant of the extension was made over two years after the grant of conditional leave. In **Allahar v Katick Dass**, it is apparent that no application for extension of time had been made, although the court found that the appellant in that case had done everything that he was required to do, to comply with the condition. The court said, however, that if it were necessary, it was prepared to extend the time for compliance.

[32] It is also not clear from the report in **Roulstone v Panton**, if the application had been made within the time originally granted. Similarly, the Privy Council found that the fault for failing to comply with the condition did not lie with the appellant in

that case. I have already dealt with the point of an application, which is made outside of the time originally granted. These differences, I find, do not prevent me from finding, as I have, that I am permitted to grant the application made herein. This is because the question of fault, in respect of the reason for the application, goes to whether the application ought to be granted; it does not affect the question of jurisdiction.

[33] Before turning to the facts of the instant case, I wish to point out that the case of **Chas E. Ramson Ltd and Another v Harbour Cold Stores Ltd** SCCA No 57/1978, cited by Mrs Minott-Phillips did not deal with an application to extend time to comply with a condition imposed by a conditional grant of leave. It concerned an application to extend time within which to appeal. It is to be noted, however, that the reference, in that case, to **Smith v McField**, was only to the effect of paragraph (a) of section 4 of the Order in Council. Their Lordships' approval, in **Roulstone v Panton**, of **Smith v McField** was also in specific reference to the effect of paragraph (a), as dealt with in the latter case.

Application to the instant case

[34] In the instant case, the applicant was ordered to comply with both conditions within 90 days. It was expected that, at or before the expiry of that period, the applicant would have complied with the conditions and would, thereafter, have applied for the conditional order to be made final. As has been recounted above, that did not occur.

[35] The applicant filed an affidavit sworn to by Mrs Suzanne Risden-Foster in support of the application for extension of time. Mrs Risden-Foster deposed that "although the Applicant immediately took steps to prepare the record, the time for filing [the] Record was inadvertently overlooked because of the length of time involved in the collation and preparation of the documents in bundles". In a later affidavit, she deposed that the record had been filed with the registrar of this court. As was mentioned above, the payment of the sum required for security was made within the time specified by the grant of conditional leave.

[36] The failure of the applicant has been cured within a relatively short period of time (two weeks). It is not a gross dereliction of its obligation and I, therefore, find that this is an appropriate case in which to grant an application for an extension of time to take the necessary steps to procure the preparation of the record of appeal and the dispatch thereof to England.

Conclusion

[37] For the reasons stated above, I find that the provisions of section 4(b) and section 5 of the Order in Council, allow a single judge to re-fix the period within which an appellant is obliged to comply with a condition concerning the preparation of the record of appeal for delivery to the Privy Council. This is so, even if the application for extension of time, is filed after the expiration of the time originally prescribed for compliance with that condition. Because the provision imposed by section 4(b) is an order of the court, rule 1.7(2)(b) of the CAR specifically authorises such an application.

[38] The applicant has satisfied me that this is an appropriate case in which to exercise the discretion afforded by section 5 of the Order in Council. There was not a long delay and the record of appeal is, as deposed by the applicant, now ready.

Costs

[39] The application being as a result of inadvertence on the part of the applicant's attorney's-at-law, costs should go to the respondent despite its opposition to the application having failed.

Order

[40] (1) The time for filing the record of appeal in the Privy Council is hereby extended to 21 days from the date hereof;

(2) The costs of the application are to be borne by the applicant. Such costs are to be taxed if not agreed.