[2018] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 9/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN **CARICOM HOME BUILDERS COMPANY LIMITED** **APPELLANT**

AND **DINSDALE PALMER** **RESPONDENT**

Written submissions by Phillipson Partners for the appellant

Written submissions by Oswest Senior-Smith and Company for the respondent

5 October 2018

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS JA

[1] On 22 January 2018, Nembhard J (Ag) ordered the appellant, Caricom Home Builders Company Limited, and its co-respondents to an application before her, to pay the costs of a hearing that had had to be adjourned. Caricom Home Builders has

appealed, with permission from the learned judge, from that decision. It asserts that the order constituted an incorrect exercise of the learned judge's discretion with regard to the payment of costs.

[2] Before assessing Caricom Home Builders' complaint, it is necessary to outline the circumstances as existed at the time that Nembhard J (Ag) made her order.

[3] The case before the learned judge at the time was related to a claim by Mr Dinsdale Palmer against Caricom Home Builders, one of Caricom Home Builders' directors, Mr Devon Evans, and their attorneys-at-law, Williams McKoy and Palmer. The three defendants will be collectively referred to below as "the defendants".

[4] There is some disparity as to the nature of the interlocutory proceedings that were before Nembhard J (Ag), at that time. Learned counsel for Caricom Home Builders asserts that the matter before the court was a case management conference, during which it was expected that Mr Palmer would make an application for summary judgment. Learned counsel for Mr Palmer disputes that assertion and instead contends that the case had not been set down for case management conference, but rather only for the summary judgment application. Nembhard J (Ag), in her written reasons for judgment, spoke only to an application for summary judgment.

[5] When the case came on for hearing before the learned judge, it was brought to her attention that Caricom Home Builders had not filed an affidavit in response to one

filed by Mr Palmer. Mr Evans was said to have filed an affidavit in response but he had not yet served it on Mr Palmer's attorneys-at-law.

[6] There is also a disparity as to whether or not there was an application for an adjournment. Learned counsel for Caricom Home Builders contends that none of the parties applied for an adjournment of the case and that all were anxious to proceed. Learned counsel for Mr Palmer stated, in their written submissions, that counsel for Caricom Home Builders did apply for an adjournment, on the basis that there had not been sufficient time to take instructions and to file a response. According to learned counsel for Mr Palmer, the application for the adjournment was stoutly resisted by counsel representing Mr Palmer before Nembhard J (Ag).

[7] In her written reasons for judgment, Nembhard J (Ag) stated that Caricom Home Builders' counsel did apply for an adjournment. The basis for the application, the judge said, was that counsel had not completed the process of responding to Mr Palmer's affidavit.

The decision in the court below

[8] The learned judge, despite opposition by counsel for Mr Palmer, nonetheless, granted the adjournment, but granted costs to Mr Palmer.

[9] Nembhard J (Ag) explained her stance. She said that it was in the interest of justice that the defendants be allowed to respond to Mr Palmer's affidavit. She said, at paragraph [14] of her reasons for judgment:

> "The Court formed the view that, in the interest of the justice among the parties to the matter and having regard to the overriding objective of the Civil Procedure Rules 2002, [Caricom Home Builders] ought properly to be afforded an opportunity to respond to [Mr Palmer's] Affidavit which was filed on January 15, 2018."

[10] She also explained her order that costs be paid to Mr Palmer. She said that Caricom Home Builders and Mr Evans had had sufficient opportunity to respond to Mr Palmer's affidavit, but had failed to do so. She said at paragraph [28]:

> "While it was in the interest of justice among the parties to adjourn the hearing of the matter the Court formed the view that [Caricom Home Builders and Mr Evans] were tardy in their preparation for the hearing of the Application and granted [Mr Palmer's] application for costs."

[11] The learned judge also ordered that no further affidavits should be filed or served after 29 January 2018. She did not explain her reason for that order.

The appeal

[12] The learned judge granted Caricom Home Builders permission to appeal against the order for costs. Caricom Home Builders filed a number of grounds of appeal. The individual grounds have been summarised below, hopefully without injury to their import. The grounds complained that the learned judge:

a. was wrong to have ordered costs in circumstances where it was a case management conference that was before her;

b. fell into error in awarding costs against Caricom Home Builders when there was no application for an adjournment, and all parties were ready to proceed;

c. in awarding costs against Caricom Home Builders, failed to appreciate and take into account that Mr Palmer had disregarded the rules relating to applications for summary judgment;

d. erred in ordering that no further affidavits should be filed after 29 January 2018 in the context of there being no new date set for the hearing of the application.

The overriding principles regarding orders for costs

[13] Two major principles govern the issue of costs in this context. The first is that orders for costs are always in the discretion of the court. Section 47(1) of the Judicature (Supreme Court) Act specifically so states. It says in part:

> "In the absence of express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court…"

[14] The other fundamental principle, to be applied in appeals against the exercise of a discretion by a judge, is that this court is reluctant to interfere with such an exercise. That principle was enunciated in **Hadmor Productions Ltd and Others v Hamilton and Another** [1982] 1 All ER 1042 and has been accepted by this court in a number of its decisions, including **The Attorney General of Jamaica v John MacKay** [2012]

JMCA App 1. Although the principle was originally set out in the context of the grant of an interlocutory injunction, it has since been accepted to be of universal application to circumstances where a discretion has been exercised in the court below. Lord Diplock, in **Hadmor**, said at page 1046:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[15] It is, nonetheless, accepted that this court will interfere with the exercise of a judge's discretion if the judge in the court below has failed to take into account, or misapplied, relevant principles of law or matters of fact (see paragraph [20] of **The Attorney General of Jamaica v John MacKay**).

[16] Caricom Home Builders' complaints will now be examined.

The adverse order for costs being made at a case management conference

[17] As has been mentioned above, Caricom Home Builders insists that it was a case management conference that was before the learned judge. It asserts that rule 27.3(8) of the Civil Procedure Rules (CPR) stipulates that the general rule is that costs at a case management conference should be costs in the claim.

[18] Ignoring, for these purposes, the dispute as to whether it was a case management conference that was before Nembhard J (Ag), it cannot be denied that there was no hearing. The case was adjourned. If it was adjourned because of the act or omission of a party, that party should be penalised in costs. It would be unfair for an

order to direct that "costs be costs in the claim", thereby, potentially, benefitting a party at fault at that hearing, if it were to succeed at trial.

[19] There is no merit in this complaint. The learned judge was entitled to depart from the general rule, which is stated in rule 27.3(8), that the costs incurred in attending the case management conference should be costs in the claim. Indeed, paragraph (9) of rule 27.3 contemplates a departure from the norm, if the circumstances warrant a departure. The paragraphs just mentioned state as follows:

> "(8) The general rule is that costs incurred in attending a case management conference are costs in the claim.
>
> (9) However the court may make some other order where the case management conference has to be adjourned due to the failure of one or more parties to –
>
> (a) attend the hearing; or
>
> (b) co-operate fully in achieving the objective of the case management conference."

The fact that some other application was before the court and could not be proceeded with, due, as the learned judge saw it, to the default of a party, were circumstances which warranted a departure from the norm.

The order for costs being made despite the parties being ready to proceed

[20] Again, without attempting to resolve the dispute as to whether Caricom Home Builders' counsel had applied for an adjournment, it was certainly the learned judge's view that given the serious nature of the contents of Mr Palmer's affidavit, the defendants ought to have been allowed to file an affidavit in answer. Mr Palmer's

affidavit was filed on 15 January 2018. Although Mr Palmer's assertions included allegations of forgery, in respect of an agreement for sale on which Caricom Home Builders was relying, the learned judge was of the view that those issues were not new to the claim. She held that the defendants would have had sufficient notice of them in order to have responded in time for the hearing.

[21] There is support for the learned judge's view. The amended particulars of claim do speak to the forging of Mr Palmer's signature on a sale agreement and to Mr Evans' tendering of that document and reliance thereon. In the circumstances, the learned judge could not be said to have been wrong in finding that the defendants were, due to their own default, not ready to proceed to answer the application for summary judgment.

[22] This complaint also is without merit.

The award of costs in the light of the alleged breaches by Mr Palmer of the procedural rules

[23] Learned counsel for Caricom Home Builders asserts that Mr Palmer had breached procedural rules relating to the application for summary judgment, and therefore, he ought not to have been awarded costs. It was submitted that the learned judge failed to take cognizance of at least two breaches of the CPR by Mr Palmer. The breaches were said to be in relation to rule 15.4. That rule stipulates the steps that an applicant for summary judgment should take. The relevant paragraphs state:

> "(3) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.
>
> (4) The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing."

Learned counsel asserts that Mr Palmer failed to give reasonable notice of an intention to claim forgery and failed to identify the issues on which he relied for the application for summary judgment.

[24] The learned judge's reasons greatly assist in this regard. She pointed out, as noted above, that the issue of fraud had been particularised some 10 months before in Mr Palmer's amended particulars of claim. The record before this court shows that the original notice of application for summary judgment had been filed on 28 September 2017. It is true that that document did not speak to any specific issue. The learned judge also noted that the application for summary judgment that was before her was an amended notice of application for court orders that had been filed on 8 December 2017. That document identified the specific issue, for which Mr Palmer sought summary judgment. Mr Palmer's first affidavit in support of the application had been filed on 8 December 2017. The affidavit went into detail on the reason he sought summary judgment. These facts militate against Caricom Home Builders' claim of inadequate notice of the application.

[25] It may also be said that the issues were known to the defendants. Mr Palmer, in his quest for summary judgment, sought an order that Williams McKoy and Palmer be

directed to hand over a certificate of title for property, for which Mr Palmer claimed that he had completely paid. This was one of the remedies claimed in Mr Palmer's amended particulars of claim.

[26] The learned judge was entitled to take the view that there was no breach by Mr Palmer that warranted depriving him of his costs.

The order that no further affidavits should be filed after 29 January 2018

[27] Learned counsel for Mr Palmer has correctly pointed out that there was no leave to appeal granted in respect of this complaint. The learned judge only granted leave to appeal in relation to the order as to costs. This aspect of Caricom Home Builders' complaints, therefore, cannot properly be considered.

[28] It may be said, however, that although the learned judge did not reveal her mind in respect of this particular order, it is not difficult to divine her reasoning. She was concerned that the defendants were tardy in getting on with the case and she was anxious to correct that situation. Her solution was to establish a deadline. It may be, in the absence of a specific date for the adjourned hearing having been set, that the time period was short. It was not unreasonable, however. Mr Evans had already completed his affidavit and counsel for Caricom Home Builders had taken instructions to enable her to prepare Caricom Home Builders' affidavit. If, for whatever reason, it was necessary for other affidavits to be filed, such as, for example a differing opinion from another handwriting expert, an application could have been made to extend the time allowed by Nembhard J (Ag).

Conclusion

[29] It cannot be said that the learned judge misapplied any principles of law, misunderstood any issue of fact, or ignored any fact or principle of law, in coming to her decision. This court will therefore not interfere with the exercise of her discretion. The appeal must be dismissed with costs to Mr Palmer.

F WILLIAMS JA

[30] I have read, in draft, the judgment of my learned brother Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

P WILLIAMS JA

[31] I have also read in draft the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

ORDER

(1) The appeal is dismissed.

(2) Costs to the respondent to be agreed or taxed.