[2014] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 57/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**EGERTON CHANG**	**1ST APPLICANT**
AND	**MARGARET CHANG**	**2ND APPLICANT**
AND	**SUPREME VENTURES LIMITED**	**RESPONDENT**

Miss Audre Reynolds instructed by Bailey, Terrelonge, Allen for the applicants

Mr John Graham and Miss Peta-Gaye Manderson instructed by John G Graham and Co for the respondent

14, 15 and 24 October 2013 and 31 July 2014

HARRIS JA

[1] In this application, the applicant seeks an extension of time to appeal and permission to appeal the following orders of Mangatal J, made on 16 May 2013:

> "1. Unless the Defendants:-
>
> (a) Pay into an interest bearing account in the joint names of the attorneys-at-law for the parties the sum of $1,500,000.00 by the 3 June, 2013; and
>
> (b) Prepare, file and serve a properly constituted claim/ application seeking to set aside the arbitration award

> handed down on the 28 March, 2013 on grounds of misconduct by the arbitrator, by the 10 June 2013, the Claimant is permitted to enforce the arbitration award pursuant to section 13 of the Arbitration Act.
>
> 2. Costs to the Claimant to be taxed, if not agreed."

The applicant also seeks a stay of execution of the orders.

[2] On 24 October 2013, the following orders were made by this court:

> "It is ordered that the applicants shall be at liberty to file an appeal against the order of Mangatal J, delivered 16 May 2013 within seven days of the date hereof. It is further ordered that the applicants are granted permission to appeal.
>
> The execution of the order of the learned judge is stayed pending the hearing of the appeal.
>
> Costs to the respondent to be agreed or taxed."

[3] The applicants, the owners of shares issued in a company called "Big A Track 2003 Limited", entered into an agreement with the respondent for the sale of the shares to the respondent. Pursuant to an arbitration clause under the agreement, arbitration proceedings were conducted by Roy Anderson J (retired). He made the following award:

> "The Claimant is awarded the sum of Three Million, Three Hundred and Forty Nine Thousand, Nine Hundred and Ninety Eight Dollars ($3,349,998.00) with interest at the rate of 6% per annum from the date of payment by the Claimant of that sum to pay up the shares, the subject of the Agreement, at the instruction of the Betting Gaming and Lotteries Commission, to the date of payment of the said sum."

[4] The applicants failed to pay the sum awarded. As a consequence, the respondent, by a fixed date claim form, initiated proceedings to enforce the arbitral award. The fixed date claim form was supported by an affidavit of Mr Brian George, the president and chief executive officer of the respondent. Paragraphs 4 to 14 of his affidavit state as follows:

> "4. The First and Second Defendants both of 2 Edgecombe Avenue, Kingston 6 were on the 31 day of July, 2008 the owners of all the issued shares in BIG A Track 2003 Limited, a company duly registered under the Companies Act of Jamaica and having a purported authorized share capital of 3,350,000 shares.
>
> 5. The Claimant and the Defendants entered into an Agreement for Sale of Shares dated the 17th day of July 2008 (hereinafter referred to as 'The Agreement').
>
> 6. Pursuant to clause 11 of the agreement:
>
> > *If any dispute or difference shall arise between the parties hereto touching anything herein contained the same shall be referred to the award of a single Arbitrator appointed by the President of the Jamaican Bar Association. Either party can make an ex-parte application to the President for the appointment of an Arbitrator and the decision of the Arbitrator shall be binding on both parties.*
>
> 7. The Claimant and the Defendants both agreed that the arbitrator should be the Honourable Mr. Justice Roy Anderson (retired). Exhibited hereto marked '**BG 1**' for identification is a joint letter dated 16 October, 2012 to the President of the Jamaica [sic] Bar Association asking him to confirm the arbitrator's appointment.
>
> 8. By letter dated 23 October, 2013 the President of the Jamaica [sic] Bar Association confirmed the Honourable Mr. Justice Roy Anderson's (retired) appointment as arbitrator. Exhibited hereto marked **'BG 2'** is a copy of the said letter.

9. The preliminary hearing was held on the 16 October, 2012 at which time Orders were made for the conduct of the arbitration. Exhibited hereto marked **'BG 3'** for identification is a copy of the Orders made at preliminary hearing.

10. The terms of Reference for the Arbitrator were agreed by the parties on the 18 October, 2012. Exhibited hereto marked **'BG 4"** for identification is a copy of the terms of reference.

11. The arbitration hearing was held on the 21 February, 2013.

12. That on the 28 day of March, 2013 the arbitrator handed down his ruling.

13. I have been advised by the Claimant's attorneys-at-law John G. Graham & Company and do verily believe that the entire arbitral award remains outstanding.

14. As at the 5 April, 2013 the amount outstanding was of [sic] **$4,149,585.36** arrived at as follows:-

'14 April, 2009 the sum of $3,349,998.00 injected $3,349,998.00 in to Big "A" Track 2003 Ltd to Capitalise Shares

Interest at the rate of 6% per annum or $550.68 $ 799,587.36 per day on the sum of $3,349,998.00 from the 14 April, 2009 to the 5th April 2013.

Total **$4,149,585.36**

Interest continues to accrue at the rate of $505.68 per day from the 6 April, 2013."

The arbitration award was not exhibited to his affidavit.

[5] On 26 April 2013, the applicants filed an anciliary claim in which they sought to set aside the award on the ground of misconduct on the part of the arbitrator.

[6] The orders of 16 May 2013 were made at the first hearing of the claim. On 17 May 2013, an application was made by the applicants for leave to appeal which was

refused by the learned judge on 30 May 2013. The refusal of the leave prompted the applicants to file, in the Court of Appeal on 31 May 2013, an application for leave to appeal and for an extension of time.

Applicants's Submissions

[7] Miss Reynolds submitted that the learned judge erred, in that, she dealt with the claim summarily, at the first hearing, despite the respondent's failure to have exhibited the arbitration award. This, she contended, was a fundamental flaw. After making reference to rule 43.10 of the Civil Procedure Rules (CPR), counsel argued that the use of the word "must" in rule 43.10(5) is of significance as it clearly means that the word is mandatory, as, in rule 43.10(3) the court is afforded a discretion whether an application to enforce an award can be made with or without notice.

[8] Counsel further alluded to rule 29.1 of the CPR, which speaks to the court's power to control evidence and the general rule of 29.2, which provides that facts should be proved by oral evidence given in public, or by affidavit, and submitted that the learned judge ought to have adhered to rule 29.2 as there was no provision in rule 29.2 which would have operated as an exception to the general provision. Further, she submitted, as required by rule 30.5(1), any document to be used with an affidavit must be exhibited to it. The award, having not been exhibited to the respondent's affidavit, a copy of it, which was handed to the learned judge during the proceedings to rectify the fundamental flaw, could not have been utilised by the learned judge in enforcing the award, she submitted. The enforcement of the award by the reception of the copy

given to the learned judge, she argued, amounted to her "pursuing an independent inquiry" as no evidence had been placed before her in support of the enforcement.

[9] Notwithstanding that under rule 27.2(8) the court may deal with a matter summarily and the learned judge had stated that the claim lent "itself to summary treatment by the court pursuant to rule 27.2(8) of the CPR because of the nature of an arbitration award", a notice must be given that the application for summary judgment would have been made summarily and in the interests of justice a notice ought to have been given prior to a hearing so that proper consideration could be given by the court as to the prospect of success of a defence, she argued. Evidence would have had to be led as to why there is no real prospect of success of the defence, if any, she submitted. Further, she argued, the learned judge ought to have given the reasons for finding that the defence or the application to set aside the award made by way of ancillary claim "was a weak one". Although conceding that the applicants' application to set aside the award ought to have been by way of an application for court orders, counsel submitted that the indication to do so was manifest and the learned judge ought to have been mindful of this.

Respondent's submissions

[10] After referring to: section 11(e) of the Judicature (Appellate Jurisdiction) Act which provides that an appeal shall not lie in the absence of leave of the judge of the court below or the Court of Appeal; and rules 1.8(1) and 1.8(2) of the Court of Appeal Rules (CAR); Mr Graham submitted that the application for leave to appeal was made in

time in the court below but in the Court of Appeal, it was made outside of the time prescribed by the CAR. He further made reference to ***Haddad v Silvera*** SCCA No 31/2003, Motion No 1/2007 delivered on 31 July 2007 and ***Saddler v Saddler*** consolidated with ***Hoilett v Hoilett et al*** [2013] JMCA Civ 11, in which guidelines have been outlined for the court's consideration in extending time and went on to rely on the following dictum of Smith JA in ***Haddad v Silvera*** in which, at page 13, Smith JA said:

> "As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly."

[11] Citing ***Evanscourt Estate Company Ltd v National Commercial Bank*** SCCA No 109/2007 Application No 166/2007, delivered 26 September 2008, counsel argued that, in that case, this court had to give consideration to the question of an enlargement of time to appeal in which an oral application for leave to appeal had not been made in the court below and at the time the matter came before this court, leave had been refused by the court below and the time limited for making the application had expired and therefore, in this case, the applicants ought to have made a prompt application in seeking leave to appeal. Counsel went on to submit that the applicants should have made their application to this court on or before 30 May 2013, which, could have been made orally pursuant to rule 1.8(3) of the CAR and they have not advanced any reason for not doing so. It was also his submission that the parties agreed to submit to arbitration and ought to be bound by the award. The applicants have filed no defence to the claim but filed an ancillary claim alleging misconduct by the

arbitrator in which they have acknowledged that the facts outlined in paragraphs 4 to 14 of the respondent's affidavit are true. The entire award is outstanding, the ancillary claim discloses no cause of action against the respondent in respect of any misconduct on the part of the arbitrator, he argued. Counsel also contended that an arbitrator's misconduct cannot be pleaded as a defence to an action for the enforcement of an award and cited ***Birtley District Cooperative Society Ltd v Windy Nook & District Industrial Co-operative Society Ltd*** [1959] 1 All ER 43 to support this submission. Further, he submitted, the arbitrator ought to be the defendant in the ancillary claim.

The law

[12] Rule 1.8(1) of the CAR states as follows:

> "Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."

Rule 1.8(2) of the CAR provides as follows:

> "Where the application for permission may be made to either court the application must first be made to the court below."

Rule 1.8(3) of the CAR reads:

> "An application to the court below may be made orally but otherwise the application for permission to appeal must be made in writing and set out concisely the grounds of the proposed appeal."

Rule 1.8(9) of the CAR reads:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

Rule 27.2(8) of the CPR states:

> "The court may, however, treat the first hearing as the trial of the claim, if it is not defended or the court considers that the claim can be dealt with summarily."

Rule 43.10(3) and (5) of the CPR provides as follows:

> (3) The general rule is that an application -
>
> (a) for permission to enforce an award; or
>
> (c) to register an award;
> may be made without notice but must be supported by evidence on affidavit.
>
> (4) The general rule does not apply where a rule or statutory provision requires notice to be given.
>
> (5) The applicant must –
> (a) exhibit to the affidavit the award or a copy of it;
> (b) if the award is for the payment of money, certify the amount remaining due to the applicant; and
> (c) give an address for service on the person against whom the applicant seeks to enforce the award."

Rule 30.5(1) of the CPR states:

> "Any document to be used in conjunction with an affidavit must be exhibited to it."

Analysis

[13] Although neither the CAR nor the CPR outlines the procedure to be adopted in making a determination on an application for an extension of time, there are authorities of this court from which guidance can be sought in extending the time to appeal.

[14] In ***Strachan v The Gleaner Company Ltd and Stokes***, Motion No 12/1999 delivered on 6 December 1999, Panton JA, (as he then was), speaking to the approach by which the court ought to be guided in giving consideration to an application for permission to appeal out of time, said at page 20:

> "(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.
>
> 4. Notwithstanding the absence of a good reason for [the] delay, the Court is not bound to reject an application for extension of time as the overriding principle is that justice has to be done."

[15] In ***Flickenger v David Preble & Anor*** [2013] JMCA App 1, Brooks JA, treating with the matter of an extension of time to appeal, distilled the principles outlined in ***Haddad v Silvera*** in the following terms:

> "a. in the absence of specific provisions in the rules, the court, in exercising its discretion should do so in accordance with the overriding objective;
>
> b. generally speaking, the rules of the court must be obeyed and litigants and their legal representative ignore the rules at their peril;

c. a successful party is entitled to the fruits of its judgment and so the party aggrieved by that judgement must act promptly in pursuing its appeal;

d. the interests of the parties and the public in certainty and finality of legal proceedings, make the court more strict about time limits on appeals;

e. in order to justify the court extending the time limited for carrying out a procedural step in the appellate process, there must be some material on which the court can exercise its discretion;

f. normally, if no excuse is offered for the default, no indulgence should be granted;

g. an indulgence may be granted even if the excuse does not amount to a good reason but generally speaking, the weaker the reason the more likely the court will be to refuse to grant the extension of time;

h. the application should address the length of the delay, the reason for the delay, the merits of the appeal and the likely prejudice, or absence thereof, to the respective parties;

i. strict guidelines as to the consideration of these applications should be avoided."

[16] As can readily be perceived, in considering an application for an extension of time, while endeavouring to do justice to the parties, four basic issues must be taken into account, namely: the length of the delay; the reason for the delay; the merits of the case; and any prejudice which may be occasioned to the other party, if time is extended.

[17] The length of the delay and the reason therefor will first be addressed. These will be considered simultaneously. The "unless order" was made on 16 May 2013. An application for leave to appeal was made to the court below on 17 May 2013. It was

refused on 30 May 2013. The application for leave to appeal and for the extension of time to appeal to this court was made on 31 May 2013. As prescribed by rule 1.8(1) of the CAR, the application to this court ought to have been made within 14 days of the date of the unless order. The applicants were at liberty to file their application to this court up to 30 May 2013 but failed to have done so. The application to this court was one day late, it having been made on 31 May 2013, which obviously cannot be regarded as inordinate.

[18] It is perfectly true, as Mr Graham submitted, that an oral application for leave to appeal could have been made on 16 May 2013, when the matter was heard in the court below. In ***Evanscourt,*** an application to obtain permission to appeal from the court below was unsuccessful. Although, in that case, reference was made to the fact that the applicant should have made an oral application for leave to appeal in the court below prior to the expiration of the time for appealing to the Court of Appeal, this court granted an extension of time to appeal and permission to appeal, notwithstanding that the application to the court was made outside of the prescribed time.

[19] Although rule 1.8(3) of the CAR makes provision for an oral application for permission to appeal to be made in the court below, an oral request for a hearing in that court is not a bar to this court giving favourable consideration to an enlargement of time if the circumstances so warrant. Further, it is important to bear in mind the principle that an appeal is a separate and distinct process from the initial proceedings. Therefore, the applicants' instructions to their attorneys would have been a prerequisite

to the lodging of an appeal. The record does not show that the applicants were present in Chambers on 16 May 2013, to have given instructions to their attorneys to make an oral application for permission to file an appeal. In such circumstances, the application for leave to appeal would have had to abide the necessary instructions from the applicants to their attorneys. The fact that the application to this court was made on 31 May 2013, is excusable.

[20] No reason has been given for the delay. However, in our judgment, the circumstances of this case are exceptional, in that, although the applicants had made their application in the court below within the prescribed time, the application to the appellate court was one day late. The delay is merely a day. The call, on the interests of justice, to forego an explanation for the delay, is compelling.

[21] The question of the merits of the appeal will now be addressed. The affidavit of Brian George outlined the facts on which the respondent sought to rely in order to enforce the award and although mention was made to the award, it was not exhibited. Miss Reynolds submitted that the learned judge, in considering the matter, was under a duty to apply the general rule for hearings specified in rule 43.10(5) of the CPR as the exception in rule 43.10(4) to the general rule is inapplicable.

[22] The learned judge, dealt with the matter summarily. She said:

> "An arbitration award is binding on parties unless successfully challenged. The avenues for challenge are very limited. An arbitration award is inherently enforceable.

> The Defendants in an action on an award plead as a defence, misconduct or irregularity on the part of the arbitrator. This was what Mr. Graham submitted. The proper course if these grounds exist is to have the award set aside :see Russell on Arbitration, 19th edition, Chapter 20 pages 393-394.
>
> It therefore seems to me that the Defendants have an uphill battle in contesting the Claimant's application, in addition, an application/claim to set aside the award on grounds of misconduct has been filed as an ancillary claim but does not appear to be properly constituted as the arbitrator is not named as a party. In addition, whilst I cannot at this stage say what the likelihood of success of an application to set aside on grounds of misconduct would be, it does seem to me that this claim, on the basis of what is in the Ancillary Claim is a weak one.
>
> Accordingly, this is a claim that in my view lend itself to summary treatment by the court pursuant to rule 27.2 (8) of the Civil Procedure Rules because of the nature of an arbitration award. The fact that the Claimant had seemingly through inadvertence not exhibited the arbitration award, does not to my mind affect that view. However, I intend to extract an undertaking from counsel for the Claimant to prepare, file and serve by 10.00 a.m. on the 17th May, 2013 a supplemental Affidavit exhibiting a copy of the arbitration award so kindly made available to the court by counsel for the Defendants."

[23] Rule 43.10(5)(a),(b) and (c) of the CPR outlines the conditions to which an applicant must adhere in seeking permission to enforce an award. In this rule, the use of the word "must" imposes a duty on an applicant to satisfy the conditions laid down therein. In contrast, the provisions of rule 43.10(3) afford the applicant a discretion in the making of an application for the enforcement of an arbitral award. The question now arising is what is the meaning of the word "must" within the context of rule 43.10(5). Significantly, in seeking to enforce an arbitral award, rule 43.10(5) does not speak to a discretion. The main concern in this case is rule 43.10(5)(a), as rule 43.10

(5)(b) and (c) has been complied with. Rule 43.10(5)(a) expressly states that, in an application for the enforcement of an award, the award or a copy of it "must" be exhibited to an affidavit. It is important to bear in mind the settled principle that a distinction exists between the construction to be placed on the provision of a rule which is mandatory and that which is simply directory where the word "must" is used in a particular rule. The question is: in the circumstances of this case whether in construing rule 43.10(5)(a), the word "must" is a vital command, which, if disregarded, will lead to an invalidating result and therefore is mandatory and not directory. It could be argued that in the enforcement of an arbitral award, it would have been the intention of the framers of the rules that the exhibition of the award or a copy thereof to an affidavit in support of the enforcement is compulsory and if the framers of the rules intended that rule 43.10(5)(a) should be discretionary, they would have so prescribed.

[24] Arguably, the award or a copy thereof, would have been a crucial piece of the evidence and it, having not been exhibited to Mr George's affidavit, was not before the learned judge and she ought not to have made the unless order as it could not be said that the reception of a copy of the award, which had not been exhibited, would have been sufficient to justify disposal of the matter summarily. It has been observed that the award was exhibited to an affidavit filed by Miss Peta-Gaye Manderson, on 17 May 2013. A further question is whether, this could have cured the defect of which the applicants have complained.

[25] At the time of the refusal of the application for leave to appeal the learned judge said:

> " This is an application for permission to appeal the ruling that I made on the 16 May, 2013. In giving permission it is my duty to consider whether the appeal has a real chance of success.
>
> The fundamental position of my ruling was that the Defendants in an action on an award, the Defendants cannot plead misconduct on the part of the arbitrator and the Defendants did not therefore put forward any proper basis of challenge to the arbitration award which I have said is inherently enforceable.
>
> My order was an unless order or a conditional order and it was made on the basis that the plea of misconduct was not a defence and I also stated, [sic] in my view the Ancillary Claim appeared to be a weak one. I have not made an unconditional order to enforce the award. I also have not made a finding or ruling about what must be contained in a properly constituted claim seeking to set aside an award on the ground of misconduct."

[26] Clause 11 of the agreement between the parties states that the decision of the arbitrator shall be binding and section 4(h) of the Arbitration Act provides that an arbitral award is final and binding. However, section 12 of that Act confers on a court the power to set aside an award by reason of the misconduct of an arbitrator. There is a line of cases which shows that an arbitrator's award can be set aside on the ground of misconduct.

[27] Rule 27.2(8) makes provision for a summary hearing where the claim is undefended or where the court is of the view that the claim can be considered summarily. In ***Britley***, it was held that misconduct could not be raised as a defence by way of a counterclaim to an action on an arbitration award. Miss Reynolds, although

conceding that the applicants ought to have made an application to set aside the award instead of filing an ancillary claim, submitted that no evidence had been led by which the learned judge could have made a determination as to the prospects of a defence. The learned judge, having said the ancillary claim was filed as an application to set aside the award, found that: the ancillary claim did not seem to have been properly constituted as the arbitrator was not a named party to the claim; it was weak; and that the applicants had not presented any proper foundation to dispute the award. However, in finding that the ancillary claim was weak, she said that she could not speak to the likelihood of the success of an application to set aside the award for misconduct. The question now arising is whether she had given consideration to the contents of the ancillary claim in arriving at her finding that misconduct of an arbitrator cannot be pleaded in an action in respect of an award despite stating that she could not make a pronouncement as to the chance of success of an application to set aside an award on the basis of misconduct.

[28] In light of all the foregoing, it cannot be said that the applicants do not have an arguable or meritorious appeal. Accordingly, they have a real chance of success on appeal.

[29] Consideration will now be given to the question of prejudice. Ordinarily, the applicants have a right of appeal. This however, must be weighed against the respondent's entitlement to have its award enforced and the right to enjoy the fruits of its judgment. There is a delay in seeking to obtain an extension of time. It cannot be

disputed that the respondent will encounter some degree of prejudice occasioned by the delay. However, the basic question is whether, in this case, despite the delay, it is fair and reasonable to grant an extension of time. The answer is in the affirmative. Although the respondent will be prevented from enforcing its award, there is nothing to show that it will suffer irremediable loss if the appeal proceeds. The order for costs, which had been made, would satisfy any prejudice which the respondent may have sustained.

[30] The application for a stay of execution of the orders of Mangatal J will now be considered. The court is obliged to ensure that an appeal is not rendered nugatory. In granting or refusing a stay, Lord Clarke, in ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd*** [2001] EWCA Civ 2065, stated the test to be one requiring a balancing exercise in which the fundamental "question is whether there is injustice to one or other or both parties". Phillips LJ in ***Combi (Singapore) Pte Limited v Ramnath & Sriam*** **and** ***Sun Limited*** [1997] EWCA 2164 states the test to be one "which best accords with the interests of justice".

[31] As earlier indicated, the appeal has a real chance of success.

[32] The 1st applicant states that he is unable to pay the sum of $1,500,000.00 ordered, as his income has been depleted by reason of the financial constraints to which he has been subjected. He is the sole provider at his home and his responsibilities continue to escalate. His poor financial state of affairs compelled him

to drastically reduce his expenditure which has resulted in his inability to meet all his expenses. In the circumstances, of this case, it appears that irremediable harm would be suffered by the applicants if a stay were to be refused and there is nothing to show that similar harm would be encountered by the respondent.

Conclusion

[33] The delay in seeking to appeal is minimal, a mere one day. The justice of this case would not require reasons for the delay as this case must be treated as exceptional. There is a real chance of success of the appeal and any prejudice suffered by the respondent may be met by it being compensated in costs. The justice of this case necessitates the extensiion of time and permission to appeal as well as the imposition of a stay of execution of the learned judge's orders. Consequently, we made the order contained in para [2] above.