[2012] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 140/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**DESOPH AUTO PARTS LTD**	**APPLICANT**
AND	**KEN'S SALES & MARKETING LTD**	**RESPONDENT**

Maurice Manning instructed by Nunes Scholefield Deleon & Co for the applicant

Miss Peta-Gaye Manderson instructed by John G. Graham & Co for the respondent

27 February and 2 March 2012

ORAL JUDGMENT

MORRISON JA

[1] This matter was heard on 27 February 2012, when the court reserved its judgment to this morning. We propose to deliver an oral judgment, which will in due course be reduced to writing and made available to the parties.

[2] By an amended notice of application for court orders dated 1 December 2011, the applicant seeks the following orders: firstly, an order granting an extension of time within which to appeal the judgment of Sykes J delivered on 30 September 2010; secondly, an order granting the applicant leave to file its appeal within 14 days of the date of this order; and thirdly, in the alternative, an order granting the applicant leave to withdraw the notice of discontinuance of appeal dated 24 March 2011 and thereby restore the notice of appeal dated 1 November 2010.

[3] When the matter came on for hearing on 27 February 2012, Mr Manning for the applicant indicated to the court that he proposed to ask for the third order only, that is, that the applicant be permitted to withdraw the notice of discontinuance of the appeal. In making this application, the applicant relies on rule 2.11(1)(e) of the Court of Appeal Rules 2002 ('CAR'). The ground of the application is that the applicant, having filed its appeal in time on 1 November 2010, "wrongly withdrew" the appeal on 25 March 2011.

[4] The facts of the matter so far as they are relevant to this application were helpfully summarised in the applicant's skeleton arguments as follows. The applicant entered into a lease agreement with the respondent on or around 1 August 2003. The agreement included a clause to the effect that either party was required to give six months notice of termination of the lease and that, if the lessee decided to leave without giving six months notice, it would be entitled to terminate by paying the six months rent in lieu of notice. On or about 3 December 2003, the lease agreement between the applicant and the respondent was cancelled by mutual agreement, duly

signed by both parties. However, the applicant continued in occupation, paying rent from month to month. On or about 15 April 2004, the applicant wrote to the respondent giving notice of termination of the tenancy, effective 15 May 2004.

[5] The respondent filed suit for unpaid rent and breach of the lease agreement. On 30 September 2010, Sykes J found that there was an implied term of the tenancy that a notice was required to terminate it and, as a result of this, he gave judgment against the applicant in the amount of $4,140,000.00, with interest at 20% per annum, from 1 November 2004 to 30 September 2010. A provisional charging order was granted *ex parte* in favour of the respondent on 5 October 2010 and the applicant filed a notice of appeal from Sykes J's judgment on 9 November 2010. It then turned out that the applicant was also in the process of selling some of its property to repay a mortgage debt to a third party and negotiations were entered into between the applicant and the respondent, to enable the applicant to substitute another property in place of the mortgaged property to be placed under the provisional charging order and thus not impede the sale of the mortgaged property. After some correspondence between the parties, an agreement was reached. The applicant then filed notice of discontinuance of its appeal on 25 March 2011, and on 13 April 2011 a consent order was entered into providing for the substitution of unencumbered property in place of the originally charged mortgaged property.

[6] By this application, which was supported by the affidavit of Deon Singh sworn to on 7 July 2011, the applicant seeks the leave of the court to withdraw the notice of

discontinuance on the basis that it made a mistake in not appreciating that the appeal was in order and could continue notwithstanding the process of execution initiated by the respondent as a judgment creditor.

[7] In response to Mr Singh's affidavit, the respondent relied on an affidavit sworn to by its managing director, Mr Ken Biersay, on 3 October 2011. In that affidavit, among other things, Mr Biersay asserted (at paragraph 6) that "the applicant was always aware that the substitution of the charge over the new property was being effected on the condition that the appeal be discontinued". Mr Biersay also exhibited to the affidavit copies of two letters dated 8 March 2011 and 23 March 2011 respectively, from the respondent's attorneys-at-law, John G. Graham & Co, to the applicant's attorneys-at-law, Hollis & Co.

[8] The first of these two letters is a response by John G. Graham & Co to an earlier letter from Hollis & Co (which was not among the papers filed with the application, but which was read to us by counsel). In their response on 8 March 2011, John G. Graham & Co set out the amount due on the judgment debt by their reckoning, did a calculation of interest and costs and stated the total amount due to be $10,192,067.51. The letter then went on:

> "Our client is prepared to accept the following offer:
>
> a) An initial payment of four million dollars ($4,000,000.00) now. [Emphasis in the original.]
>
> b) Monthly instalments of one million dollars ($1,000,000.00) to settle the Judgment on [sic] costs.

c) That the appeal filed by you be discontinued.

Please let us have your response as a matter of urgency."

[9] This letter therefore made it clear that, even if it had not been discussed previously, the discontinuation of the appeal was being made a condition of any agreement that might be reached as regards settlement of the judgment debt. There is no record of a response by Hollis & Co to this letter and, on 23 March 2011, John G. Graham & Co again wrote to Hollis & Co on the subject. The full text of this letter is as follows:

> "We refer to previous correspondence herein and to the application to discharge the Provisional Charging Order in the captioned suit.
>
> "Despite numerous requests of the Supreme Court Registry, they have been unable to locate the file. It is our thinking that because an appeal was filed, the file may have been given to the trial judge for him to prepare the notes of evidence.
>
> We are requesting that you write to Mr. Anthony Pearson, the attorney-at-law who represented the Defendants at the trial and request that he file a Notice of Abandonment of the Appeal.
>
> It also strike [sic] me that until you file a Notice of Change of Attorney, you will have no standing which will enable you to come into court and consent to the orders that are being sought."

[10] Two days later, on 25 March 2011, notices of change of attorney and discontinuance of the appeal were duly filed by Hollis & Co.

[11] In response to Mr Biersay's affidavit, the applicant filed an affidavit sworn to by Ms Sophie Singh, speaking to the merits of the proposed appeal and seeking to establish that it had some prospect of success.

[12] Before us, Mr Manning submitted, in reliance on the judgment of this court in ***R v Maslanka*** (1971) 12 JLR 843 and a judgment of the Court of Appeal of England and Wales in ***R v Sutton*** [1969] 1 All ER 928, that the applicant should be permitted to withdraw its notice of discontinuance of the appeal, on the basis of its mistake in not appreciating that the appeal could continue, notwithstanding that an execution process had already been initiated by the judgment creditor.

[13] The court in ***Maslanka*** was concerned with the issue of whether an appellant in relation to a conviction in the Resident Magistrates' Court could be allowed to withdraw a notice of abandonment of the appeal. It was held that the right of appeal given by the Judicature (Resident Magistrates) Act was indivisible and once it was exercised it was expended. Therefore, if an appeal is abandoned, the proceedings on appeal are thereby terminated and cannot thereafter be revived, unless the Court of Appeal gives leave to the appellant to withdraw the notice of abandonment. Such leave will not be granted unless it is shown affirmatively that something amounting to mistake or fraud had led the appellant to abandon the appeal in the first place.

[14] To similar effect is ***Sutton***, in which it was held that leave to withdraw a notice of abandonment of an appeal would only be granted if it was apparent on the face of the application that either fraud or bad advice from a legal advisor had brought about

from the appellant an unintended decision to abandon the appeal. In addition, Mr Manning also referred us to the case of ***S. Kaprow & Co., Ltd. v MacLelland*** [1948] 1 All ER 264, to make the point that, in a proper case and on proper terms, the court may in its discretion relieve a party who applies quickly from the effect of his mistake or that of his legal advisers.

[15] On the basis of these authorities, Mr Manning therefore submitted that it is clear that the court retains a discretion to allow an appeal that has been discontinued or abandoned to be restored. Mr Manning also submitted that the appeal in this case had some prospect of success and that the application ought therefore to be allowed.

[16] Miss Manderson for the respondent repeated and strongly maintained the position put forward by Mr Biersay that the abandonment of the appeal in this case, far from being as a result of bad or wrong advice (of which, she submitted, there was in any event no evidence), was a pre-condition to the respondent's agreement to a substitution of the security for the charging order. Miss Manderson also referred us to ***Sutton*** and directed our attention in particular to the concluding paragraph of the judgment of Winn LJ (at page 929):

> "The purpose of delivering a judgment at all in this case instead of simply dismissing the application is to emphasise once again that the court will not entertain these applications for leave to withdraw notices of abandonment unless it is apparent on the face of such an application that some grounds exist for supposing that there may have been either fraud, or at any rate bad advice given by some legal adviser, which has resulted in an unintended, ill-considered decision to abandon the appeal."

[17] The decision to withdraw the appeal in the instant case was, Miss Manderson submitted, not an ill-considered one, but reflected a good business decision on the part of the applicant in all the circumstances.

[18] Although we have not been shown any case in which a judicial discretion similar to that confirmed by the court in ***Maslanka*** has been held to exist/exercised in a civil case, I am prepared to accept for present purposes that such a discretion may indeed exist. Thus, if it could be demonstrated that the applicant's decision to withdraw the appeal was an ill-considered one, made as a result of fraud or bad legal advice, the applicant might, in my view, be entitled to the order which it seeks on this application.

[19] For my own part, I had initially been attracted to the view that there was no evidence of the agreement contended for by the respondent, that is to say, an agreement that the applicant would abandon the appeal in exchange for the respondent's consent to the substitution of the security. However, after careful consideration of all the evidence that has been placed before us, I have come to the view that that interpretation of the facts is in fact irresistible. When one looks again at the two letters produced by Mr Biersay, it is clear that in the first letter of 8 March the respondent expressly raised the condition of abandonment of the appeal and, while it is true that in that letter that condition is not explicitly tied to the issue of substitution of security, the second letter dated 23 March makes it plain by referring specifically to the application to discharge the provisional charging order and repeating in its penultimate paragraph the request that Hollis & Co write to Mr Anthony Pearson, the attorney-at-

law who represented the applicant at the trial, and request that he file a notice of abandonment of the appeal.

[20] What followed on from that was that, without demur, notice of abandonment of the appeal was in fact filed on 25 March 2011 and on 13 April 2011 the consent order was in fact made substituting the security. In these circumstances, it seems to me that the applicant, having had the benefit of the agreement which is contended for, that is to say, the substitution of the security by consent, cannot now be permitted to resile from what was in effect, the price of the respondent's consent, that is, the withdrawal of the appeal. I would therefore dismiss this application, with costs to the respondent to be taxed if not sooner agreed.

PHILLIPS JA

[21] I agree, and have nothing to add.

HIBBERT JA (Ag)

[22] I also agree.