[2012] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 233/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**WILFRED EMANUEL FORBES**	**1ST APPLICANT**
AND	**COWELL ANTHONY FORBES**	**2ND APPLICANT**
AND	**MILLER'S LIQUOR STORE (DIST.) LIMITED**	**RESPONDENT**

Wendell Wilkins instructed by Robertson Smith Ledgister for the estate of the 1st applicant

Christopher Dunkley instructed by Phillipson Partners for the 2nd applicant

Marvalyn Taylor-Wright instructed by Marvalyn Taylor-Wright and Co for the respondent

26 March and 29 June 2012

HARRIS P (Ag)

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

McINTOSH JA

[2] I too have read the draft reasons for judgment of Brooks JA and agree.

BROOKS JA

[3] On 26 March 2012, an application was listed before us to review and discharge the order of a single judge of this court. When the application came on for hearing, the respondent, Miller's Liquor Store (Dist) Ltd, made a preliminary objection to the application. After hearing the parties, we refused the application, struck out the appeal in respect of which the application was made, granted costs to the respondent, such costs to be taxed if not agreed, and promised to put its reasons in writing.

[4] The appeal was against a judgment of Smith J which was handed down on 17 December 2010. Smith J gave judgment for the respondent with costs to be taxed, if not agreed. The notice of appeal was lodged on behalf of the then claimants, Wilfred Emmanuel Forbes and Cowell Anthony Forbes, and an application was filed in this court for an injunction preventing the sale of the subject realty, pending appeal. The application was heard by Morrison JA, sitting as a single judge of this court, and was refused.

[5] The present application was then filed, on behalf of Mr Cowell Forbes only, for Morrison JA's decision to be reviewed and discharged. It was when the application came before the court that Mrs Taylor-Wright, on behalf of the respondent, raised the preliminary objection.

The Preliminary Objection

[6] Mrs Taylor-Wright's preliminary objection was pointed. The appeal, she submitted, was a nullity and any application, thereunder, must, therefore, be a nullity. She brought to the attention of the court that the named first appellant, Mr Wilfred Emanuel Forbes was dead. He had, in fact died before the appeal herein was filed. There is no issue as to his death or as to the time thereof. Learned counsel submitted that, when the notice and grounds of appeal were filed on behalf of Mr Wilfred Forbes, the attorneys-at-law who filed them had no authority so to do. The notice and grounds of appeal and the present application are, therefore, on learned counsel's submission, irregular and are not capable of being regularised. The application and the appeal, she argued, should, therefore, be both struck out.

[7] She submitted that, in law, one of two co-claimants has no standing to pursue an appeal against a decision, which affects them jointly. Accordingly, on her submission, Mr Cowell Forbes cannot properly seek to now, pursue the present application on his own.

[8] Learned counsel also argued that there was no compliance with the procedural requirements for filing an appeal, as there was no person, in being, to comply with those requirements, on behalf of Mr Wilfred Forbes' estate. In particular, learned counsel pointed to the need for the notice and grounds of appeal to be signed by the appellant or the appellant's attorney-at-law (rule 2.2(4) of the Court of Appeal Rules (CAR)). She argued that, Mr Wilfred Forbes, having died, there was no attorney-at-law who could properly sign on his behalf.

[9] In respect of her submissions, learned counsel relied on, among others, the cases of **International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India** [1996] 1 All ER 1017, **Tetlow v Orela Ltd** [1920] 2 Ch 24 and **In re Mathews** [1905] 2 Ch 460**.**

The response

[10] In response to the objection, Mr Dunkley, on behalf of Mr Cowell Forbes, submitted that the death of one of two or more appellants cannot prejudice the rights of the survivors. He submitted that there was an obligation to deal with cases justly and that justice required that Mr Cowell Forbes, being alive and fully capable of prosecuting the appeal, should be accepted as possessing the requisite capacity so to do.

[11] Mr Dunkley sought to distinguish the various cases cited by Mrs Taylor-Wright. He argued that, unlike those cases, the instant case is one where a judgment has already been delivered. He argued that clarifying the issue of the late Mr Wilfred Forbes' status is, practically speaking, "a matter of housekeeping". He submitted that this court could consider the appeal by Mr Cowell Forbes alone. He pointed out that the two men were to have taken title as tenants-in-common and so their respective interests are not inseparable.

[12] Mr Dunkley submitted that the cases cited do not support the submission that the appeal is a nullity. He relied on **In re Wright** [1895] 2 Ch 747.

[13] Having summarised the submissions, which were made by counsel on both sides, it is next necessary to set out an outline of the rest of the factual background to the application.

The factual background

[14] Messrs Forbes, who were brothers, entered into an agreement to purchase real property from the respondent. They were allowed into possession and executed a mortgage of the title for the property, although they were not actually registered on that title as the proprietors of the property. At some stage, they were deemed to have been in default and the respondent entered into an agreement to sell the property, purportedly under powers of sale contained in the mortgage deed. The Forbeses filed their claim in the court below to prevent the sale, to secure an accounting between the parties and to secure damages against the respondent for breach of contract. It was in respect of that claim that Smith J delivered the judgment mentioned above.

[15] The document containing the notice and grounds of appeal was filed on 27 January 2011. It was signed by Phillipson Partners as "Attorneys-at-Law for the Appellants". The body of the document started with the words "TAKE NOTICE that the Appellants HEREBY APPEAL...". There was no indication that Mr Cowell Forbes was pursuing the appeal on his own behalf alone.

The analysis

[16] Mrs Taylor-Wright has accurately stated that "the issue as to the authority of the attorneys-at-law to file the notice and indeed amended notice and grounds [of appeal]

on behalf of the appellants goes to the heart of whether the appeal is legitimate or not". It will also be necessary, however, to determine whether the respective interests of the Forbeses were so bound together that one would be prohibited from proceeding without the other. These issues will be considered separately.

(a) The authority of the attorneys-at-law

[17] The Rules of the Supreme Court in England, which were in force prior to the advent of that country's Civil Procedure Rules, stipulated that where a solicitor is instructed in High Court proceedings, he is considered the solicitor for that party "until the final conclusion of the cause or matter, whether in the High Court or Court of Appeal" (Order 67 rule 1 – The Supreme Court Practice 1997). The learned editors of Halsbury's Laws of England at paragraph 134 of volume 44(1) of the 4th edition of that work, relying on O. 67 r 1, seem to be of the opinion that a retainer to sue or defend, which is given in the High Court, continued through to the conclusion of the matter, even if it went on appeal. That rule does not seem to have been replicated in that country's later Civil Procedure Rules. The explanation for that may be the advent of the Access for Justice Act 1999, in England, which is said to have brought about "fundamental changes in which litigation may be funded" in that country.

[18] The learned editors of Halsbury's continued, by also stating at paragraph 134:

> "Thus, after judgment the [attorney-at-law's] authority continues for the purpose of issuing execution or protecting his client from execution, and of **receiving notice of appeal**, or of motion to vary an order, or of motion relating to the satisfaction of the judgment, but it is doubtful whether after judgment the [attorney-at-law] has authority to compromise, and **he has no authority to start**

> **substantially new and distinct proceedings**, such as interpleader proceedings, even where the question in those proceedings arises in consequence of the judgment." (Emphasis supplied)

It should be noted that the learned editors did not speak to acting for the client in respect of an appeal for which notice had been received.

[19] That last quotation would seem to draw a distinction between receiving a notice of appeal and filing a notice of appeal, the latter of which, it would seem, would be considered "new and distinct proceedings". Undoubtedly, an attorney-at-law would require specific instructions from the client to file an appeal, before proceeding so to do. The following comment by Wills J in **James v Ricknell** [1887] 20 QBD 164, would be equally applicable to the issue of an appeal as it would to new proceedings at first instance. He said at page 166 of the report:

> "As a reasonable man, [the client] may well decide to give way and to refuse to stake the cost and anxiety of a second litigation against the chance of success."

[20] Our Civil Procedure Rules (CPR) support the proposition that there is a continuation of the authority of an attorney-at-law who is retained in respect of litigation in the Supreme Court. Rule 63.7 of the CPR stipulates that no notice or order whereby an attorney-at-law is removed from the record, as appearing for a party, "takes effect until all relevant persons have been served". This rule applies to the claims in that court and does not mention an extension of the authority of the attorney-at-law in respect of representation in the Court of Appeal. Part 63 is not one of those

parts of the CPR which the CAR adopts for application to its processes (see rule 1.1(10) of the CAR).

[21] It is also to be noted that, as in the case of agency (an attorney-at-law being a kind of agent), when his client dies, the authority of the attorney-at-law is thereby, terminated. Any action taken by the attorney-at-law, thereafter, on behalf of that client, with the knowledge of that death, may be set aside. The attorney-at-law, who institutes a claim in the name of that client, although he knows of the prior death of the client, may be personally liable to the defendant for the costs incurred.

[22] Authority for those propositions may be found in **Salton v New Beeston Cycle Company** [1900] 1 Ch 43. In that case, it was contended that solicitors, who had appeared at a trial, without knowing that their corporate client had been dissolved, were not liable for the costs of the trial. Stirling J, at page 49 of the report, opined as follows:

> "A solicitor is an agent of a special kind. By entering an appearance on behalf of his client he represents or warrants to the opposite party that he has authority so to do; if it turns out that he has not he is liable. That is well established and has been decided in many cases. No hardship is thereby thrown on the solicitor, because it is his initial duty, both as regards his client and third parties in entering upon the defence or the prosecution of an action, to obtain from his client a proper retainer. But why should a solicitor warrant anything to the opposite party in the further stages of the action beyond that which is termed by Story "good faith", including the use of due diligence in ascertaining **whether anything has happened which may have the effect of terminating his authority**? It seems to me that the principle laid down in **Smout v Ilbery** [(1842) 10 M & W 1; 152 E.R. 357] applies to a solicitor appearing for a party in an action and known to the opposite

> party to be such, **and applies just as much to the dissolution of a legal entity as to the death of a living person**." (Emphasis supplied)

The solicitors were held not to be liable for costs incurred up to the time of the trial and for the trial itself. They were, however, found to be liable for the costs incurred, thereafter, on the basis that they were less than diligent in determining the true status of their corporate client, having been informed that a final meeting of the company, had been held.

[23] Another general rule which is applicable to the present application, is that a claim, "commenced in the name of a non-existent person, or company, is a nullity" (per Evans LJ in **International Bulk Shipping Services Ltd**). On the basis of that rule, an appeal filed on behalf of Mr Wilfred Forbes would be a nullity. I, therefore, agree with Mrs Taylor-Wright that Phillipson Partners, having been aware of the prior death of Mr Wilfred Forbes, acted without authority in filing a notice of appeal on behalf of both men and that the appeal, at least on behalf of Mr Wilfred Forbes, is a nullity.

[24] That finding brings me to the **Tetlow** case. The headnote states, in part, that "[w]here an action is commenced in the name of a dead man his representative cannot be substituted as plaintiff". In **Tetlow**, a writ was issued in the name of a man who had died some years before. It was issued in the mistaken belief that he was still alive. When an attempt was made to substitute his personal representative, the court held that the rules of the Supreme Court of England, at the time, did not permit the substitution. Russell J ruled that substitution was only allowed where the original party, substitution of which was sought, was a living person.

[25] Mr Dunkley sought to distinguish **Tetlow** on the basis that that case dealt with originating process, while the instant case concerns an appeal. I cannot agree with learned counsel in respect of that submission. I find, for the reasons stated above, that an appeal is, to use the words of the learned editors of Halsbury's, "substantially new and distinct proceedings". For that reason, I find that **Tetlow** cannot be distinguished on the basis advanced by Mr Dunkley.

[26] Rule 19.2(5) of the CPR speaks to the power of the court to substitute a new party for an **existing** one, in certain circumstances. It seems that the principle behind **Tetlow** is, therefore, still applicable. This is despite the fact that, since that case was decided, there has been the passage of our Law Reform (Miscellaneous Provisions) Act. Although that Act preserves the right of action for the estate of the person who has died, it does not, in my view, create a person for the purposes of rule 19.2(5) and as was contemplated in **Tetlow**. I accept that Part 19 of the CPR is not one of the parts which the CAR incorporate for the purposes of carrying out this court's functions. I find, however, that the principle that, an appellant must be a living party, should be applied in these circumstances. That requirement would ensure that a representative is in place for the various purposes of the litigation. No step should be taken, which affects the estate, without a personal representative being in place to authorise that step or be bound by it.

[27] That finding seems to conflict with the reasoning of the English Court of Appeal in the case of **Fielding v Rigby (trading as Ashlea Hotel)** [1993] 1 WLR 1355. In

Fielding, the plaintiff Mr Fielding died after the writ in that case had been issued but before it had been served. The administrator of his estate was appointed before the writ was served but no order was made substituting the estate before service was effected. After the writ was served, an *ex parte* order was made substituting the administrator. The English Court of Appeal ruled that the order had been properly made. The relevant portion of the headnote accurately summarises the finding:

> "...since, by virtue of [the section equivalent to section 2(1) of the Law Reform (Miscellaneous Provisions) Act] the cause of action vested in F. survived his death for the benefit of his estate and the action did not abate, **there was no stage at which the cause of action was not vested in a living party**..." (Emphasis supplied)

[28] The court went on to find that an order of substitution should have been obtained before service, or any other step was taken, but that the failure so to do did not render the proceedings a nullity but was an irregularity which might be cured by the court under the relevant rules of court. Sir Thomas Bingham MR, as he then was, with whom the other members of the court agreed, said at page 1360 A, in distinguishing the cases cited to the court:

> "Again, as it seems to me, that authority can be distinguished because, in this case, the cause of action was vested in Mr Fielding when the writ was issued and **there has never been a stage at which the cause of action has not been vested in a living and existing party**." (Emphasis supplied)

[29] The learned editors of The Supreme Court Practice 1997 (The White Book) at paragraph 15/7/2 identify **Fielding** as being decided "in special circumstances" as the

writ was already in existence. I would also distinguish **Fielding** on that basis, because, in the instant case, the appeal was not in existence when Mr Wilfred Forbes died.

[30] Based on the reasoning set out above, I find that, Phillipson Partners, having acted without authority, there was no appellant in place along with Mr Cowell Forbes, for whom the personal representative of Mr Wilfred Forbes, could be substituted. The next issue is whether the appeal is nonetheless a valid appeal because Mr Cowell Forbes could have, on his own, properly proceeded to appeal.

(b) May Mr Cowell Forbes appeal by himself?

[31] The general principle in respect of cases begun by co-claimants, is that one may not continue the prosecution of the claim without the other, unless that other has been made a defendant to the claim. Authority for the proposition can be found in the cases of **Brown v Sawer** (1841) 3 Beav. 598; 49 E.R. 235 and **In re Mathews**.

[32] In **In re Mathews**, Swinfen Eady J, considered a situation where one of several co-plaintiffs, entered into compromise with the defendant, revoked the authority of her solicitors to prosecute the action and sought to withdraw therefrom. He pointed out that the "general rule was that where co-plaintiffs disagree the name of one is struck out as plaintiff and added as defendant". The principle to be derived from that case is that the remaining claimant may not just carry on. The estate of the party who has died must either be joined as a claimant or as a defendant to the claim. The principle extends, logically in my view, to an appeal and, in respect of the instant case, to the transition from a claim to an appeal.

[33] Mrs Taylor-Wright submitted that "[i]n law, one of two co-claimants has no standing to pursue an appeal against a decision which affects them jointly. Continuing onward, learned counsel argued that Mr Wilfred Forbes "is a necessary party to the proceedings without whom this court cannot make any complete or effective order to resolve the proceedings". On her submission, "[t]he rules governing joinder of parties therefore prevent these proceedings from going any further" (paragraph 3 of her skeletal submissions).

[34] Mr Dunkley, on the other hand, argued that Mr Cowell Forbes was entitled to proceed without Mr Wilfred Forbes' estate. Learned counsel argued that there "is no tension between the two...unlike the case in **In re Mathews**". He submitted that Mr Cowell Forbes' joint and several rights should not be prejudiced by the death of Mr Wilfred Forbes. He cited **In re Wright** as authority for the proposition that the court seeks to have all the parties before the court and that the aim for so doing is to do justice in the circumstances.

[35] In **In re Wright**, a preliminary objection was made to a motion brought by some of several co-plaintiffs. It was argued that an application could not be made by some of the plaintiffs independently of others. Kekewich J agreed with the objection. He reasoned that it was important that all the relevant parties should be before the court, and he so ruled. As a result of his ruling, the motion was amended and was, thereafter, argued.

[36] In **Brown v Sawer**, **In re Wright** and **In re Mathews**, the claim in each case, had already been instituted, when one or more of the claimants sought to proceed without others. In the instant case, however, as has been determined above, these are new proceedings although bearing a close connection to the claim in the court below. Does it necessarily follow that the general principle to be found in those cases is applicable here?

[37] It is trite to say that one of several persons, possessing a right of action against a single defendant, which right is distinctly identifiable from that belonging to the other persons, may file a claim without the others being co-claimants. An example of that would be one of several passengers of a vehicle where the driver of that vehicle has acted negligently. The court may, as part of its management of the case, order all the connected cases to be tried together.

[38] Where, however, the right to claim is joint with the other persons, then practicality, as well as the interests of justice, would demand that all those persons who are jointly entitled to the remedy, should be parties to the claim. That principle should apply unless some other consideration renders that approach undesirable or impractical. Having all those parties in the same claim, and in the instant case, the same appeal, would ensure that all issues are dealt with at once. It would have the benefit of having all the relevant parties before the court at the same time, at least giving them an opportunity to be heard.

[39] In the instant case, the claim by the Forbeses is a joint claim. At pages one to two of her judgment, Smith J set out the declarations which had been sought:

> "1. That the plaintiffs are entitled to redeem the said mortgage [sic] property upon payment by the plaintiffs jointly/or severally to the defendant of any sums found due on the taking of an account.
>
> 2. That in taking the said account the Defendant/mortgagee should not be allowed interest after 31st August 2000 then due under the said mortgage.
>
> 3. That the Plaintiffs are entitled to an Injunction restraining the Defendant/mortgagee, by their [sic] directors or officers or any of them or otherwise howsoever from taking any further steps to complete the purported contract of sale between Millers [sic] Liquor Store (Dist) Ltd. and Duncarl Ltd dated 30th August 2001 and from executing or registering any instrument of transfer in respect of the mortgage (sic) Mandeville...until the trial of this action or until further order.
>
> 4. That the purported contract for sale of the mortgage [sic] property was at a gross undervalue and the plaintiffs are entitled to Damages for negligence and misrepresentation.
>
> 5. Damages with interest, for breach of contract and wrongful exercise of the power of sale thereof.
>
> 6. Further and other relief."

Whereas their interest in the property, as tenants in common, could have been dealt with separately, the Forbeses' claim, as filed in the court below, in my view, properly sought declarations that, I find, could not, in the main, have been separated. The right to redemption, in the sense that that term is used in connection with the Torrens System, would seem to be the only exception to that statement, in that one mortgagor may pay off the entire debt owed by both. The exception, in my view, does not justify

Mr Cowell Forbes proceeding in this court without the inclusion of the estate of Mr Wilfred Forbes.

[40] Based on the above, I would agree with Mrs Taylor-Wright that the appeal could not, properly, have been filed by Mr Cowell Forbes alone.

Conclusion

[41] I find that Mrs Taylor-Wright is correct in her submission that the appeal filed herein was a nullity in that it was filed without authority, Mr Wilfred Forbes having died before the date of filing. The notice of appeal which was filed, was therefore, not signed in accordance with rule 2.2(4) of the CAR, by Mr Wilfred Forbes or his attorneys-at-law. The authority of the attorneys-at-law would have terminated on his death.

[42] The fact that there was another claimant, in the court below, could not save the notice of appeal from invalidity. This is because the claim was properly pursued as a joint claim in the court below. It required both claimants' interests to be represented in the appeal, so as to ensure that there was a resolution of all the issues between the parties.

[43] It is for those reasons that I agreed with the orders set out at paragraph [3] above.