[2018] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 95/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**MARLAN HIGGINS (Executor of Estate of Egbert Higgins)**	**APPELLANT**
AND	**PAUL REID**	**1ST RESPONDENT**
AND	**WILLIAM HINDS**	**2ND RESPONDENT**

Written submissions filed by DunnCox for the appellant

Written submissions filed by Oswest Senior-Smith & Co for the respondents

16 January and 9 March 2018

PROCEDURAL APPEAL

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

BROOKS JA

[1] I have read, in draft, the judgment of my brother F Williams JA and agree with his reasoning and conclusion. There is nothing further that I wish to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA

Background

[3] Mr Marlan Higgins, the appellant, has appealed against the order of Palmer J (the learned judge), made on 6 October 2017. By that order the learned judge granted Messrs Paul Reid and William Hinds, the respondents, relief from the sanction of an unless order of Wint-Blair J, made on 3 November 2016, striking out their defences.

[4] The appellant, who is the claimant in the court below, sues in a representative capacity as the executor of the estate of his deceased father, Egbert Higgins. On 30 June 2016, the appellant commenced claims for recovery of possession against several purchasers, including the respondents, who had in 1999 entered into contracts with his father, for the purchase of land in Huntley District, Brown's Town in the parish of Saint Ann.

[5] The appellant, in his particulars of claim against the respondents, averred that the sale agreements were expressly subject to a parish council sub-division approval being granted. That approval, he claims, was not granted and the monies which had been paid by the respondents were returned to them. Further, it is his case that the respondents and the other purchasers, without the permission or knowledge of the

elder Higgins, submitted a new application for sub-division approval, which was granted. The respondents thereafter entered into possession of the land without the permission or knowledge of the deceased, he averred.

[6] On 3 November 2016, the matter came up in chambers before Wint-Blair J. The appellant was present in person but unrepresented, whereas the respondents were represented by counsel. Wint-Blair J adjourned the matter to 27 June 2017 for the appellant to seek legal representation. However, in view of the appellant's applications for default judgment, Wint-Blair J made several orders. Significantly, in order 3, which is of particular relevance for the purposes of this appeal, she stated as follows:

> "Unless defences not filed are filed and served in all matters within seven (7) days of the date of this order the defendant's defence to stand as struck out."

[7] Suffice it to say that the defences of the respondents had been filed before the making of the above order, that is, on 15 September 2016. However, at the time the order was made and after the deadline for service, that is 11 November 2016, the respondents had still not served the defences.

[8] On 7 December 2016, the respondents filed a notice of application seeking: (i) relief from the sanction of the unless order; (ii) an extension of time of one day to effect service of their defences; and (iii) that the defences stand as having been properly served.

[9] The grounds set out in the notice of application were that the respondents' process server had sought to effect service on the appellant on at least two occasions,

but that the appellant and his representatives had evaded service, which resulted in the failure to serve the defences; and that the respondents would be substantially prejudiced if the relief sought was not granted. The application was supported by the affidavit of Mrs Denise Senior-Smith (an attorney-at-law for the respondents) filed on 7 December 2016.

[10] When the application came on for hearing before Graham–Allen J on 27 June 2017, it was adjourned to 27 July 2017. Further, Graham-Allen J granted the respondents permission to file further affidavit evidence on or before 10 July 2017 and granted the appellant permission to reply. Two further affidavits were subsequently filed on behalf of the respondents: (i) a supplemental affidavit of Mrs Senior-Smith and (ii) an affidavit of Miss Andrea Richards, both filed on 10 July 2017 and served on the appellant's attorneys-at-law on 14 July 2017.

[11] The affidavit of Kristopher Brown (an attorney-at-law for the appellant) was filed on 18 July 2017, in opposition to the application for relief.

[12] On 27 July 2017, the application for relief from sanction came before Palmer J. The learned judge, after hearing submissions in the matter, granted the orders sought by the respondents in like terms to those set out in the notice of application (see paragraph [8] above). Counsel for the appellant informed the court that the formal order is yet to be perfected.

The appeal

[13] On 12 October 2017, the appellant filed his notice and grounds of appeal. In it, four grounds of appeal were stated. They are as follows:

> "a) That the learned judge wrongly exercised his discretion in granting the Applications for Relief from Sanctions in Claim No. 2015 HCV 04609 Marlan Higgins (Executor of Estate of Egbert Higgins) v Paul Reid and Claim No. 2015 HCV 04606 - Marlan Higgins (Executor of Estate of Egbert Higgins) v William Hinds having regard to all the circumstances of the matter
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> b) The learned judge erred in not having regard or having sufficient regard to all the evidence and the entire factual matrix before him, including but not limited to:
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> i. The Respondents' Notices of Application for Court Orders for Relief From Sanctions both filed on December 7, 2016 ('Notices') were not filed promptly in that the Notices were filed 30 days after it was discovered that the Defences were not served upon the Appellant and 26 days after the sanctions in the Unless Order of the Honourable Mrs. Justice Wint-Blair took effect:
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> ii. The Respondents have given no explanation for the delay in filing the Notices after it was discovered that the Defences have not been served;
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> iii. The Respondents failed to file an application for an extension of time to serve the Defences prior to the sanction taking effect; and
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> iv. As at December 7, 2016, when the Respondents filed the Notices, the

Respondent had no valid affidavit or evidence to support the Notices.

c) The learned trial judge erred in not finding that the requisite legal threshold and matters of law to grant relief from sanctions were not made out in all the circumstances, including but not limited to the following:

i. The Applications for Relief from Sanctions were not filed promptly;

ii. There was no good explanation given by the Respondents as to why the Defences were not served within the prescribed time of the Unless Order of the Honourable Mrs. Justice Wint-Blair; and

iii. The Respondents have not generally complied with other Court Orders made in each claim.

d) The learned judge erred in not finding that he was bound by the Court of Appeal decisions of **HB Ramsay & Associates Ltd. & Others v Jamaica Redevelopment Inc.** [2013] JMCA Civ 1, **Jamaica Public Service Co. Ltd. v Charles Francis & Anor** [2017] JMCA Civ 2 and **Price Waterhouse (A Firm) v HDX 9000 Inc** [2016] JMCA 18, along with the decision of the Judicial [Committee of the] Privy Council in **AG v Universal Projects Ltd**. [2011] UKPC 37, thereby failing to apply or adequately apply the principles stated therein to the instant circumstances." (Emphasis and underlining as in original)

Preliminary issue

[14] The appellant, by letter dated 10 January 2018 and in the affidavit of Kristopher Brown sworn on 11 January 2018, complained that the respondents had improperly placed certain documents before this court for its consideration of this matter. On 16

January 2018, the court heard oral submissions in this regard. Mrs Dixon-Frith, counsel for the appellant, argued that the respondents had sought to introduce into the record of appeal documents which were not before Palmer J for his consideration. Learned counsel identified those documents as the ones appearing at items 1-11 of the supplemental record of appeal filed on 8 January 2018. She stated that those documents related to claims for recovery of possession filed by the appellant against other purchasers who are not parties to this appeal. On the other hand, Mrs Senior-Smith, counsel for the respondents, argued that the documents identified, albeit they were not before the learned judge for his consideration, presented a complete picture of what had transpired in the court below; and as such were properly before this court.

[15] At the conclusion of that hearing, the court ruled that the decision on this preliminary issue would be given in the substantive judgment in the procedural appeal.

[16] The preliminary issue of whether the documents numbered 1 to 11 in the supplemental record of appeal ought properly to be before the court for our disposal of the procedural appeal, can be disposed of succinctly. Both counsel have acknowledged that the documents were not before the learned judge for consideration in the exercise of his discretion to grant relief from sanction. As such, for that reason (and also as there is no application to include them), I find that these documents cannot be utilised in a consideration of this matter.

Main issue for consideration

[17] Having perused the grounds of appeal and the written submissions, I find that the central issue to be determined is whether, in the light of the factual circumstances of this case, the learned judge correctly exercised his discretion to grant relief from sanction pursuant to rule 26.8(1), (2) and (3) of the Civil Procedure Rules, 2002 (the CPR). Attempting to resolve this issue involves a consideration of the appellate court's power to review the learned judge's exercise of his discretion. The principle has long been entrenched that this court will not lightly interfere with the exercise of the discretion of a judge below (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, page 1046) unless it can be demonstrated that the learned judge was palpably wrong. Thus, before we could consider allowing the appeal, the appellant must demonstrate that the learned judge's exercise of his discretion was based on a misunderstanding of the law or evidence before him or that his decision was so aberrant that no judge regardful of his duty would have reached it.

Submissions of counsel

[18] The main tenor of the appellant's submission was that the learned judge had erred in granting relief from sanction as, based on the factual circumstances of the case, the respondents had failed to meet the threshold test in rule 26.8(1) and (2) of the CPR which is necessary to trigger the exercise of the learned judge's discretion to grant such relief. In that regard, it was submitted that there was no affidavit evidence to support the application as the first affidavit deposed to by Mrs Senior-Smith contained erroneous statements. It was also submitted that, although permission was

granted by the court for the respondents to file and serve supplemental affidavits, those affidavits were served outside the time permitted (served on 14 July 2017, seven days out of time). It was further averred that the application for relief was not filed promptly, that the respondents had failed to provide an explanation for the delay in filing the application and that the respondents had not generally complied with the orders of the court.

[19] For the respondents, it was submitted that the learned judge had conducted a proper balancing exercise of the circumstances of the case and had correctly exercised his discretion. It was further argued that the relief from sanction was properly granted because this case did not entail circumstances in which the unless order was made as a consequence of the disobedience of a previous court order.

Discussion

Rule 26.8 of the CPR

[20] Rule 26.8 of the CPR sets out the guidelines that the court must consider in exercising its discretion to grant relief from sanctions. It states that:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
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> (b) supported by evidence on affidavit.
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> (2) The court may grant relief only if it is satisfied that –
>
> (a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) ..."

[21] It is best at this juncture to consider the issues in this appeal as they relate to the requirements of this rule.

The requirements of rule 26.8(1) of the CPR

[22] In **Morris Astley v the Attorney General of Jamaica and the Board of Management of the Thompson Town High School** [2012] JMCA Civ 64, Morrison JA (as he then was), writing on behalf of the court, expounded on rule 26.8(1) of the CPR. He opined at paragraph [26] that:

> "...As has been seen, rule 26.8(1) provides that such an application must be made (a) promptly and (b) supported by affidavit. Once these **preconditions** are met, rule 26.8(2) permits the court to grant relief from sanctions imposed for failure to comply with any rule, order or direction **(only) if it is satisfied** that (a) the failure to comply was not intentional, (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions. And rule 26.8(3) sets out the general factors to which the court asked to grant relief from sanctions must have regard..." (Emphasis supplied)

[23] Thus, the test in rule 26.8(1) must first be satisfied before a judge is entitled to consider the conditions listed under rule 26.8(2). The onus is therefore on the appellant in this appeal to demonstrate that the learned judge granted relief from sanction in circumstances in which the preconditions were not met.

Whether the application was filed promptly

[24] In **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and the Workers Bank** [2013] JMCA Civ 1, the meaning of the word 'promptly', as used in rule 26.8, was discussed. In that appeal, the appellants had failed to comply with an order of the Master to pay the respondents' costs. The Master thereafter made an order that unless the respondents' costs were paid before 18 June 2010, the appellants' statement of case was to stand as struck out. The appellants failed to comply with the latter order and on 15 July 2010 filed an application for relief from sanction. There was no affidavit evidence to explain the default or the delay in making the application.

[25] Brooks JA, writing on behalf of the court, found that the application had not been made promptly. He opined as follows at paragraph [10]:

> "...I do accept, however, that the word 'promptly', does have some measure of flexibility in its application. Whether something has been promptly done or not, depends on the circumstances of the case."

[26] In the case at bar 26 days had passed between the date of the start of the non-compliance and the date on which the application for relief was filed. That period of delay is close to that in **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Workers Bank** (27 days). However, bearing in mind that a consideration of the issue of "promptness" requires an examination of the particular facts of each case, I find the case of **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Workers Bank** to be distinguishable. In **HB Ramsay & Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Workers Bank**, the unless order was made by the Master in an effort to compel obedience by the appellants after the appellants had breached an initial order of the court. It was of especial significance in that case that the appellants had breached both orders. In those circumstances, "promptness" would have necessitated swifter action in making the application for relief from sanctions. There was no similar factor in the instant case which would open to attack the decision of the learned judge when he found the period of 26 days in this matter to have been prompt in the circumstances. I find that the learned judge cannot be said to have been plainly wrong in finding, implicitly, that the application was made promptly.

Requirement for application to be supported by affidavit evidence

[27] The submission of the appellant that there was no affidavit evidence in support of the application does not find favour with me. Whilst the first affidavit contained erroneous assertions, it was filed in support of the application for relief, as required by the rules. Further, permission was granted by the court below for the respondents to file supplemental affidavits (an application to do so having been made when the errors contained in the initial affidavit came to the attention of counsel). Consequently, two supplemental affidavits were filed and those two later affidavits corrected the erroneous assertions regarding the explanation for the failure to serve the defences within the stipulated time. In the light of this, it cannot be maintained that there was an absence of affidavit evidence before the court for its consideration. I find the preconditions of rule 26.8(1)(a) and (b) of the CPR to have been satisfied.

Whether the learned judge correctly exercised his discretion pursuant to rule 26.8(2) of the CPR

[28] As a follow up to the discussion in paragraphs [22] and [23], it must be noted that there are several authorities from this court that affirm the position that the test set out in rule 26.8(2) of the CPR is a cumulative one: it must be satisfied in its entirety before the court can proceed to consider the elements of the test outlined in rule 26.8(3). One such case is the previously-cited one of **HB Ramsay and Associates Ltd and others v Jamaica Redevelopment Foundation Inc and Workers Bank** in which Brooks JA observed as follows:

> "[31] An applicant who seeks relief from a sanction, imposed by his failure to obey an order of the court, must

> comply with the provisions of rule 26.8(1) in order to have his application considered...the next hurdle that the applicant has to clear is that **he must meet all the requirements set out in rule 26.8(2)**. Should he fail to meet those requirements then the court is precluded from granting him relief. There would, therefore, be no need for a court, which finds that the applicant has failed to cross the threshold created by rule 26.8(2), to consider the provisions of rule 26.8(3) in relation to that applicant." (Emphasis supplied)

[29] At this point, a brief review of the affidavit evidence which was before the court below will be necessary.

The affidavit evidence

[30] In the first affidavit supporting the application for relief from sanction, sworn to by Mrs Senior-Smith, it was averred that the appellant had deliberately avoided service of the defences on him on 9 and 10 November 2016, but that service had been effected on 11 November 2016. That position is clearly retracted in the supplemental affidavit of Mrs Senior-Smith which stated that the defences had in fact not been served within the stipulated time. Learned counsel then deposed that the failure to serve the defences within the stipulated time was due to an omission to deliver the defences to the process server who was out of town, in order for the documents to be served. She also deposed that the failure to comply was not intentional and that the defences have a reasonable prospect of success.

[31] I find that sufficient evidence was before the court for the learned judge to have concluded, as he did, that the failure to comply was not intentional. In relation to whether there was a good explanation, the reason given by counsel seems to be one of

oversight. Several authorities have affirmed the position that inexcusable oversight cannot amount to a good explanation for a failure to comply (see, for example **The Attorney General v Universal Projects Limited** [2011] UKPC 37, in particular at paragraph 23). When one assesses the wider circumstances of this case, however, it is apparent that the defences in the several other matters were indeed served within the requisite time period. That being the case, I cannot reasonably fault the learned judge for finding that the respondents provided a good explanation for their failure to serve the two defences.

General compliance

[32] In relation to the issue of whether the respondents had generally complied with the rules of the court, Mr Kristopher Brown, attorney-at-law, in his affidavit in opposition to the application for relief from sanction, sets out several instances of what he would have the court regard as general non-compliance on the part of the respondents. He deposed that:

i) The acknowledgment of service of Mr Hinds was filed on 9 August 2016, when it ought properly to have been filed on or before 2 August 2016.

ii) There was a two-week delay in serving the affidavit of Mrs Senior-Smith filed on 7 December 2016. That affidavit was served on 14 July 2017 when Mr Hinds had undertaken to have it served by 30 June 2017.

iii) The supplemental affidavits on behalf of the respondents were served four days outside the prescribed time, that is, on 14 July 2017, when the learned judge had ordered that they be served on or before 10 July 2017.

[33] It can be concluded from the information outlined above that the respondents have generally filed their documents within the requisite time period, the difficulty however seems to arise in effecting service. Nonetheless, the circumstances of this case do not permit me to find that these factors amount to a general state of non-compliance.

[34] It is also a noteworthy consideration that the appellant did not dispute the satisfaction of the conditions outlined under rule 26.8(3) of the CPR.

Conclusion

[35] I am of the view that, considering all the circumstances, the justice of the case demands that the matter proceed to trial (see rule 26.8(3) (a)). The claims filed in the court below concern the important issue of land ownership, in circumstances in which the respondents contend: (i) that there exist stamped sale agreements; (ii) the preconditions for completion stipulated therein have been satisfied, in that parish council sub-division approval has been obtained; (iii) they have entered into possession of the land; and (iv) have received no refund of monies paid pursuant to the sale agreements. To my mind, these are issues that ought properly to be resolved at trial in

the light of the differing contentions of the parties. Furthermore, any failure to comply with the unless order cannot be attributed to the client, resulting in their being deprived of their day in court. This court in **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23, paragraph [30] embraced the words of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, at page 866, wherein he said "[w]e never like a litigant to suffer by the mistake of his lawyers". That statement, to my mind, lends support to this view. Also, it must be noted that rule 26.8(3)(b) of the CPR directs that the court, in granting relief, must have regard to whether the failure to comply was as a result of the party or his attorney.

[36] Additionally, the circumstances show that failure to comply has been remedied within a reasonable time (rule 26.8(3)(c)) and the case management conference dates set by the learned judge can timeously be met (rule 26.8(3)(d)).

[37] In my view, the appellant has failed to satisfy the threshold test laid down in **Hadmor Productions Ltd and others v Hamilton and others**. I therefore propose that the appeal be dismissed, with costs to the respondents to be agreed or taxed.

BROOKS JA

ORDER

Appeal dismissed. Costs to the respondents to be agreed or taxed.