[2010] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 85/2003 & 62/2004

BEFORE:	THE HON. MR JUSTICE MORRISON JA THE HON. MISS JUSTICE PHILLIPS JA THE HON. MRS JUSTICE McINTOSH JA (Ag)

APPLICATION NO. 148/2006

BETWEEN	RONHAM & ASSOCIATES LTD	APPLICANT
AND	CHRISTOPHER GAYLE	1ST RESPONDENT
AND	MARK WRIGHT	2nd RESPONDENT

APPLICATION NOS. 50/2007 and 68/2007

BETWEEN	CHRISTOPHER GAYLE	APPLICANT
A N D	RONHAM & ASSOCIATES LTD	1ST RESPONDENT
AND	MARK WRIGHT	2nd RESPONDENT

Wendell Wilkins instructed by Bishop & Fullerton for Ronham & Associates Ltd.

Mrs Ingrid Lee Clarke-Bennett, instructed by Pollard, Lee Clarke & Associates, for Christopher Gayle.

28 June, 30 July, and 8 October 2010

MORRISON JA:

Introduction

[1] By notices of application filed on 12 April 2007 (application No. 50/2007) and 14 May 2007, (Application No. 68/2007), Christopher Gayle ("the plaintiff") applied for orders striking out notices of appeal filed by Ronham & Associates Ltd. ("Ronham") on 2 October 2003 (SCCA No. 85/2003) and 23 June 2004 (SCCA No. 62/2004). By a re-listed notice of application filed on 11 June 2010, Ronham applied for orders (a) granting an extension of time for the filing of the record of appeal in SCCA No. 85/2003 and (b) that the record of appeal filed on 19 December 2006 should stand. These applications were heard together on 28 June 2010, and judgment was reserved until 30 July 2010, when the following orders were announced:

> "(i) The appellant's application for extension of time to file Record of Appeal is refused:
>
> (ii) The 1st respondent's applications to strike out Supreme Court Civil Appeals Nos. 85/2003 and 62/2004 are granted.
>
> (iii) Costs to the 1st respondent to be agreed or taxed."

These are my reasons for concurring in that decision.

The background

[2] This matter has its origins in a motor vehicle accident which occurred on 25 November 1999, while the plaintiff, who was then an employee of Ronham, was a passenger on a motor truck owned by Ronham and driven by the 2nd respondent. The plaintiff, who alleged that this accident was caused by the negligence of the 2nd respondent, sustained serious personal injuries as a result and, on 11 April 2001, he filed suit in the Supreme Court against both the 2nd respondent and Ronham to recover damages for negligence. The writ of summons and the statement of claim in this action (having been amended on 25 April 2001) were served on Ronham on 24 June 2001. No appearance was entered by or on behalf of Ronham, as a result of which interlocutory judgment was entered against it on 8 November 2001 and, on 16 May 2002, an order was made for the plaintiff to proceed to assessment of damages.

[3] By an application filed on 25 July 2002, Ronham, having entered an appearance on that day, applied to the court for an order setting aside the default judgment and sought leave to file and deliver a defence, a draft of which was exhibited to the affidavit filed in support of the application. The main point made in the draft defence was that the plaintiff was at the material time a passenger on Ronham's truck without permission and had accordingly been on a frolic of his own. That

application was heard and dismissed by James J on 21 November 2002, with costs to the plaintiff.

[4] On 24 June 2003, Ronham filed a renewed application to set aside the default judgment and for leave to file a defence, on the ground that it was in possession of "new and relevant information", recently made available to it, which would enhance its ability to defend the plaintiff's claim. This application was in due course heard by Straw J, who, in a written judgment dated 25 September 2003, dismissed it on the basis that the so-called "new and relevant information" did not carry the degree of conviction necessary to satisfy the court that there was a 'real prospect' of successfully defending the claim, which was what was required (by the Civil Procedure Rules 2002, (the "CPR"), Part 13.3(1)(c)) to be shown by a party applying to set aside a default judgment. Both Ronham and the plaintiff were represented by counsel at the hearing of this application.

[5] On 2 October 2003, Ronham filed notice of appeal (SCCA No. 85/2003) against the decision of Straw J. The formal order in respect of the hearing before Straw J, which was subsequently filed by Ronham's attorneys-at-law in the Supreme Court on 14 October 2003 (and signed by Straw J), indicated in its second paragraph that, in addition to dismissing the application to set aside the default judgment, the judge had also granted Ronham leave to appeal against her order. But the plaintiff's

attorneys-at-law contended strongly that leave to appeal had not in fact been given by the judge and, by notice of application dated 18 December 2003, applied to the court (pursuant to rule 42.10 of the CPR) to correct the previous order. That application was in due course heard by Straw J on 10 June 2004, when the judge confirmed that she had not in fact given leave to appeal her previous order, by ordering that that order "be corrected to truly reflect the actual Order made…in that no leave was granted at that hearing to [Ronham] to appeal…". This time around, however (with the parties again both represented by counsel), leave to appeal was sought by Ronham and granted by the judge and, on 23 June 2004, Ronham accordingly filed its second notice of appeal (SCCA No. 62/2004), this time against the 'amending' order made by the judge on 10 June 2004.

[6] By what is no doubt pure coincidence, on the day after the second appeal was filed, that is 24 June 2004, the assessment of the plaintiff's damages commenced before Sykes J (Ag, as he then was) in the Supreme Court. That hearing lasted for some eight days over a two month period and, on 20 September 2004, the plaintiff's damages were assessed against Ronham, for general damages (pain and suffering and loss of amenities) in the sum of $3,200,000.00, future medical care of $70,000.00, special damages of $36,000.00, loss of earning capacity of $300,000.00 and loss of future earnings of $952,120.00. Both the sums

ordered to be paid for general and special damages were to bear interest at 6% per annum on the basis usually ordered and Ronham was also ordered to pay the plaintiff's costs, to be agreed or taxed.

[7] The position as matters stood in the Registry of this court at the beginning of 2005 was therefore that, although SCCA No. 85/2003 and SCCA No. 62/2004 had been filed from 2 October 2003 and 23 June 2004 respectively, no further step had been taken by Ronham in respect of either appeal. This was to remain the position for close to two years, despite the fact that, by notice over the signature of the Deputy Registrar of this court dated 22 September 2005, the attorneys-at-law on the record for the parties in SCCA No. 85/2003 were advised that the Court of Appeal had received from the Registrar of the Supreme Court "certified documents" relating to the action in that court, and that "the transcript of the Judgment and Notes of Evidence are now available from the Registrar of the Supreme Court on payment of the prescribed fee". This notice specifically alerted the parties' attention to rule 2.7(3) of the Court of Appeal Rules ("the CAR"), requiring that four sets of the record of appeal "must be filed within twenty-eight (28) days of receipt of this notice". The obligation to prepare the record under rule 2.7(3) is that of the appellant.

[8] One year later, on 28 September 2006, the Deputy Registrar issued a further notice (again in SCCA No. 85/2003) advising the parties' attorneys-at-law that, the record not having been filed, it was the Registrar's intention to report the failure to the court, pursuant to rule 2.20(1) of the CAR, on 20 December 2006. No doubt spurred into action by this notice, on 19 December 2006 Ronham actually filed the record of appeal in SCCA No. 85/2003, simultaneously filing an application for an extension of time, by which the court was asked to sanction the filing of the record on 19 December 2006 by allowing it "to stand in good stead". On 20 December 2006, apparently on the strength of the court having been advised by counsel for Ronham of the application for extension of time filed the day before, the Registrar's Report was adjourned sine die, with the direction that evidence of service of notice of that application was to be filed with the Registrar.

[9] Ronham's application for extension of time, which was fixed for hearing on 6 March 2007, was supported by a single affidavit filed by Mr Keith Bishop, attorney-at-law, who had acted for Ronham for some time and whose firm, Bishop & Fullerton, was on the record as the company's attorneys-at-law. In his affidavit, Mr Bishop confirmed having received the Registrar's notice with regard to the availability of the transcript in September 2005 stating that upon receipt of the notice he had been in contact with Ronham with regard to his continued status as the

company's attorney-at-law. However, Mr Bishop stated that that issue had been satisfactorily resolved and he had since been advised by Ronham that it had "a serious interest in pursuing the appeal and would wish an opportunity to do so". In the circumstances, Mr Bishop assured the court, Ronham was now in a position "to comply with all orders to ensure that the matter, when fixed for trial, will be presented without further delay".

[10] On 12 April 2007, the plaintiff filed an application to strike out the appeal in SCCA No. 85/2003, primarily on the ground that Ronham had not obtained permission to appeal against the order of Straw J made on 25 September 2003, and on 14 May 2007, the plaintiff filed a second application, this time to strike out the appeal in SCCA No. 62/2004, on the ground that Ronham had failed to take any steps to prosecute the appeal since the date of its filing on 23 June 2004.

[11] It appears that when Ronham's application for an extension of time was considered by a single judge, it was ordered that it should be heard inter partes. On 24 July 2007 the plaintiff's application to strike out the appeal in SCCA No. 85/2003 came on for hearing, with counsel for both parties in attendance, but was taken out of the list, apparently by consent. In due course, that application and Ronham's application for extension of time were both listed for hearing together before a single

judge of this court on 20 November 2007, but on that occasion, there being no appearance for or on behalf of either party, the matter was again taken out of the list.

[12] Both appeals then remained in a state of quietude for another two years, until 15 December 2009, when Ronham filed an urgent application to this court in SCCA No. 62/2004 for an order staying all proceedings in the court below pending the hearing of the appeal. This application was triggered by the fact that on 4 December 2009 the plaintiff had obtained a Provisional Attachment of Debts Order from the Supreme Court, based on the judgment debt (in respect of which there was no stay of execution in place), which was calculated at $6,795,700.42. As a result of this order, garnishee orders were issued to several of Ronham's known creditors, including its bankers, and on 9 December 2009 Ronham discovered that its bank accounts were frozen. On 17 December 2009, an order for a stay of the Supreme Court proceedings for four months, "pending the determination of matters at the Court of Appeal", was entered upon terms, by and with the consent of the parties.

[13] Finally in this sorry history, Ronham's application for an extension of time came before the court on 18 May 2010, but did not proceed, because of the absence of its legal representatives.

The current applications

[14] I propose, as Mrs Lee Clarke-Bennett, who appeared for the plaintiff, submitted that we should, to take the applications to strike out the appeals first. In addition to the material filed when these applications were originally made in 2007, which was basically concerned to show the history of the matter, much of which has been set out in the foregoing paragraphs of this judgment, the plaintiff relied on a supplemental affidavit in support of the application to strike out the appeal in SCCA No. 62/2004. This affidavit, which was sworn to by Ms Shanna Stephens, a legal research assistant with the firm of Pollard, Lee Clarke & Associates, spoke to "the prejudice that will be suffered by the [plaintiff] if this appeal is allowed to proceed at this time, eleven (11) years after the accident in which [the plaintiff] was seriously injured". Assuming that, if the Supreme Court action is allowed to proceed, a trial date might not be obtainable before the year 2012 or possibly 2013, Ms Stephens deposed, on the basis of information given to her by the plaintiff, that "he would be hard pressed…to locate witnesses in relation to the issues raised by [Ronham] in its proposed defence, i.e. that the [plaintiff] was on a frolic of his own at the time of the accident". The affidavit went on to state that the plaintiff was "financially challenged and has expended all his available resources on this matter for the past eight (8) years or more and would be unfairly

prejudiced in having to prosecute afresh a full claim against [Ronham],…11 to 13 years or more after the fact".

[15] The only other new material before the court was an affidavit sworn to on behalf of Ronham, again by Mr Bishop, in response to Ms Stephen's affidavit. Mr Bishop pointed out in his affidavit that, of the 11 year period which had indeed elapsed since the accident, the first five years were "accounted for" by the time it took the plaintiff to file the action in the first place (two years) and the period thereafter that it took for the assessment of damages to be completed (a further three years). Mr Bishop's affidavit challenged Ms Stephen's characterisation of the plaintiff's injuries as "serious" and, in relation to the likely date for trial of the action, asserted that Ms Stephens' projection was unduly pessimistic in the light of the provisions of the CPR which allow the case management judge to make an order for an early trial, perhaps "as early as next year". Mr Bishop further asserted that Ronham has a right to be heard on the issue of liability and that the plaintiff was also to blame for some of the delay that had affected this matter.

[16] Mrs Lee Clarke-Bennett very helpfully provided us with detailed skeleton arguments in support of the applications to strike out the appeals. She referred us to rules 1.1(10) and 1.13 of the CAR for the applicability of the "overriding objective" of the CPR to this court, as well

as to the power of the court to strike out a notice of appeal. She also invited us to consider the extent of the unexplained delay by Ronham in this case, submitting that the plaintiff had not contributed to the delay, while Ronham, on the other hand, "has been casual and delinquent in its conduct and has abused the process of the Court", as evidenced by its not having "even bothered to file an Affidavit in response to the application to strike out its appeal". In support of these submissions, Mrs Lee Clark-Bennett referred us to Commonwealth Caribbean Civil Procedure (Kodilinye & Kodilinye, 2nd edn) and to decisions of this court, the Supreme Court and of the Court of Appeal of England.

[17] Mr Wilkins for Ronham was constrained to accept that there had been "some delay" in prosecuting the appeal, but pointed out that some of the period of delay was attributable to the fact that the transcript of the proceedings in the Supreme Court was being awaited. In addition, Ronham had at some point suffered from some "financial woes", which had also affected the progress of the matter. He argued that such delay as there had been was not unreasonable and that no real prejudice had been shown by the plaintiff, though if there was any prejudice, this could be mitigated by any order that the court might make. Finally, Mr Wilkins urged the court not to "shut out" Ronham from its day in court, submitting that both sides were entitled to be treated fairly and pointing out that in

the case of ***Biguzzi v Rank Leisure Plc*** [1999] 1 WLR 1926, striking out had been said to be a last resort.

The court's powers

[18] Rule 1.13(a) of the CAR empowers this court to "strike out the whole or part of a notice of appeal or counter-notice". In addition to this power, rule 2.20(1) provides that where an appellant fails to comply with the rules, "any other party may apply to the court to dismiss the appeal".

[19] Rule 1.1(10) (a) of the CAR provides that Part 1 of the CPR (the overriding objective) shall apply to this court, subject to any necessary modifications. This court is therefore equally enjoined to have regard to "the overriding objective of enabling the court to deal with cases justly" (CPR, rule 1.1(2)), which includes ensuring that matters are "dealt with expeditiously and fairly" (rule 1.1(2) (e)).

Discussion

SCCA No. 85/2003

[20] This is Ronham's appeal from Straw J's order made on 25 September 2003, dismissing Ronham's application to set aside the default judgment entered against it by the plaintiff on 8 November 2001. It is now common ground between the parties that leave to appeal that order was not given by Straw J. Section 11(1) (f) of the Judicature (Appellate Jurisdiction) Act provides that no appeal shall lie "without the leave

of the judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except…". Certain exceptions follow, none of which applies in this matter.

[21] It therefore follows that, if this is an appeal from an interlocutory order, leave to appeal is in fact a precondition to the jurisdiction of this court. The question whether an appeal is from an interlocutory or final order is one of those old controversies which, happily, may now be considered to be settled, it having been held in ***White v Brunton*** [1984] 2 All ER 606 that, in considering whether an order or judgment is interlocutory or final for the purposes of leave to appeal under the equivalent English statutory provisions, regard should be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, where the nature of an application is such that any order made will finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal. However, if the nature of the application that is before the court is such that the decision on that application, if given one way, will finally dispose of the matter in dispute, but if given the other way, will allow the action to go on, the matter is interlocutory, irrespective of the actual outcome. This approach, known as 'the application approach' (to be contrasted with 'the order approach'), was approved and applied by this court in ***Leymon Strachan v The Gleaner***

Company Ltd and Dudley Stokes (SCCA No. 54/97, judgment delivered 18 December 1998).

[22] In the instant matter, it seems to me to be clear that Straw J's order was an interlocutory order, this being a case where, however the application to set aside the judgment in default had been determined, the matter in dispute would not have been disposed of finally. It follows from this that, leave to appeal being a matter going to the jurisdiction of this court, this appeal is not properly constituted and must be struck out on this ground alone. A further result of this conclusion is that Ronham's application for an extension of time, which was filed in this appeal, cannot avail it in these circumstances.

SCCA No. 62/2004

[23] This is Ronham's appeal from Straw J's order on 10 June 2004 correcting the order which had been signed in respect of her decision refusing to set aside the default judgment. There is no question that leave to appeal was sought and granted in respect of this order and that the appeal, having been filed in time on 23 June 2004, was properly constituted.

[24] However, this was, in my view, plainly a procedural appeal, that is, "an appeal from a decision of the court below which does not directly decide the substantive issues in a claim…" (CAR, rule 1.1(8)). Rule 2.4 of

the CAR requires the appellant in a procedural appeal to "file and serve written submissions in support of the appeal with the notice of appeal". The notice of appeal filed by Ronham was not accompanied by written submissions as required by the rules, nor has any application been made by Ronham since the time of filing for an extension of time to do so (the single application for extension of time having been made by Ronham in SCCA No. 85/2003). In fact, it seems to me to be clear that absolutely no step has been taken by Ronham to advance this appeal since it was filed on 23 June 2004.

[25] Mrs Lee Clarke-Bennett very helpfully brought to our attention a brief report of a statement by Neuberger J (as he then was) in ***Annodeus Entertainment Ltd and Others v Gibson and Others*** (2000) The Times, 3 March, of the considerations which it would normally be relevant to have regard to in applications to strike out for want of prosecution:

(i) the length of the delay;

(ii) any excuses for the delay;

(iii) the extent to which the claimant had complied with the rules and any orders of the court;

(iv) the prejudice to the defendant;

(v) the effect on the trial;

(vi) the effect on other litigants;

(vii) the extent, if any, to which the defendant has contributed to the delay;

(viii) the conduct of the claimant and the defendant with regard to the litigation; and

(ix) any other relevant factors.

[26] In my view, these considerations are equally applicable, *mutatis mutandis*, to applications to dismiss civil appeals, pursuant to rule 2.20 (1) for non-compliance with the rules. In the instant case, the length of Ronham's delay, for which no real excuse has been offered, has, by any measure, been inordinate and there has been a blatant failure to comply with the rules.

[27] On the question of prejudice to the plaintiff, this court has on more than one occasion accepted that, in personal injury matters in particular, "even the best of memories falter after a lapse of six years and so it may be impossible to obtain a fair trial" (per Downer JA in ***Patrick Valentine v Nicole Lumsden and another*** (1993) 30 JLR 525, 527; see also ***West Indies Sugar v Stanley Minnell*** (1993) 30 JLR 542, 546, where some seven years had elapsed from the date of the accident by the time the matter reached this court, in which Forte JA, as he then was, considered that "the length of the delay since the filing of the writ is in itself evidence that there is a substantial risk that a fair trial is not possible.").

[28] It is now nearly 11 years since the accident in which the plaintiff was injured. Even if Ronham were somehow to succeed in putting its house in

order procedurally and to reverse Straw J's decision not to set aside the default judgment against it, it is clear that there is no chance of all of that being achieved so as to allow the trial of this action to take place this year, or quite possibly next year. In my view, therefore, quite apart from the evidence of prejudice which has been put forward on behalf of the plaintiff (which there is, in any event, no reason to doubt), it already seems to be the case that there is a substantial risk that it will not be possible for the plaintiff to obtain a fair trial. Even if there were occasionally points during the seven years since this appeal was filed when it appeared that the plaintiff's cause had also become becalmed, these were few and this being Ronham's appeal, it was its primary responsibility to see to its advance.

[29] Mr Wilkins referred us to ***Biguzzi v Rank***, for Lord Woolf's observation in that case that the rules will in many cases provide the court with "alternatives which will enable a case to be dealt with justly without taking the draconian step of striking out". I have no doubt that that may be so, but it is also relevant to bear in mind the earlier observation by that same learned judge in ***Grovit and Others v Doctor and Others*** [1997] 2 All ER 417, 424, that, "To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process". The very few steps taken by Ronham since the filing of this appeal, have been purely defensive: in late 2006 as a result of the threat

of the Registrar's Report and a full three years later, in late 2009, as a direct result of the plaintiff taking long overdue steps to enforce the judgment in his favour. In these circumstances, it seems to me that Ronham by its conduct throughout the period since the filing of this appeal has evinced no real intention to bring it to a conclusion and that has in fact amounted to an abuse of the process of the court.

[30] A final, and substantial, consideration which might weigh in Ronham's favour would arise if there was anything in the material placed by it before this court to suggest that the appeal against Straw J's refusal to set aside the default judgment had any realistic prospect of success. This would, in turn, depend on whether Ronham had succeeded in demonstrating that it had a "real prospect of successfully defending the [plaintiff's] claim", which is the test laid down in rule 13.3 (1) of the CPR. On this point, Straw J referred to the following observations by Potter LJ in ***ED&F Man Liquid Products Ltd v Patel & ANR*** [2003] EWCA Civ 472 (at paras. 7 and 8) on precisely what that phrase (as it appears in the equivalent English rule) was intended to convey:

> "What is clear is that, in drafting the Civil Procedure Rules the draftsman adopted the phrase "real prospect of successfully defending the claim" for the purposes of both CPR 13.3.(1) and 24.2 and, subject to the question of burden of proof, may be taken to have contemplated a similar test under each rule. It was stated by Lord Woolf MR in ***Swain v Hillman*** [2001] 1 All ER 91 at 92j that:

> "The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success … they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'
>
> I regard the distinction between a realistic and fanciful prospect of success as appropriately reflecting the observation in the ***Saudi Eagle*** that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable…"

[31] Straw J formed the view that the material placed before her by Ronham (which is, in all material respects, identical to that which was before this court) did not carry the degree of conviction necessary to satisfy the court that there was a real prospect of successfully defending the plaintiff's claim. I entirely agree and would only add that there was nothing before Straw J in the way of direct evidence to support the contention that the plaintiff was on a frolic of his own at the material time. Neither of the two affidavits filed on behalf of Ronham in support of the first or the second application to set aside the default judgment was sworn to by Mr Gregory Hamilton, the managing director of the company, who was the person who was said, in the second of those affidavits, to have had "the sole responsibility of assigning sidemen and drivers", and who, presumably, could best speak to the specific instructions that were given to the plaintiff at the material time (see para. 19e of the second of the two affidavits sworn to by Ms Paulette McKenzie-Hamilton on 24 June

2003). Mr Hamilton's voice was in fact heard in this matter only when, several years after the fact, he swore an affidavit in support of the application to stay proceedings on 15 December 2009. But, even then, he was not able to say more than that it was the 2nd respondent, the driver of the truck on which the plaintiff was a passenger, who had allowed the plaintiff onto the truck, "unknown to me and without permission". Quite apart from the fact that this affidavit was not before Straw J, it is difficult to see how it could possibly assist Ronham to establish the proposed defence, without the input of the 2nd respondent himself as to the circumstances in which the plaintiff, his fellow employee, came to be a passenger on the truck. In the almost 11 years that have passed since this accident occurred, there has been no indication of the whereabouts of the 2nd respondent, far less of his willingness to give evidence on behalf of Ronham.

[32] These are my reasons for concurring in the decision of the court announced on 30 July 2010 and set out at para. [1] above.

PHILLIPS, J.A.

I have read the draft reasons of my learned brother Morrison, J.A and agree with the same. I have nothing further to add.

McINTOSH, J.A.

I agree with my brother Morrison, J.A that these are the reasons for our decision handed down on 30 July 2010.