[2017] JMCA App 32

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 62/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN GRACE TURNER APPLICANT

AND THE UNIVERSITY OF TECHNOLOGY JAMAICA RESPONDENT

Owen Crosbie instructed by Owen S Crosbie & Co for the applicant

Gavin Goffe, Jahmar Clarke and Adrian Cotterell instructed by Myers Fletcher & Gordon for the respondent

23 and 26 October 2017

ORAL JUDGMENT

BROOKS JA

[1] In this application for leave to appeal, the applicant, Ms Grace Turner, argues that she has a real prospect of success in overturning the decision of Simmons J, who, on 17 March 2017, refused to set aside a judgment in default of defence, which was secured by the respondent, the University of Technology Jamaica.

[2] In supporting the application, Mr Crosbie, appearing for the applicant, argued that:

(a) the decision of the court below was tainted by communication initiated by the learned judge to only the respondent;

(b) the learned judge embarked on a trial of the case, which was not her mandate at that stage;

(c) the learned judge was wrong to rely on a written judgment of this court, delivered on 13 June 2014, which found that the respondent was properly constituted as a claimant;

(d) the learned judge was wrong to have ignored the fact that in that previous judgment, this court had said that the document signed by the applicant was not a bond; and

(e) the respondent was not entitled to judgment as its attorneys-at-law had misconducted themselves by applying for the default judgment before the ruling of this court in the previous proceedings had been handed down.

[3] Having considered the arguments of learned counsel and the material placed before us, including the comprehensive judgment of Simmons J, we find that none of these proposed grounds have any merit.

[4] Firstly, there is no evidence of any improper communication between Simmons J and the respondent's attorneys-at-law. The learned judge's clerk requested copies of the amended claim form and particulars of claim from those attorneys-at-law and they obliged, and in the process informed the applicant's attorneys-at-law that they had done so.

[5] Secondly, in respect of the previous judgment of this court and the respondent's reliance on it, it must be said that the applicant's categorisation of that judgment as unlawful is not only unfortunate, but is to be condemned. The judgment has not been set aside by the Privy Council and therefore stands. It bound Simmons J as it does these parties.

[6] There is, therefore, nothing untoward in the conduct of the respondent's attorneys-at-law who acted on the decision of this court, which was handed down on 19 December 2013. The period allowed for the applicant to file a defence to the claim was long past when the respondent filed its request for judgment in default of defence. The judgment in default of defence was obtained on 28 May 2014.

[7] Thirdly, the learned judge in exercising her discretion conducted a careful examination of whether the applicant had a real prospect of success in defending the claim. This required her to consider whether there was an affidavit which disclosed a

defence with a real prospect of success. She found that there was no such disclosure. In doing so, she properly looked at the issues of the bond versus a contract and whether the applicant had an obligation to repay the loan made by the respondent to the applicant. We find no fault with either the learned judge's approach or her conclusion. In fact, we commend her approach and as previously said, have no basis to disagree with her conclusion.

[8] Based on all the above we agree with Mr Goffe, for the respondent, that the application should be refused as not having disclosed that an appeal has any real prospect of success.

ORDER

1. The application is refused.

2. Costs to the respondent to be agreed or taxed.