[2018] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2014

APPLICATION NO 57/2018

BETWEEN	**UNITED GENERAL INSURANCE COMPANY**	**APPLICANT**
AND	**MARILYN HAMILTON**	**RESPONDENT**

Conrad George and Andre Sheckleford instructed by Hart Muirhead Fatta for the applicant

Captain Paul Beswick and Ms Gina Chang instructed by Ballentyne Beswick and Company for the respondent

11 and 25 July 2018

IN CHAMBERS

PUSEY JA (AG)

[1] This matter has had a long and tortured history. Its genesis is a purported dismissal in 2006. The action was filed in 2007 and this appeal was filed in 2017. Many hearings have been held in the Supreme Court and this court.

[2] This application seeks a stay of execution of a default costs certificate. This court ordered costs against the applicant on 10 November 2017. The respondent filed and served a bill of costs and notice to serve points of dispute on the applicant's attorneys-at-law on 8 February 2018.

[3] The applicant failed to file and serve the necessary points of dispute and the applicants applied for a default costs certificate. The certificate was dated 12 March 2018.

[4] On 13 March 2018 the applicant applied to the court to set aside the default costs certificate and for a stay of the default costs certificate. By affidavit of that date, their attorneys indicated that although they were served on 8 February 2018 the bill of costs did not come to the attorneys' attention until the default costs certificate was served on them on 12 March 2018.

[5] In the proposed points of dispute the applicant makes a detailed challenge to the respondent's bill of costs and asserts that the costs to be awarded to the respondent ought to be $475,230.00. The respondent's default costs certificate is for $11,484,070.00.

[6] Captain Beswick was strident in his opposition to the application for a stay. He mentioned the history of this matter. As he articulated in his written submissions "There is a consistent wanton abuse of the processes of the Court by the ... Applicant and the court has consistently exercised their discretion and granted relief. They pay little regard to court orders, rules and procedures and constantly seek relief for their tardiness, non-compliance and inefficiency".

[7] Counsel pointed out that this court has recently commented on the conduct of this case. In a judgment handed down when the costs order, which led to the certificate

that is the subject of this application was made, Phillips JA said:

> "[t]he lack of attention to the protection of UGI's rights, and the scant regard paid to the orders of the court and to the rules has been quite extraordinary in this matter. We hope that the strident warnings given by this court earlier in June of this year, and now yet again in this judgment, will help representatives of UGI to take heed, as they will not obtain further indulgence or receive benefits from the court with that dilatory approach".

Stay of execution

[8] The principles relevant to a stay of execution have been examined by several decisions of this court. These decisions draw upon **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065 and have been explored in **Ferrnah Johnson-Brown v Marjorie McClure** [2015] JMCA App 19 and **Caribbean Cement Company Limited v Freight Management Limited** [2013] JMCA App 29 In that last mentioned case the court expressed the principles in this way:

> "[The] authorities show that in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interest of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:
>
> (a) The applicant's prospect of success in the pending appeal
>
> (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.
>
> (c) The financial hardship to be suffered by the applicant if the judgment is enforced."

[9] Captain Beswick indicated that the application should not be granted because no good or sufficient reason has been given for the failure to file points of dispute and the court has taken a more stringent position to setting aside default costs certificates.

[10] Counsel pointed out that the applicant implied administrative inefficiency as the reason for their failure to file the points of dispute on time. Among other cases, he relied on **The Commissioner of Lands v Homeway Foods Limited and Anor** [2016] JMCA Civ 21 from this court and **The Attorney General v Universal Projects Limited** [2011] UKPC 37 from the Privy Council. In both of these cases law officers of the state pleaded lack of resources and administrative inefficiencies to explain significant delays in obeying orders of the court in filing relevant documents under the court rules.

[11] Captain Beswick rightly argued that these cases confirmed that administrative inefficiencies and inexcusable oversight were not justifiable reasons for delay. He went on to say that as a result the substantive application to set aside the default costs certificate was destined to fail.

[12] Great assistance was sought by the respondent from the case of **Andrew Mitchell MP v New Group Newspapers Limited** [2013] EWCA Civ 1537. In that case, a cost budgeting hearing was hindered by the claimant failing to file the budget until a few hours before the hearing rather than the required seven days before the hearing. The Master entered a default cost certificate and after a hearing refused relief

from sanction. She held that the excuses for the breach were inadequate and noted that the claimant's attorneys provided inconsistent reasons for the delay. In her ruling the Master used as an analogy amendments to the Civil Procedures Rules which had not been applicable to the case before her. The English Court of Appeal upheld the Master's ruling agreeing that the defaults were not minor or trivial and there was no good excuse for them. The appellate court held that although the decision was a robust one it was necessary to send a clear message that legal representatives increase their efficiency and routinely comply with rules, practice directions and orders.

[13] Counsel for the respondent, also pointed out that when undertook, the balancing exercise that was required as set out by Morrison P, in **Channus Block & Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16, it would be clear that the applicant was not in danger or ruin. As it is by counsel's words "one of the island's most successful insurance companies" with "good financial standing". On the other hand, the respondent is being prejudiced by being kept out of her judgment.

Analysis

[14] Every court order should be obeyed. Where there is disobedience the circumstances of the disobedience should be taken into account. The circumstances of this case are that two bills of costs were sent to the applicant's attorneys on the same day in relation to the same order of the court. The attorneys responded to one of the bills of cost but did not realise until after the default costs certificate was granted that the second certificate was overlooked. As stated before, this application was filed the day following the grant of the default costs order.

[15] Brooks JA has helpfully set out the powers of this court in relation to default costs orders and clarified some misconceptions in **Lijyasu Kandekore v COK Sodality Credit Union Limited and others** [2017] JMCA App 20. In summary the learned judge of appeal indicated that the registrar could only set aside a default costs certificate if the receiving party was not entitled to it. However, an application may be made to the court to set aside the default costs certificate for "good reason".

[16] The ever helpful Brooks JA outlined the issues that would constitute "good reason " in paragraph 14 of **Rodney Ramazan and another v Owners Of Motor Vessel (CFS Pamplona)** [2012] JMCA App 37. The factors to consider include:

> "(1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought; and
>
> (4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs"

[17] In considering a stay of execution in this case it seems to me that the circumstances of the default and the promptness of the application are factors where a court **may** reasonably find for the applicant, even with the history of this matter. Additionally, there is a clearly articulated dispute over costs which is delineated in the proposed points of dispute. In terms of a realistic prospect of successfully disputing the

bill of costs, I will merely comment that it is uncommon for the gap between the proposed bill of costs and the points of dispute to be as large as it is in this case.

[18] In relation to balancing the circumstances as mentioned in **Channus**, while conceding that the applicant may not be ruined by this order, I also note that in **Channus** the court was considering a judgment after trial. I believe that the circumstances are different when balancing a stay of execution of an order for costs made on a default costs certificate. At this stage of the proceedings the award of costs is guaranteed and the only uncertainty is the amount of the costs that the respondent will receive. It would seem reasonable that if the other circumstances are in favour of granting a stay of execution, that such a stay should be granted on the condition that the amount the applicant contends in its points of dispute that should be awarded is paid by the applicant to the respondent.

[19] I have considered Captain Beswick's reminder that in **Andrew Mitchell** the Court of Appeal made the order despite realising that it may create a windfall for the other party. However, the circumstances of the cost budgeting system in the United Kingdom is quite different from what obtains in this jurisdiction.

[20] It has come to light in the hearing of this application that there are proceedings in the Supreme Court in relation to the execution of orders arising out of this matter. One order in relation to this was disclosed in these proceedings. It appears that there has been a conditional stay with some moneys paid into court, consequent on an order of Batts J. It was implied that the applicant may have had to pay out additional sums in

relation to this order. I say this in passing, as in the absence of any affidavit setting out these circumstances, the court is unable to consider any other sums that may have been paid into court in this matter.

[21] The dicta in **Andrew Mitchell** and of Phillips JA's comments in her judgment in this matter urging efficiency will still have to be surmounted by the applicant at the hearing of the application to set aside the default cost order. At this stage however, in view of all the circumstances the court is willing to order a conditional stay of execution of the default costs order.

[22] The application for stay of execution of the default cost certificate until the hearing of the application to set aside is granted, on the condition that the applicant pays the sum of $475,230.00 to the respondent on or before 10 August 2018.

[23] Costs of this application is to be paid to the respondent by the applicant.