[2023] JMCA App 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00012

APPLICATION NO COA2023APP00080

BETWEEN	**CLIFTON WILLIAMS**	**APPLICANT**
AND	**ANTHONY BROWN**	**1ST RESPONDENT**
AND	**AMBUCARE COMPANY LIMITED**	**2ND RESPONDENT**

Richard Hemmings instructed by Sylvester Hemmings & Associates for the applicant

Mrs Suzette Radlein and Ms Monique Rowe for the respondents

9 and 27 October 2023

Civil practice and procedure — Application for extension of time within which to file counter-notice of appeal — The correct procedure where a successful party is served with a notice of appeal and also seeks to appeal

BROOKS P

[1] This is an application for an extension of time in which to file a counter-notice of appeal. The applicant, Mr Clifton Williams, is the respondent to a notice of appeal filed by the respondents, Mr Anthony Brown and Ambucare Company Limited, against a judgment handed down by Hutchinson Shelly J on 19 December 2022 ('the learned judge').

[2] The respondents served their joint notice of appeal on Mr Williams' attorneys-at-law on 27 January 2023. By virtue of rule 2.3(4) of the Court of Appeal Rules ('CAR'),

Mr Williams should have filed his counter-notice of appeal on or before 13 February 2023. The reason given for failing to do so is that his attorneys-at-law were not able to reach him within the required time so as to take his instructions on the matter. He filed the present application on 14 April 2023.

[3] The respondents opposed his application. They contended that he does not have a good explanation for his default and, in any event, his proposed counter-notice of appeal has no real prospect of success.

[4] We heard the application on 9 October 2023 and, after hearing the submissions of counsel, made the following orders:

> "1. The application for an extension of time within which to file a counter-notice of appeal is refused.
>
> 2. Costs of the application to the [respondents] to be agreed or taxed."

At that time, we promised to put our reasons in writing and this is the fulfilment of that promise.

The background to the application

[5] The genesis of the litigation is an incident which occurred on 10 October 2013 in which an ambulance, owned by Ambucare Company Limited, and driven by Mr Anthony Brown, struck Mr Williams while he was a pedestrian crossing the road in the vicinity of the Half-Way-Tree clock tower. He suffered injury as a result. It was a question of fact for the learned judge as to the way in which the incident occurred and whether the vehicle had its siren on and lights flashing at the time.

[6] The learned judge gave judgment for Mr Williams but found that he was 80% contributorily negligent and thus the respondents were ordered to stand only 20% of his general damages (assessed at $5,000,000.00). She, however, ordered the respondents to pay all of his special damages ($88,500.00).

[7] Whereas the respondents seek to set aside the learned judge's assessment of the quantum of damages, Mr Williams, through his proposed counter-notice of appeal, sought to reverse the learned judge's apportionment of liability, so that the respondents would be responsible for paying 80% of his general damages.

The application

[8] Mr Hemmings, on behalf of Mr Williams, argued that the application for extension of time ought to be granted on the basis that the delay in making the application was not inordinately long. He relied on **Clive Banton and Another v Jamaica Redevelopment Foundation Inc** [2016] JMCA App 2 ('**Banton v JRF**'), where this court permitted an application for extension of time where the delay was 56 days. Additionally, he said there was a good explanation for the delay, that is, Mr Williams resided in a rural area, with poor cell phone reception and at some point he did not have a cell phone to instruct his attorneys. Learned counsel advanced that Mr Williams' proposed grounds of appeal had merit and the award of damages should properly increase given the nature of Mr Williams' injuries and that the learned judge's apportionment of liability should be modified in favour of Mr Williams. He added that if this court grants the application, there would be no prejudice to the respondents.

The opposition

[9] Mrs Radlein, in opposing the application, submitted that the application should be refused because:

a. the reasons tendered for the delay lacked credibility and sincerity; and
b. the proposed grounds of appeal in the counter-notice of appeal had no real prospect of success.

A procedural question

[10] During the course of submissions, the court raised the issue as to the correct form that Mr Williams should use if he were granted permission to contest the learned

judge's judgment. Mr Hemmings pointed the court to the decision in **Banton v JRF**, in which a similar question was raised.

[11] The procedural situation in that case was similar to this case in that:

a. the judge at first instance ruled in favour of the Bantons;
b. the other party filed an appeal against the judge's decision;
c. the Bantons also wished to contest the judgment; and
d. they were late in filing their counter-notice of appeal.

[12] Paras. [21] – [23] of **Banton v JRF** deal with the procedure that a successful party is to follow if they are served with a notice to appeal and also wish to challenge the judgment in their favour. The court set out the procedure at para. [23]:

> "In this case, the Bantons … were served with JRF's notice of appeal on 8 April 2015. They were, themselves, dissatisfied with the decision in the court below. They should have filed their counter-notice of appeal, using form A2 [of the CAR], on or before 22 April 2015, in accordance with rule 2.3(1) of the CAR."

[13] Based on the above, if Mr Williams' present application had succeeded, the required procedure would have been for him to file a form A2 as stipulated by rule 2.3(1) of the CAR. That, given the decision set out at para. [4] above, is now unnecessary.

The principles that relate to this application

[14] The general principle is that the court's timelines ought to be observed. The court, however, in appropriate cases, may exercise its discretion to extend timelines where there has been non-compliance (see rule 1.7(2)(b) of the CAR). The application for the exercise of that discretion must be assessed against the well-established standard set by this court in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment

delivered 6 December 1999 ('**Leymon Strachan**'), and cited in numerous cases since. The essence of the requirements of any applicant in Mr Williams' position is to satisfy this court that:

(i) the length of the delay is not inordinate;
(ii) there are good reasons for the delay;
(iii) there is an arguable case for the counter-notice of appeal;
(iv) if the application is allowed, the degree of prejudice to the other parties is not oppressive; and
(v) it would be in the interest of justice to grant the application.

[15] The court exercises some flexibility in respect of requirement (i) and even in the absence of a good reason for the delay (although a reason must be given – **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 31/2003, judgment delivered 31 July 2007), it is not bound to reject an application for an extension of time. As Panton JA, as he then was, said in **Leymon Strachan**, "the overriding principle is that justice has to be done".

The analysis

Requirements (i) and (ii): The length of the delay and the reasons for the delay

[16] The length of the delay in filing this application was not inordinate in the scheme of things. As mentioned above, Mr Williams should have filed his counter-notice of appeal on or before 13 February 2023. In fact, a document purporting to be a counter-notice of appeal was filed on 28 March 2023, but since it was out of time and without prior leave, it is invalid (see **Evanscourt Estate Company Limited v National Commercial Bank** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Application No 166/2007, judgment delivered 26 September 2008 ('**Evanscourt**') at page 5).

[17] Mr Williams' reasons for failing to observe the stipulated timeline were given in affidavits by Mr Richard Hemmings and Mr Williams, respectively. Mr Hemmings stated that the attorneys-at-law were not able to contact Mr Williams by telephone because, as he later informed them, he lives in an area "with very poor cell phone reception" (para. 5 of Mr Hemmings' affidavit).

[18] Mr Williams gave different reasons. He said in his affidavit sworn to on 12 June 2023, firstly, that he did not have an email address and was "**currently** without a cell phone" (emphasis supplied). However, he did not say when that situation with the phone came about. Next, he said that although he comes to Kingston for three to four days per week, he did not know where to find his attorneys-at-law because they had moved office. Then he said that it was only in March 2023 that the attorneys-at-law were able to contact him, and it was through telephone contact with one of his relatives.

[19] Mrs Radlein criticised Mr Williams' reasons in this regard. She argued that the assertion that he did not know where to find his lawyers was unlikely to be true, because a witness statement that he signed in June of 2022 bore their current address. He also said that they had removed in April of 2022. Ms Radlein's criticisms are not unreasonable.

[20] The reasons given for the delay are, therefore, not good, but, as Panton JA said in **Leymon Strachan**, they will not prevent an analysis of the merits of the proposed appeal.

Requirement (iii): Whether the counter-notice of appeal is arguable

[21] Mr Williams' proposed counter-notice of appeal contains five grounds of appeal:

> "i. The Learned Judge erred by allowing the [respondents' ambulance] to be considered an emergency vehicle without the presentation of evidence to this effect.

ii. The learned [sic] Judge failed to acknowledge or adequately acknowledge that the standard of care for emergency vehicles and civilian motorists are one [and] the same.

iii. The Learned Judge erred in her conclusion that both pedestrians and motorist [sic] have an equal burden to other road users.

iv The learned [sic] Judge erred in stating that there was no heavier burden from [sic] pedestrians or motorists to their [sic] road users, while implying a greater burden on [Mr Williams].

v. The Learned Judge erred by apportioning Liability at 80% to [Mr Williams], when [Mr Williams] took reasonable steps to follow the Road Traffic Act, thus making it excessive and disproportionate in relation to the circumstances."

[22] Mrs Radlein argued that these grounds of appeal had no real prospect of success as:

a. the complaint in ground i. was inconsistent with Mr Williams' case in the court below;
b. the other complaints directly dealt with the learned judge's findings of fact, and it is well established that this court will not lightly disturb such findings; and
c. the learned judge conducted a comprehensive assessment of the law regarding the respective duties of motorists (particularly drivers of emergency vehicles) and pedestrians and there can be no fault found with her analysis.

[23] Although Mr Hemmings sought to impugn the learned judge's findings, his submissions lacked sure support. A perusal of the learned judge's judgment shows a comprehensively reasoned analysis. She indicated her bases for rejecting various aspects of the evidence of Mr Williams and Mr Brown. The learned judge, in carefully

analysing the issues of fact, found that Mr Williams was not credible in his account of the way in which the collision occurred.

[24] Ground (i) has no real prospect of success. Mr Hemmings sought to say that the respondents failed to prove that the vehicle was an emergency vehicle at the time of the incident. However, the learned judge found, as a fact, that the vehicle's "lights and sirens had been engaged…and that these were still being used at the point of the collision", and that it was "operating in emergency mode" (para. 75]). The learned judge also noted, at para. [32] of her judgment, that the issue of the registration of the vehicle had not been raised during the cross-examination of the respondents' witnesses or otherwise in evidence. She was correct in ignoring any analysis of the point. The issue of the registration of the vehicle as an emergency vehicle would not have affected the issue of negligence in that scenario.

[25] Grounds (ii) – (v) are similarly doomed to failure. The learned judge carried out a careful consideration of the law and the evidence, and the application of the former to the latter. She considered several cases involving emergency vehicles and the principles of law that they followed or produced. She accepted that:

a. Mr Brown stopped in obedience to the traffic lights and "only moved the vehicle when instructed to do so by the [police] officer [on the scene at the time]" (para. [76]);

b. the police officer signalled pedestrians to stop and signalled the ambulance to proceed;

c. Mr Williams crossed the road based on the indications of the pedestrian light and in "complete disregard of the presence and commands of the officer who was on duty" (para. [72]); and

d. "…while Mr Brown sought to act in compliance with the instructions of the officer he placed a greater reliance in proceeding on the indication from the police and in that narrow window failed to keep a proper lookout for the movement of pedestrians" (para. [79]).

[26] She found that "although Mr Brown was guilty of a minor lapse in judgment, [Mr Williams] fell woefully short of his responsibility to ensure that it was safe to proceed" (para. [82]). The presence and directions of the police officer in that scenario were important to the learned judge's apportionment of liability, and it cannot be said that she erred in the discharge of her duties. Her findings of fact would not be disturbed by an appellate court since they were, from the witness statements, supported by the evidence (see **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 – cited by Mrs Radlein).

[27] Based on that analysis, the proposed grounds of appeal have no real prospect of success.

Requirement (iv): The degree of prejudice to the other party

[28] Based on that analysis, there would be no need to consider the requirement of prejudice, but it may be said that there would be little prejudice to the respondents in this case if leave to file a counter-notice had been granted. The circumstances are such that an appeal is to be heard in any event. At worst, the appeal would be more involved but there would be no prejudice that the respondents that could not be compensated for by an order for costs.

Requirement (v): The decision that justice requires

[29] The decision that justice requires is to refuse the application. The assessment of the learned judge's consideration of the case turns on whether her findings of fact are

supported by the evidence. The appeal proceedings will be limited to the issue of damages, thus saving time and costs.

Conclusion

[30] It is for the reasons set out above that Mr Williams' application was refused.

Costs

[31] The respondents must have the costs of the application for the extension of time.

D FRASER JA

[32] I have read the draft judgment of Brooks P. They agree with my own reasons for agreeing to the decision delivered in this case.

V HARRIS JA

[33] I too have read the draft judgment of Brooks P and agree with his reasoning and conclusion and have nothing useful to add.