[2012] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 52/2010

APPLICATION NO 209/2011

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**CARIBIC VACATIONS LIMITED**	**APPLICANT**
AND	**DEBBIE POWELL**	**1ST RESPONDENT**
AND	**BULK LIQUID CARRIERS LIMITED**	**2ND RESPONDENT**
AND	**OSMOND PUGH**	**3RD RESPONDENT**

Maurice Manning and Miss Camille Wignall instructed by Nunes Scholefield DeLeon and Co for the applicant

Mrs Nicole Superville-Hall and Raymond Samuels instructed by Norman O. Samuels for the 1st respondent

Miguel Williams instructed by Livingston Alexander and Levy for the 2nd respondent

David Johnson instructed by Samuda and Johnson for the 3rd respondent

13 and 16 March 2012

ORAL JUDGMENT

BROOKS JA

[1] The 1st respondent, Miss Debbie Powell seeks to appeal against the judgment of Sykes J made on 19 March 2010. On 1 November 2011, the applicant herein, Caribic Vacations Ltd, filed a multi-faceted application seeking a number of orders, including an order that the appeal be struck out. While some of those aspects have already been dealt with in other orders by this court, one of them will be dealt with below.

[2] The essence of this part of the application is that two documents attached to the 1st respondent's skeleton arguments, to be advanced at the hearing of the appeal, and all reference to those documents in the skeleton arguments, should be removed. Certain consequential orders have also been sought.

[3] The documents in question are, firstly, a letter said to have been penned by the applicant's previous attorneys-at-law, and addressed to Miss Powell's attorney-at-law. The second is a letter to the applicant's previous attorneys-at-law, purportedly written by the chief executive officer of the applicant. The second document is said to have been sent along with the first to Miss Powell's attorney-at-law.

[4] On 13 March 2012, we ruled that Miss Powell, was permitted to further amend her notice and grounds of appeal to include a ground that the learned trial judge had erred in refusing an application to admit into evidence the second document, mentioned above. The ruling did not daunt the applicant from pursuing its application.

[5] In support of the present application, Mr Manning, on behalf of the applicant, argued that the aspect of admissibility was a separate consideration from that of

relevance. He submitted that it was not only unnecessary for the hearing of the appeal that the documents be produced to the appellate court but also, that their production would be prejudicial to the applicant.

[6] We confess that it was with some concern that we approached this application for, what could be viewed as an attempt to conceal evidence from this court, especially as it is not a tribunal of fact. Mr Manning argued, however, that this was a situation imposed by the rules of procedure and was not a question for the discretion of either the learned trial judge or the court of review.

[7] His arguments may, I trust with no injustice to them, be summarised thus:

(a) The documents were not disclosed by Miss Powell in accordance with the obligation to disclose, which obligation is imposed by the Civil Procedure Rules (CPR).

(b) As a result of that failure to disclose, the learned trial judge rightly refused an application by Miss Powell's counsel, during the trial, to admit the documents into evidence.

(c) It is rule 28.14 (1) of the CPR, which directed the learned trial judge's decision. The rule states:

> "A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial."

The rule does not admit of any exercise of discretion by the learned trial judge. The sanction imposed by the rule is that the party in breach "may not rely on or produce" the document.

(d) There was no application for relief from sanction before the learned trial judge.

(e) The issue of whether or not the learned trial judge was correct in refusing to admit the documents into evidence turns on the application of the rules in the CPR, especially rule 28.14 (1), and a review of his decision does not require sight of the document.

(f) Sight of the documents by this court has no probative value, but would be prejudicial to the applicant's submissions to the court below.

[8] In answering the, not unreasonable, question as to why the applicant did not, itself, disclose the documents, Mr Manning submitted that perhaps, it was due to the fact that the documents were, by the time of the trial, some 15 years old and had not been remembered by the applicant. In any event, it proved that the applicant's witness at the trial was not the officer who is said to have signed the applicant's letter in question, and so the matter of surprise was still relevant.

[9] In answer to those submissions, Mrs Superville-Hall, for Miss Powell, argued that the learned trial judge had an ongoing duty to exercise case management in respect of the claim. That duty, she submitted, continued even during the trial of the claim. She

argued that the learned trial judge recognised that duty at paragraph 28 of his judgement when, in the context of a separate issue, he said:

> "This court therefore holds that it is always appropriate for any judge having read the documents to question whether a trial ought to proceed if the judge is of the view that either party has no real prospect of successfully presenting or resisting the claim. The issue of bias does not arise. It is all about case management and effective use of the public good of judicial time."

[10] On her submissions, the learned trial judge failed to do his duty in respect of these documents. She submitted that, by rule 28.1 (4) of the CPR, these documents were directly relevant to the claim. She stressed that the applicant should have disclosed them itself and would have suffered no surprise at their production by Miss Powell. The learned trial judge ought, she argued, to have admitted the document and this court needs to have sight of the document in order to determine the issue.

[11] Although initially alarmed by the applicant's position, we, upon reflection, have come to accept Mr Manning's submission that the legal issue of the admissibility of the documents may be considered without having sight of them. If, after hearing the submissions on the point, the court rules that the documents, or either of them, ought to be produced, it can then, after viewing them, decide upon the question of relevance and determine what effect, if any, the admission into evidence would have on the appeal.

[12] Although the application sought to strike out all references in the skeleton arguments, to the documents, such an order would conflict with the spirit of the

previous order made, granting permission to Miss Powell to argue the issue of the admissibility of the documents on the appeal. Only the reference to the content of the letters should be excised. The orders made below will reflect recognition of that conflict.

Costs

[13] In light of the fact that this decision is in respect of only one aspect of a multi-faceted application and an order for costs has already been made favouring the applicant in Miss Powell's application for extension of time, it is appropriate that there should be no order as to costs in connection with this aspect of the application.

Conclusion

[14] For the reasons stated above, the application to have the documents removed from the skeleton arguments, is granted.

Order

[15] The orders are as follows:

1. The following letters attached to the 1st Respondent's skeleton arguments filed on 8 July 2011 shall be removed therefrom:

    a. letter from Gifford, Haughton & Thompson to Mr Norman Samuels, dated 29 November 1995;

b. copy letter from Caribic Vacations Limited dated 21 November 1995, over the signature of Gordon Townsend, to Mr Hugh A Thompson, attorney-at-law of Gifford, Haughton & Thompson.

2. The 1st respondent shall file new skeleton arguments removing therefrom all reference to the content of the letters mentioned above, and in particular, the reference at paragraph 72 of the original skeleton arguments, to that content;

3. The registrar of the Court of Appeal is hereby directed to remove the said letters from the court's file and place them in a separate envelope;

4. The record of appeal shall not contain any of the said documents and neither shall be produced to the court without specific directions by the court, so to do;

5. No order as to costs.