[2012] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 26/2012

BETWEEN	**COLE'S FARM STORE LTD**	**APPLICANT**
AND	**CHINA MOTORS LTD**	**RESPONDENT**

2 May 2012

(Considered on paper pursuant to rule 2.10 of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] The applicant, Cole's Farm Store Ltd, seeks an order permitting substituted service, on the respondent, China Motors Ltd, of an application for extension of time within which to file an appeal.

[2] The applications have their genesis in a judgment of Campbell J in the Supreme Court. Campbell J had reduced his decision and reasons therefor, to writing. In that judgment, the learned trial judge made awards in favour of the applicant.

[3] Subsequent to the delivery of the judgment, however, the applicant sought to have certain aspects of the judgment clarified. These issues included the question of interest on some items of special damages and the question of costs. According to the applicant, its attorneys-at-law wrote to the learned trial judge seeking clarification, but they have had no response to date. In the absence of a response from the learned trial judge, the applicant has prepared no formal order in respect of the judgment. The affidavit evidence, filed in support of the application, suggests that the respondent has also not served any formal order of the judgment, on the applicant.

[4] According to the applicant's attorneys-at-law, while awaiting a response from Campbell J, the time for filing the applicant's notice and grounds of appeal elapsed. As a result, the applicant filed an application for extension of time to file the notice and grounds of appeal.

[5] A date was fixed for the hearing of that application by the full court, but the applicant has been experiencing challenges in serving the respondent with the application and the affidavit in support thereof. Mrs Janet Taylor, on behalf of the applicant, has deposed that the documents were served on the respondent's attorneys-at-law by post, but at the time of the hearing, the respondent was neither present nor represented.

[6] Since that time, other dates have been set and the results have been the same. Mrs Taylor deposed that the respondent has ceased operating at the two locations, at

which, to the knowledge of the applicant, they previously operated. One of those locations is still the respondent's registered office.

[7] In order to overcome the difficulties of service, the applicant has filed the present application seeking orders permitting substituted service. It wishes to serve the application to extend time, by two publications of the notice of proceedings in the Daily Gleaner newspaper, seven days apart.

The time for filing the notice of appeal

[8] Although this is not the substantive application, in my view, the present application raises the question of whether the time for filing the notice and grounds of appeal has, in fact, expired. Although the applicant is of the view that the time has expired, I was not convinced that that was, in fact, so. Submissions in respect of the issue were requested of the applicant's attorneys-at-law. Their response, by way of a letter, was that rule 1.11(1)(c) of the Court of Appeal Rules 2002 (the COAR), dealing with the time for filing and serving a notice of appeal, would not assist the applicant. I found the response unhelpful.

[9] I have therefore embarked on an analysis of the question without the benefit of assistance from counsel from either side. The examination of the issue requires reference to both the COAR and the Civil Procedure Rules 2002 (the CPR).

Analysis

[10] As mentioned before, rule 1.11(1) of the COAR deals with the time for filing and serving a notice of appeal. The rule states:

> "The notice of appeal must be filed at the registry and served in accordance with rule 1.15 -
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> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
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> (b) where permission is required, within 14 days of the date when permission was granted; or
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> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against **was served on the appellant**." (emphasis supplied)

It will have been noticed that each paragraph provides its own trigger as to when time begins to run. I have emphasised the point concerning service, because in my view, it is critical to deciding this issue.

[11] The rule just quoted, refers to rule 1.15 of the COAR. Rule 1.15, in turn, states that the provisions of parts 5 and 6 of the CPR apply to the issue of service of notices of appeal. Rule 1.1(10)(g) of the COAR also provides for the application of part 6 of the CPR to appeals to this court. I now turn to the relevant provisions in the CPR.

[12] Part 5 of the CPR is mainly concerned with the service of the forms by which claims are commenced (claim forms). It speaks to the methods of service and stipulates the general rule, which is that personal service is required, except where an attorney-at-law has agreed to accept service. Rule 6.1(1) of the CPR is more helpful for these purposes. It states:

> "Any judgment or order which requires service must be served by the party obtaining that judgment or order unless the court orders otherwise."

Rules 6.2 and 6.6 provide support for rule 6.1(1), in terms of the means of service and the deemed date of service. Other than to say that rule 6.2 speaks to the means of service of documents, besides claim forms, there is no need, for these purposes, to set out any of the terms of those rules.

[13] Rule 42.6 of the CPR specifically speaks to the service of judgments and orders. It requires the party who files a draft judgment for perfecting, in accordance with rule 42.5(2) or 42.5(3), to serve the perfected judgment on every other party to the claim. For completeness rules 42.5(2), 42.5(3) and 42.6 are set out in full below:

> "42.5 (2) Subject to paragraph (5), every judgment or order must be drawn up and filed at the registry by the party on whose claim or application the order was made, unless –
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> (a) the court directs another party to draft and file it;
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> (b) another party with the permission of the court agrees to draft and file it;
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> (c) the court dispenses with the need to draw the judgment or order; or
>
> (d) it is a consent order under rule 42.7.
>
> (3) **Where a party fails to file a draft of an order within 7 days after the direction was given, any other party may draw and file the order**."

> "42.6 (1) Unless the court otherwise directs the party filing a draft judgment or order in accordance with rule 42.5 **must serve the judgment or order on –**

(a) **every other party to the claim in which the judgment or order is made; and**

(b) any other person on whom the court orders it to be served.
(Part 6 deals with service.)

(2) Where a party is acting by an attorney-at-law, the court may direct that any judgment or order be served on the lay party personally as well as on the attorney-at-law." (emphasis supplied)

[14] Based on those rules, the judgment having been made on the applicant's claim, the primary obligation lay on the applicant to serve the formal order of that judgment. It is only where, in the absence of an order of the court, the applicant failed to fulfil that obligation, that rule 42.5(3) allowed the respondent to seek to have the judgment perfected and served.

[15] There are two other rules to be considered. Rule 42.2 stipulates that a party who is present, whether in person or by its attorney-at-law, when a judgment or order is pronounced by the court, is bound by the terms of that judgment or order, "whether or not the judgment or order is served". Allied to that rule, is rule 42.8, which states that "[a] judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date". I find, however, that the fact that the party present, is bound by the terms of the judgment, and the fact that the judgment takes effect, do not cause time to begin to run for the purposes of rule 1.11(1)(c). The concepts are not, inextricably, intertwined. Rule 1.11(1)(c) specifies its own trigger. That trigger is not the obligation to respect or obey the terms of the judgment. The trigger is the service of the formal order.

[16] The CPR does not provide a penalty for failing to draw up and to file a judgment or order for perfecting. The only provision in that regard is rule 42.5(3), which allows another party to have the order perfected and served in the event that the party, bearing the primary obligation to do so, fails or refuses so to do. The judgment remains a judgment of the court despite the fact that it has not been perfected. It is effective from the date on which it is pronounced, although the court may amend it at any time before it is perfected. That point was succinctly made by Jenkins LJ in **Re Harrison's Share under a Settlement** [1955] 1 All ER 185. The headnote accurately reflects the reasoning of the learned Law Lord:

> "Although the order of a judge dates from the day of its being pronounced, it can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it and the right of withdrawal will not be prevented or prejudiced thereby."

[17] This court in **San Souci Ltd v VRL Services Ltd** SCCA No 20/2006 Application No 8/2009 (delivered 10 June 2009), accepted that latter principle, as being correct. Smith JA, at paragraph 24 of his judgment, accepted that the order is not final until it has been perfected.

[18] The enunciation of that principle is, however, a digression. The principle, which is to be recognised as critical to determining this application, is that it is service of the perfected judgment, which triggers the clock for calculating the time, within which notice and grounds of appeal may be lodged.

Application to the instant case

[19] As has been stated above, the applicant has not prepared the formal order for perfecting by the registry of the Supreme Court. The respondent has also not served the applicant with a copy of the formal order.

[20] It follows, that since service, pursuant to rule 1.11(1)(c) of the COAR, is the trigger for time to begin to run, for the purposes of filing the notice and grounds of appeal, time has, therefore, not yet begun to run. The time has, consequently, not elapsed. The application to extend time for filing the notice, as well as the present application for substituted service, are, therefore, misconceived.

[21] I find support for this conclusion in the judgment of Edwards JA in the Court of Appeal of St Christopher and Nevis in the case of **Barbier and Another v Leduc** HCVAP 2008/010 (delivered 8 December 2008). The learned judge of appeal arrived at a similar conclusion after assessing the civil procedure rules of that jurisdiction and, in particular, a rule, similar in terms, to rule 1.11(1)(c), mentioned above. She said at paragraph 20:

> "This application for extension of time to file the notice of appeal is therefore unnecessary having regard to CPR 62.5(c). The time for filing the notice of appeal will commence from the date when the written judgment or order is served on the applicant...."

The circumstances of that case were slightly different, in that the applicant there was the unsuccessful party at first instance, but that difference, in my view, is not material for these purposes.

Conclusion

[22] Based on my interpretation of the relevant rules of the CPR and the COAR, the application for extension of time is misconceived and unnecessary. Time has not yet begun to run for the purposes of filing the notice and grounds of appeal and has therefore not expired. The present application for permission to use substituted service is, therefore, also unnecessary.

Order

[23] The application for substituted service is dismissed.