[2014] JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 133 /2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**SYLVESTER DENNIS**	**APPLICANT**
AND	**LANA DENNIS**	**RESPONDENT**

John Clarke for the applicant

Miss Tavia Dunn instructed by Nunes Scholefield DeLeon & Co for the respondent

3 February, 6 March and 2 May 2014

PHILLIPS JA

[1] I have read in draft the judgment of Mangatal JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

MCINTOSH JA

[2] I concur.

MANGATAL JA (Ag)

[3] The application before us is an amended notice of application filed by Mr Sylvester Dennis ("the applicant") on 28 January 2014. The applicant seeks an extension of time for filing notice and grounds of appeal in relation to an order for summary judgment granted by R. Anderson J in favour of Mrs Lana Dennis ("the respondent") on 15 July 2011. We heard the application on 3 February and 6 March 2014 and on the latter date, we reserved our decision.

[4] The original notice of application was filed on 25 October 2013. Initially, the amended notice of application had also sought an extension of time within which to file notice and grounds of appeal in relation to an order for sale of land. That order was made on 11 June 2013, by K. Anderson J, and the amended application had also sought a stay of that order for sale pending the appeal. However, at the hearing, Mr Clarke, who appeared for the applicant indicated that he would not be pursuing the extension of time or stay in relation to the order for sale of land. This was as a result of the view which he took as to the current effect and status of that order. Nevertheless, Mr Clarke indicated that the grounds set out in the original application, as well as the grounds in relation to the order for sale of land would continue to be relied upon by the applicant. This was so because counsel submitted that they were still relevant to the question of delay in filing the notice and grounds of appeal in relation to the order for summary judgment.

Background to the order for summary judgment

[5] The applicant and the respondent were married on 19 October 1974, in Toronto, Ontario, Canada. By judgment dated 28 January 2000, the Superior Court of Justice, Toronto, Ontario adjudged that the parties would be divorced effective 28 February 2000. There were a number of court proceedings between the parties in the Canadian courts, both before and after the divorce judgment and on 2 November 2009, the respondent filed a claim in the Supreme Court of Judicature of Jamaica ("the Supreme Court").

[6] In the particulars of claim filed within the claim form, the respondent set out her claim, and amongst other matters, sought relief as follows:

> "....
>
> 4. The matrimonial proceedings between the parties in the Canadian courts included proceedings for the equalization of property, including property in Jamaica known as part of Unity District, Langton Hill in the Parish of St. Andrew and being the land comprised in Certificate of Title registered at Volume 953 Folio 409 of the Register Book of Titles (hereafter called "the Property") owned jointly by the parties.
>
> 5. By Order dated November 4, 2008 and issued out of the Superior Court of Justice, Ontario, Canada (hereafter called "the Order") the claims and cross-claims by the parties in those Courts were dismissed and the terms agreed to in the global settlement arrived at by the parties were reflected in the Order.
>
> 6. Pursuant to the Order, the Defendant was required to pay to the Claimant the amounts of:

a) CAN$200,000.00 in 2 equal installments on April 14 and October 14, 2009;

b) CAN$10,000.00 as a penalty should he default on payment of the first installment; and

c) CAN$20,000.00 as a penalty should he default on payment of the second installment. (sic) upon which the Claimant would release her one-half interest in the Property to the Defendant.

7. It was also a term of the Order that it bears interest at 5% per annum on any payment or payments in respect of which there is a default from the date of default.

8. The Defendant has failed to pay any of the installments and penalties as agreed and ordered or at all, and is indebted to the Claimant in the sum of CAN$233,356.17 as at November 2, 2009…..

9. Interest continues to accrue on the said sums from (sic) at the rates of CAN $15.07 and CAN$16.44 respectively, from November 3, 2009.

10. As a result of the Defendant's failure to pay these sums, the Claimant has not transferred her one-half interest in the Property to him and the parties therefore remain the joint owners…

…."

[7] The applicant filed his defence in person on 1 March 2010. Amongst the many matters pleaded in the defence are the following:

"….

5. That further in respect of paragraph 4 of the Claimant's Particulars of Claim the Defendant annexes hereto marked "SD1" for identification the Affidavit sworn to by the Claimant on the 9th day of November 1999 in support of her motion for divorce from the defendant and in that Affidavit at paragraph 11 she stated that the parties had "divided the matrimonial property to my satisfaction and I am satisfied with that

arrangement". The Defendant also states that from as far back as 1978 the Claimant has had no interest in the property situate at Unity, Langton Hill in the parish of Saint Andrew … and she has neither visited nor contributed to its upkeep or improvement over the years and all costs relating thereto have been borne by the Defendant save and except for $3,000.00 Canadian dollars contributed to help with repairs needed to be made after Hurricane Gilbert caused damage to the property.

6. Save that it is admitted that documents purporting to reduce discussions held by the parties at mediation have been served on the Defendant purporting to be an Order of the Canadian Courts, paragraph 5 of the Claimant's Particulars of Claim is denied. In respect of paragraph 5, the Defendant further states that he was not served with any Court process leading to the granting of the settlement purported to have been arrived at by the parties and further states that the tribunal acted *ultra vires* in making an Order without reference to the Defendant and in doing so at mediation without the benefit of a Trial. The Defendant therefore denies the truth and veracity of any such document brought before this Honourable Court.

   ...

8. That paragraph 7 of the Claimant's Particulars of Claim is denied and the Claimant will be put to the strictest proof of same at the trial of this matter and the Defendant states further that the purported "Order" obtained by the Claimant which even were it believed to have legal effect in Canada which the Defendant states it does not, cannot take legal effect in Jamaica without more and does not bind the Courts of Jamaica.

9. That paragraph 8 of the Claimant's Particulars of Claim is denied and in further response to that paragraph the Defendant states that there was no agreement between the parties and that the purported "Order" sought without reference to the Defendant to place sanctions on him which he had neither agreed nor been given the opportunity to defend.

   …

11. That by reason of the matters aforesaid paragraph 10 of the Claimant's Particulars of Claim is neither admitted nor denied and that under Canadian law the Claimant has not settled with the Defendant as she should and outstanding to the Defendant is Spousal Support in the amount of CDN$800.00 per month from March1, 2000 to the present plus CDN $20,000.00 representing half of joint loans taken by the parties and repaid by the Defendant and the cost of furniture removed unlawfully by the Claimant from the Defendant's home."

[8] The applicant also filed a counterclaim seeking certain declarations and orders.

[9] On or about 13 April 2010, the respondent filed an application for, amongst other relief, the following:

> "1. That the Claimant be granted summary judgment on the Claim in the sum of CAN$233,356.17 with interest at 5% per annum:
>
> i. On the sum of CAN$110,000.00; and
>
> ii On the sum of CAN$120,000.00
>
> from November 3, 2009 to date of judgment.
>
> …
>
> 3. An order that the Counterclaim be struck out. …"

[10] The stated grounds of the application were as follows:

> " <u>As to proposed order</u> 1:
>
> 1. The Defendant has no real prospect of successfully defending the claim. The Claimant relies on CPR 15.2(b) which provides that the court give summary judgment on the claim if it considers that the defendant has no real prospect of successfully defending the claim.

2. The Claimant abandons her claim for the partition and/or sale of ALL THAT parcel of land part of UNITY situate at LANGTON HILL in the parish of ST. ANDREW and being the land comprised in Certificate of Title registered at Volume 953 Folio 409 of the Register Book of Titles owned jointly by the Claimant and the Defendant.

…

7. The Claimants [sic] propose that the Court deal with the following issues at the hearing:

   i. Whether the defendant is indebted to the Claimant in the sums claimed pursuant to a "global settlement agreement" reflected in order dated November 4, 2008 and issued by the Superior Court of Justice, Ontario, Canada ("the November 4, 2008 Order").

   ii. Whether, in circumstances where the Defendant has consented to and not appealed from the November 4, 2008 Order, he can properly deny liability for the sums due pursuant to the global settlement agreement."

[11] The respondent's application for summary judgment was supported by the affidavit of Lana Dennis filed 13 April 2010. At paragraph 4 of that affidavit, the respondent stated:

> "4. I did not initially make a claim for division of property and as part of my Affidavit for Divorce I did, as indicated by the Defendant, state that the matrimonial property had been divided to my satisfaction and that I was satisfied with this arrangement. The Defendant has failed, however, to inform this Honourable Court that by Order dated July 25, 2003, the Superior Court granted me permission to amend my petition for divorce to claim equalization of net family property. The Defendant was present when this Order was granted. As far as I am aware, the Defendant has not appealed from this Order. Included in "LD1" are copies of the Order dated July 25, 2003 and the endorsement of the Honourable Madam Justice Kiteley…"

[12] In opposition to the application for summary judgment, the applicant in person filed two affidavits, on 21 July 2010 and 8 June 2011 respectively. Attached to the 2010 affidavit was a letter dated 30 October 2008, from the unrepresented applicant to the then attorneys-at-law for the respondent in Canada, Messrs Prouse, Dash & Crouch LLP. It is to be noted that this letter was written before the order dated 4 November 2008 was finalized. In this six page letter the applicant stated, amongst many other points, the following:

> "October 30, 2008
>
> Mrs. Mahzulfan S. Uppal
>
> …
>
> **Re: Dennis v Dennis**
>
> Dear Mrs. Uppal,
>
> I am unable and I am unwilling to enter the Minutes of Settlement you are proposing to impose on me. You are attempting to coerce me to enter an unconscionable agreement and I cannot agree to it.
>
> After I showed up in court on October 14, 2008, I found out that my two sons were subpoenaed to give evidence in our matter. I wanted to protect my sons from having to suffer the emotional impact of such event, as I kept our children out of our legal matter all these years.
>
> Therefore I suggested that I pay your client $100,000 to make this case go away. Than [sic] you put further pressure on me, requiring me to double this offer two hundred thousand Canadian dollars.
>
> There is no way that I can finance such payments to your client.
>
> …
>
> Throughout this litigation all my pleadings and claims were very proficiently silenced by you and ignored by the court, taking

advantage that I cannot afford to hire a lawyer and get justice in this matter. Each and every court appearance, your aggressive and eloquent presentation took centre in the hearing. I, on the other hand, being disabled, unsophisticated , not well spoken, was never able to get the opportunity in a hearing to properly present my case, and I was really never heard and my claims were always put to the back burner, as opposed to you being able to dominate the hearings.

…"

[13] The grounds upon which the present application for extension of time is based are stated in the amended notice of application for court order as follows:

"1. That the Court has discretion to extend the time for filing the Notice and Grounds of Appeal

2. That it is just and reasonable based on the circumstance and financial position of the Applicant that such direction [sic] be exercised.

3. That there is an arguable case for appeal.

4. That based on the overriding principle of the need to do justice the extension [sic] of this Application ought to be allowed."

[14] The proposed grounds of appeal were also described as including the following:

"a) …..

b) The learned Judge erred in failing to consider whether the conditions that must be met to enforce a foreign money debt judgment in Jamaica were met in this case.

c) The learned Judge erred in not denying the Summary Judgment Application since the Defendant had a real prospect of success.

d) The learned Judge erred in failing to consider whether there were genuine issues in dispute pertaining to the un-adjudicated Order before granting the Application for Summary Judgment.

e) The Summary Judgment in relation to a Formal Order from the Canadian Court should not stand based on non-disclosure of material facts.

f) The learned Judge erred in failing to consider adequately (or at all) whether he should refuse to enforce the un-adjudicated Consent Order in relation to Jamaican Property which the Summary Judgment enforces.

g) The learned Judge failure [sic] to consider-

I. Whether the un-adjudicated Canadian Order can be recognized or enforced in Jamaica

II. Whether on a public policy ground such an un-adjudicated [sic] should be enforced for the following reasons:-

- The land subject to equalization claim was land situated in Jamaica

- The application for division of 'matrimonial' property (in Jamaica) was made in Canadian Court three years after the divorce was final

- The application for division of matrimonial property would not be entertained in a Jamaican Court under the Property Rights of Spouses Act without an application for leave in this Court.

- The fact that the Canadian Court entertained it deprived the Applicant of the right he would enjoy in Jamaica to present cause why the leave should not be granted three years after the divorce

- Whether the penalty sums specified in the Consent Order was enforceable in Jamaica.

III. Whether Natural justice requirements were breached in reaching the Settlement Order

IV. Whether the defendant was under undue influence of the Canadian Court to reach a settlement.

V. Whether the Defendant truly consented to the alleged consent and whether there is proof of such consent."

[15] Rule 1.11 (1) of the Court of Appeal Rules 2002 ("CAR") sets out the relevant time periods for appealing to this court from orders made in the Supreme Court. It provides as follows:

"1.11 (1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15-

(a) In the case of a procedural appeal, within 7 days of the date of the decision appealed against was made;

(b) Where permission is required, within 14 days of the date when such permission was granted; or

(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."

[16] Rule 1.7(2) of the CAR provides for an adjustment to that time frame. It states:

"2. Except where these Rules provide otherwise, the court may-

..

(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;…"

[17] On 15 July 2011, in granting summary judgment in favour of the respondent as prayed, and on the counterclaim, R. Anderson J, also granted the applicant permission to appeal "if necessary".

The applicant's arguments

[18] Mr John Clarke, who appeared for the applicant ably presented the case on behalf of the applicant. He submitted that in an application such as the present one, the court must look at all of the circumstances of the case. Reference was made to this court's decision in ***Arawak Woodworking Establishment Ltd. v Jamaica Development Bank Limited*** [2010] JMCA App 6 where, following a number of English Court of Appeal decisions considered persuasive, Harrison JA at paragraph [16] held that looking at all of the circumstances would include considerations that:

> "1. Time requirements laid down by the rules and directions given by the Court were not mere targets to be attempted; they were rules to be observed.
>
> 2. At the same time the overriding principle was that justice must be done.
>
> 3. Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation.
>
> 4. In addition the vacation or adjournment of the date of the trial prejudiced other litigants and disrupted the administration of justice."

[19] The applicant relied on paragraph [28] of this court's decision in ***Jamaica Public Service Company Limited v Rose Marie Samuels*** [2010] JMCA App 23, in particular where Morrison JA, agreed with and endorsed the view of Panton JA (as he then was) in ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (Motion No 12/1999, judgment delivered 6 December 1999) that "notwithstanding the

absence of a good reason for delay, the court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done".

[20] The applicant dealt with the factors which he wished the court to consider under three main heads, that is, (a) reason for the delay; (b) merits of the appeal, and (c) prejudice relating to the extension.

Reason for delay

[21] In relation to this issue, the applicant sought to rely heavily on the Further Affidavit of Sylvester Dennis, filed on 28 January 2014, in particular paragraphs 22-32. At paragraph 22, Mr. Dennis stated:

> "That any delay in proceeding with the applications before the Court was attributed to:
>
> a) my limited resources
>
> b) difficulties I encountered in obtaining legal representation
>
> c) difficulties in securing my file after being notified of the Court Order."

[22] The applicant candidly concedes that the length of delay is "not insignificant". The "speaking notes" filed on his behalf on 4 February 2014 seem to have the dates somewhat confused. It is there stated (at paragraph 13) that, pursuant to Rule 1.11(1)(b) of the CAR the notice of appeal should have been filed by 16 September 2011, being within 14 days of the date when permission to appeal was granted. However, the date 16 September 2011 is erroneous, since the summary judgment order

was made on 15 July 2011. The written notes continued (at paragraph 14) that "the order was served on the 12th September 2013". This would appear to be a typographical error and what was intended was to state that the order was served 12 September 2011. Support for this, is to be found in paragraph 4 of the Second Affidavit of Lana Dennis, filed on 25 January 2012, in relation to the application for the sale of land, which states:

> "I am informed by my attorney-at-law and do verily believe that the Summary Judgment was served on the Defendant's attorneys-at-law on September 12, 2011. …"

Consequently, the applicant's counsel submits (at paragraph 15) that the applicant would have had four days to comply with rule 1.11(1) (b) of the CAR.

[23] However, the argument continues, since his then attorney-at-law Sylvester Hemmings was not a party to the suit, service on him must be on the basis of the respondent being notified that the attorney is authorized to receive service. The applicant submitted that neither had he so authorized Mr Hemmings nor had he notified the respondent that the attorney was so authorized. By permission of this court, granted on 6 February 2014, the applicant was allowed to refer to and rely upon an affidavit of Sylvester Hemmings, filed that morning, as well as to file a supplemental affidavit. In his supplemental affidavit filed 7 February 2014, at paragraphs 2-4, Mr Hemmings stated:

> "….2. That I am an Attorney-at-Law and was the Attorney-at-Law who appeared for the Applicant before the Supreme Court on the

> 13th August 2011 in relation to a Summary Judgment Application brought by the Respondent/Claimant.
>
> 3. That my retainer was limited to appearance on said date and I had not filed a Notice of Appearance for the Applicant nor did I represent to the Court or the Respondent that I was authorized to accept service on his behalf. Retainer exhibited as "SD1".
>
> 3. That I had NOT notified the Respondent in writing that I am authorized to accept service on the Applicant's behalf and that personal service is not required….."

[24] The applicant filed numerous affidavits in support of the application for extension of time. Some of these affidavits were more focused on the application for the extension of time in relation to the order for sale of land which is no longer being pursued. Thus, much of the information and evidence filed did not relate directly, or at all, to the application as presently constituted. However, in his affidavit headed "Addendum to Further Affidavit of Sylvester Dennis in support of application filed on 28 January 2014", filed 28 February 2014, at paragraphs 2-4 the applicant finally purports to explain directly the reasons for the delay in relation to the summary judgment order. He stated:

> "2. That the reason for my delay in relation to the 2011 Summary Judgment Order is that I was unaware of the 2011 Order until 25th July 2012 when I was served with Court Documents which included it and a Notice of Adjourned hearing [sic] to Court date 21 February 2013. I thought everything would be up for discussion on this date.
>
> 3. That I attended the Supreme Court on 21 February 2013 and then found out from the presiding Justice Beckford that I should retain a lawyer for the Supreme Court matter and a lawyer to appeal the 2011 Order at the Court of Appeal. That I retained a

> lawyer for Supreme Court who represented me on the 11th June 2013 (in my absence) but did not appeal 2011 Order despite my request due to financial dispute. The lawyer withdrew from said hearing.
>
> 4. That I sought to retain a Lawyer for the Court of Appeal but experienced financial difficulties since I was appealing matter in Canada as well. That I sought legal aid/ human rights assistance from 21st February 2013 to no avail. I have only now been able to pass my legal representation hurdles
>
> …."

[25] In the alternative, Mr Clarke stated that if the court does not accept those submissions, the notice of appeal ought to have been filed within 14 days of 15 July 2011. He submitted that the reasons highlighted by the applicant are good reasons explaining the delay. Further, and in any event, he argued that the court is not bound to reject an application for extension of time on the basis of the absence of a good reason since the overriding principle is that justice must be done. Reference was made to the very helpful and well-reasoned decision of Rattray J, in ***Bowes v Bowes*** [2012] JMSC CIVIL 127. Reliance was placed in particular on paragraph 30 where, in dealing with an application before the Supreme Court to extend time for the filing of an appeal as permitted by rule 1.11(2) of the CAR, the learned judge stated:

> "[30] In the present case, a delay of approximately five (5) months in filing the applications presently before this Court is not an insignificant period. However, the length of the delay should not be looked at in isolation. It ought in my mind to be viewed in conjunction with the steps, if any, that the Applicant had embarked upon as regards the Order complained of. Paulette Bowes faced certain representational difficulties and having eventually overcome same, pursued proceedings to challenge the Order of the 4th October, 2011. Those proceedings proved unsuccessful as her applications were refused on the 9th May, 2012. Shortly thereafter,

> in fact two (2) days later, the present Applications were filed. I do not find this to be a situation where the Applicant stood idly by after being aware that the Order was made against her. In the particular circumstances of the present case, I am of the view that the delay was not unreasonable."

Merits of the appeal

[26] At the time of granting the application for summary judgment, R Anderson J granted the applicant permission to appeal against the order. Mr Clarke relied upon this court's decision in ***Jamaica Public Service Company Limited v Rose Marie Samuels*** [2010] JMCA App 23, to submit that the learned judge's grant of leave could support the applicant's view that there is merit to the appeal.

[27] Counsel alluded to the fact that most of the grounds of appeal are based on an assertion that the learned judge erred in law, and it was submitted that the appeal has a real chance of succeeding. Counsel sought to highlight the aspect of the Canadian Order which speaks expressly to a penalty being imposed in a situation of default.

[28] It is useful to set out the full terms of the Canadian Order dated 4 November 2008 and which on its face is expressed to be a final order. The order, made by the Honourable Justice van Rensburg provides as follows:

> "(ONTARIO-SUPERIOR COURT OF JUSTICE)
>
> …
>
> Applicant(s)
>
> …
>
> Lana Marlene Dennis

…

Respondent(s)

Sylvester Dennis

…

The Honourable van Rensburg

Judge…

November 4, 2008

Date of order

The Court heard a pretrial

The following persons were in court *(name of parties and lawyers in court)*

The Applicant, Lana Marlene Dennis; Mahzulfah S. Uppal, counsel for the Applicant; and the Respondent, Sylvester Dennis, in person and assisted by the Parties' son Elvis Dennis.

The court received evidence and heard submissions on behalf of *((name or names)*

The parties

THIS COURT ORDERS THAT:

1. An order shall issue in the terms agreed and reflected in the endorsement of October 14, 2008, which reflect a global statement of all claims are as follows:

    a. The Respondent shall pay to the Applicant the sum of $200,000.00(Can.) as follows:

        i. $100,000.00 on or before April 14, 2009; and

        ii. a further $100,000.00 before October 14, 2009. [sic]

    b. If there is a default on the first payment, the Respondent will pay a penalty of $10,000.00.

c. If there is a default on the second payment, the Respondent will pay a penalty of $20,000.00.

2. Upon the payments being made of the amounts in paragraph one(1) above, the Applicant will release her half-interest in the jointly owned Jamaican property registered as Volume 953, Folio 409, in the Register Book of Titles, being part of Unity District, known as Langton Hill, in the Parish of St. Andrew.

3. THIS IS A FINAL ORDER in this court and all other claims and cross-claims of the parties are dismissed. This is a global settlement and is intended to address the Applicant's claims for support and for the sharing of debts including loans by Household Finance under loan number 102537 and Scotiabank.

4. THIS FINAL ORDER shall be enforceable as a Judgment in both Ontario and Jamaica.

5. THIS FINAL ORDER bears interest at the rate of 5 percent per annum on any payment or payments in respect of which there is a default from the date of default.

6. ON CONSENT the Applicant is to make arrangements for the Respondent to pick up the dining room set currently in her possession in January 2009.

7. There shall be no costs payable by either party…"

[29] Mr Clarke in his written submissions asked this court to take note of the words of Lord Browne-Wilkinson, delivering the judgment of the Privy Council in ***Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*** [1993] AC 573, at page 578E in relation to penal clauses or liquidated damages in contract law.

[30] Mr Clarke submitted that the $30,000.00 CAN apparent on the face of the Canadian Order is clearly identified as a penalty and is not liquidated damages or a genuine pre-estimate of the loss.

[31] Counsel also submitted that the learned judge erred by entering a summary judgment because this had the effect of the Jamaican court enforcing an unlawful penalty for a simple money debt contract. Reliance was also placed upon this court's decision in ***Vasconcellos v Jamaica Steel Works et al*** SCCA No 1/2008, judgment delivered 18 December, 2009.

[32] Counsel further submitted that the fact that the applicant objected to the consent order before it was perfected was an additional basis which merited the court's consideration and adjudication. It is noteworthy that this order does not reflect the applicant's signature. The applicant also does not appear to have had any separate or independent legal advice at any time before the final order was issued on 4 November 2008.

[33] The applicant's very thorough counsel, completed his arguments by submitting that there were also public policy grounds upon which the court ought to find that there is merit in the appeal. In further written submissions filed on behalf of the applicant, reference was made to a number of works and authorities, including the work of R. H. Graveson, **Conflict of Laws Private International Law**, 7th Edition, Chapter 21, " pages 616-645 under the heading "THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS". It was argued that it is contrary to public policy for the

Jamaican court to enforce a foreign judgment which was obtained on a basis that could not have been obtained or been enforceable here in Jamaica.

[34] At pages 630-635 of the work by Graveson, it is pointed out that despite the generally conclusive nature of a foreign judgment, several defences may be effectively set up in any action in the English courts to enforce such a judgment. The three broad heads under which these defences are discussed, are fraud, disregard of English public policy, (including the principle that foreign judgments of a penal nature will not be enforced) and disregard of English ideas of natural justice.

The respondent's arguments

[35] Miss Dunn in her very thorough submissions made reference to **Blackstone's Civil Procedure**, page 184 for the proposition that the address for service of a party who is represented by an attorney-at-law is the business address of the attorney-at-law. Reliance was placed on the English Civil Procedure, Volume 1, Order 6.0.2 as support for the general rule that a document must be served on an attorney-at-law who is on the record.

[36] The submission continues that so long as an attorney-at-law for a party remains on the record, service on that attorney-at-law is good service. It was submitted that an attorney-at-law therefore can only be discharged from liability to receive service of proceedings by the substitution of another attorney-at-law. If such substitution is duly effected, the discharged attorney-at-law cannot be served nor can he accept service.

[37] Miss Dunn submitted that Mr Sylvester Hemmings, attorney-at-law, having appeared on behalf of the applicant at the hearing of the summary judgment application, was therefore the attorney on record for the applicant and as such, service of the order for summary judgment on Mr Hemmings should stand as good service.

Reason for delay

[38] It was submitted on behalf of the respondent that the applicant failed to provide the court with a reason for the delay of two years and six months. The delay was described as being inordinate.

Merits of the appeal

[39] It was submitted that at common law a foreign judgment can be enforced in this country by bringing a claim for the amount of the judgment as a debt. Theoretically, the submission continues, the foreign judgment gives rise to an implied contract to pay, which can be enforced by the courts. Reference was made to the work of Stuart Sime, **A Practical approach to Civil Procedure**, 6th Edition. At pages 580-581, paragraph 43.6, the learned author sets out a number of defences that may be raised in relation to a foreign judgment are set out.

[40] It was submitted that in any event, the defence as filed by the applicant, does not challenge the validity of that judgment either on the basis of fraud or want of jurisdiction. It was counsel's submission that the issues as raised in the proposed grounds of appeal are not borne out by the defence as filed by the applicant and that the defence as filed was what the learned trial judge had before him for consideration.

[41] In her oral submissions, Miss Dunn for the first time submitted that the order of the Canadian court made on 4 November 2008 was not a consent judgment, but was simply a formal final order made by Justice van Rensburg. She submitted, further, that whether it was or was not a consent judgment or order, it was nevertheless, an order or judgment made by a court of competent jurisdiction and which ought to be enforced by the Jamaican court.

Analysis and discussion

[42] Although Counsel for the applicant sought to argue in the alternative that the summary judgment order may be a final judgment, it seems clear that a summary judgment order is an interlocutory order. Permission to appeal is therefore necessary and was in fact granted by R. Anderson J. This point is dealt with with great clarity by this court's decision in ***Jamaica Public Service Company Limited v Rose Marie Samuels*** [2010] JMCA App 23 – see in particular paragraphs [13] to [24], per Morrison JA, and the judgment of Lord Denning MR in ***Salter Rex & Co v Ghosh*** [1971] 2 All ER 865. It would seem clear therefore that the notice of appeal should have been filed within 14 days of the date of the grant of permission on 15 July 2011, pursuant to rule 1.11(1)(b) of the CAR. The question of when the applicant received notice of the summary judgment order is therefore only relevant, if at all, to the issue of the reasons for the delay, and the question of the discretion whether to extend the time.

[43] It also seems clear that for the respondent to argue that the order made on 4 November 2008, is a formal final order and not a consent judgment, is a new argument, not fully dealt with at the summary judgment application. Indeed, in the stated grounds of the summary judgment application, the respondent had then argued that the order constituted a global settlement agreement and that the applicant had consented to the order. This fundamental issue as to classification of the order may itself support the applicant's submission that there are legal matters deserving of being ventilated on appeal.

[44] In ***Jamaica Public Service Co. Ltd v Samuels***, this court, in dealing with an application for an extension of time within which to file an appeal in respect of a summary judgment, pointed out, at paragraph [29], that the question of the merits of the proposed appeal is an important one. (See also on the issue of extension of time this court's decision in ***Haddad v Silvera*** SCCA 31/2003 delivered 31 June 2007 and the English decision of ***Finnegan v Parkside Health Authority*** [1998] 1 All ER 595, referred to in ***Haddad***.) In ***Jamaica Public Service Co. Ltd v Samuels,*** the suit involved a claim for damages for trespass. The proposed appeal was concerned with factual as well as legal grounds. In relation to the merits of the appeal in that case, Morrison JA simply and succinctly stated at paragraph [29] that:

> "…. From a reading of the judgment of Williams J(Ag) and the material placed before us in the written and oral submissions of both the applicant and the respondent, I am quite unable to say that there is no merit in the proposed appeal in this matter."

[45] At paragraph [27] of the judgment Morrison JA quoted from the decision in ***Salter Rex & Co v Ghosh*** in the following fashion:

> "This is how Lord Denning MR, with whom the other judges agreed, disposed of the application to extend time (at page 866):
>
> > "So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake, and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merit in [the applicant's] case. If we extended his time it would only mean that he was throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application."

[46] Whilst it is true that generally a foreign judgment is conclusive in nature, I am unable to say that the proposed appeal lacks merit or is unarguable or has no real prospect or chance of succeeding. In my judgment, this is most plainly so in relation to the issues of the alleged disregard of Jamaican public policy and Jamaican principles of natural justice. It is to be noted that during the course of the hearing, the applicant placed evidence before us that an unsuccessful application by way of motion had been made on his behalf which was heard by Justice Seppi of the Superior Court of Ontario, seeking to set aside the settlement incorporated in the order of Justice van Rensburg. An appeal from that dismissal was itself dismissed by the Court of Appeal of Ontario on 14 March 2013. However, in my judgment, the fact that the Canadian Courts have so decided the matter does not affect the question of whether the applicant ought to have his day in court at trial here in Jamaica on the basis of his defence that the Canadian

judgment is not enforceable here in Jamaica because of breach of Jamaican public policy and notions of natural justice. Further I disagree with Miss Dunn's argument that the defence as filed by the applicant did not raise these points. The applicant filed his defence in person, and ideally it could have more plainly stated the fundamental pillars of his defence. However, what was pleaded and was before R. Anderson J was in my view sufficient so as not to render the proposed appeal one with no real merit or lacking real prospects of succeeding (see in particular paragraphs 6-9 of the defence). If we were to extend the time it would not mean that the applicant would plainly be throwing good money after bad.

Reasons for the delay

[47] As the applicant concedes, the length of the delay is not insignificant. Further, in my judgment, the applicant has not really provided a good reason for the delay. It should be noted that Rule 1.11(1) (b) of the CAR speaks to a timeline of an appeal being filed within 14 days of the date when permission was granted. This is quite unlike Rule 1.11(1) (c) which speaks to a calculation within 42 days of the date when the order or judgment appealed against was served on the appellant. The notice of appeal in relation to the summary judgment order should therefore plainly have been filed within 14 days of the summary judgment order on 15 July 2011. The question of when the applicant was served with the formal order is therefore of less significance. Plainly, his attorney-at-law applied for permission to appeal on the very day of the order. It is difficult to see how the applicant, who even filed affidavit evidence in opposition to the summary judgment application and retained Counsel to appear, could

have remained in a state of ignorance about what happened until July 2012. In any event, this court's decision in ***David Watson v Adolphus Sylvester Roper*** SCCA 42/2005, referred to in ***Bowes v Bowes*** is authority for the proposition that a litigant should remain in contact with his attorney-at-law (see in particular pages 10 -12 of the judgment in ***Watson v Roper***).

[48] However, it does appear that the applicant experienced difficulties with legal representation and had financial limits. He is at the end of the day insisting that he did not know of the order until July 2012 and thus impliedly he is saying that his lawyer did not tell him about it. As Lord Denning stated in the ***Salter Rex*** decision, courts do not like to have a litigant suffer because of his lawyer's default. The applicant also claims to have had difficulties in securing his file or copies from the Supreme Court. He points to differences in his and the respondent's relative financial means.

[49] On the issue of prejudice, I find myself unable to improve on the analysis conducted by Rattray J, in ***Bowes v Bowes*** at paragraph [31]. The learned judge there stated:

> "[31] On the issue of whether Fabian Bowes would suffer any prejudice were the applications to be granted, there is no doubt that such an Order would cause a delay in his enforcing the Orders made in his favour. I am satisfied however that far less prejudice would accrue to Mr. Bowes, as there would still be in place a ruling in his favour pending the hearing of the appeal. If successful, the grant of these applications would only delay his right to enforce the Orders made in Mrs. Bowes' absence. On the other hand, a refusal of the Applications for Extension of Time and for a Stay of Execution, closes the access door to the Court for Pauline Bowes."

[50] I note that an affidavit of Tavia Dunn was filed in opposition to this application on 31 January 2014. That affidavit does not deal with the question of prejudice. Further, although many different documents and bundles have been filed and placed before this panel, I cannot trace any affidavit evidence from the respondent herself that speaks to prejudice.

[51] In my judgment, whilst the respondent will suffer the disadvantage of further delay in being able to proceed on the summary judgment order obtained, there is in place a ruling in her favour pending the appeal. On the other hand, the applicant would in effect have had the access doors to justice slammed in his face.

[52] Notwithstanding the absence of a good reason for delay, in my view the proposed appeal has merit. In all the circumstances justice requires that this applicant, who appears to have had legal representation challenges in the past, and continuing financial obstacles, ought to be allowed to put forward his appeal to this court.

PHILLIPS JA

ORDER:

It is hereby ordered that:

(1) The time for filing a notice and grounds of appeal in respect of the order for summary judgment made on the 15 July 2011, and in respect of which permission to appeal was granted on the 15 July 2011, is extended until the 16 May 2014.

(2) Costs of this application are awarded to the respondent to be taxed if not agreed.