[2013] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2012

APPLICATION NO 12/2013

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

BETWEEN	**EXCLUSIVE HOLIDAY OF ELEGANCE LIMITED**	**APPLICANT**
AND	**ASE METALS NV**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin instructed by Henlin Gibson Henlin for the applicant

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones & Co for the respondent

17, 18 April and 19 July 2013

MORRISON JA

[1] By notice of application dated 1 February 2013, the applicant, which is the respondent in the substantive appeal in this matter, sought orders for (a) security for the costs of the appeal and (b) extension of time within which to file a counter-notice of

appeal. On 20 March 2013, Brooks JA refused the application for security for costs. However, the learned judge set down the application for extension of time within which to file the counter-notice of appeal for hearing before the court during the week of 15 April 2013.

[2] On 18 April 2013, after hearing the parties, the court made the following orders:

> "1. The application for permission to file a counter-notice of appeal out of time is granted.
>
> 2. The applicant Exclusive Holiday of Elegance Ltd shall file and serve, at or before 2:00 pm on 18 April 2013, a counter-notice of appeal in the terms exhibited to the affidavit of Marc Jones which was filed herein on 1 February 2013.
>
> 3. The case management orders made herein on 20 March 2013 in respect of the appeal shall stand.
>
> 4. Costs of this application and of application No 91/2012 to the Respondent ASE Metals NV, to be taxed if not agreed."

These are the promised reasons for the making of these orders.

[3] The substantive appeal in this matter is from an order made by Sinclair-Haynes J on 18 April 2012 by which she refused the respondent's application for summary judgment against the applicant. That application arose out of a claim filed against the applicant by the respondent for a total sum, including interest, of over US$1,000,000.00.

[4] The respondent filed and served the appeal (a procedural appeal) on 13 November 2012. During the time limited by the Court of Appeal Rules 2002 ('the CAR') for the filing of a counter-notice of appeal (that is, within 14 days of the date of service

of the notice of appeal – see rule 2.3(4)), the applicant filed a notice of preliminary objection to the procedural appeal on the ground that the consideration on paper by a single judge of such an appeal is unconstitutional. Subsequent to this, on 10 December 2012, the parties were notified by the registrar of the Court of Appeal that the appeal had been fixed for hearing before the court itself on 27 April 2013, thus rendering the preliminary objection as to the jurisdiction of a single judge to hear the appeal otiose.

[5] It is in those circumstances, the time for filing a counter-notice of appeal by now having long since expired, that the applicant filed the application with which the court is now concerned. The application is supported by an affidavit sworn to on 1 February 2013 by Mr Marc Jones, a member of the firm of attorneys-at-law representing the applicant. The affidavit posits two additional or alternative bases upon which Sinclair-Haynes J could have refused the respondent's application for summary judgment. The first is that the affidavit filed in support of the application was deficient in that, while it was sworn to in Belgium, a foreign state, the signature and authority of the person administering the oath sworn to by the respondent had not been authenticated in the manner required by section 22(2)(4) of the Judicature (Supreme Court) Act. The second basis for the proposed counter-notice of appeal is that the documents attached to the affidavit in support of the application for summary judgment were not exhibited in accordance with rule 30.5(4) of the Civil Procedure Rules 2002 ('the CPR').

[6] Mrs Gibson-Henlin for the applicant accordingly submitted that it should be allowed to argue these points as providing additional bases on which this court might be asked on the hearing of the substantive appeal to affirm the decision of Sinclair-

Haynes J. Pointing out that there was no response from or on behalf of the respondent to Mr Jones' affidavit, it was further submitted that the proposed counter-notice has a good prospect of success.

[7] Mr Nigel Jones for the respondent resisted the application for extension of time on a single basis, that is, that a counter-notice of appeal is required by rule 2.3(2) of the CAR to comply with rule 2.2(3), which provides that "[w]here permission to appeal is required a copy of the order giving permission to appeal must be attached to the notice of appeal". This being an appeal from an interlocutory order, so the argument ran, permission to appeal is required by section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act. Mr Jones therefore submitted that permission to appeal is also required before a counter-notice of appeal can be filed and, in its absence, the application for extension of time within which to file a counter-notice must be refused.

[8] In response, Mrs Gibson-Henlin submitted that a counter-notice of appeal under rule 2.3(3) is not an appeal and therefore requires no permission to appeal. This is made clear, Mrs Gibson-Henlin submitted further, by the prescribed form A3 in the CAR which demonstrates that a counter-notice of appeal filed under that rule does not in fact seek to overturn the decision appealed from.

[9] Rule 2.3(3) of the CAR provides as follows:

> "A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds."

[10] Form A3, so far as is material, is in the following terms:

> "TAKE NOTICE that the Respondent ... will contend that the decision of ... should be affirmed on the following grounds:
> (a)...
> (b)..."

[11] In my view, the reference in rule 2.3(3) to a "respondent" plainly relates to a respondent in an existing appeal. What the rule provides is a mechanism whereby that respondent may seek to defend the judgment of the court below in his favour on grounds not relied on by the trial judge. Both in form and substance, even if not in nomenclature, the counter-notice of appeal referred to in rule 2.3(3) performs the identical function as that performed by the 'respondent's notice', which was provided for by rule 14(2) of the now repealed Court of Appeal Rules, 1962, in the following terms:

> "A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than those relied upon by that Court shall give notice to the effect specifying the grounds of that contention."

[12] In A Practical Approach to Civil Procedure (10th edn, para. 46.59), Mr Sime observes in relation to the equivalent English rule (CPR rule 52.5(2)), that "[s]uch a respondent is not appealing as such, so there is no question of seeking permission to cross-appeal". I regard and adopt this statement as equally applicable to a respondent who files a cross-appeal pursuant to rule 2.3(3) of the CAR and I would therefore hold that the applicant in the instant case does not require permission to appeal as a

precondition to the filing of a counter-notice of appeal. It accordingly follows that Mr Jones' primary objection to this application must be dismissed.

[13] As regards the principles upon which this court will consider an extension of time, within which to file an appeal, Mrs Gibson-Henlin referred us to ***Wilbert Christopher v Helene Coley-Nicholson*** [2011] JMCA App 23, para. [9], in which this court stipulated that, in order for such an application to succeed, the applicant must show (a) some satisfactory reason for the delay; and (b) that there is some substance in the proposed appeal. In the instant case, by analogy to such an application, I would adopt (without prescribing) a similar approach.

[14] Insofar as the reason given by the applicant for not having filed the counter-notice on time is concerned, it seems to me to be at least arguable that, out of an abundance of caution, the counter-notice of appeal could well have been filed at the same time or shortly after the filing of the notice of preliminary objection to the procedural appeal. However, in the unusual circumstances of this case, I am prepared to accept the excuse proffered for not doing so, which is that the applicant did not wish in any way to compromise its right to object, on constitutional grounds, to the matter proceeding by way of a procedural appeal before a single judge of appeal (an objection which was, it may be noted as a matter of interest, subsequently upheld in ***William Clarke v Bank of Nova Scotia Jamaica Ltd*** [2013] JMCA App 9, in which this court held that the procedural appeal regime provided for in rule 2.4 of the CAR, to the extent that it provided for the hearing and disposing of appeals within that category by

a single judge of appeal, was in breach of section 109 of the Constitution of Jamaica and was accordingly null and void).

[15] As regards the prospects of success of the proposed counter-notice of appeal, I am content to say, at this very preliminary stage, that I cannot regard the contention that the affidavit filed in support of the application for summary judgment was inadmissible by reason of a breach of section 22(2) of the Judicature (Supreme Court) Act and of the CPR as wholly unarguable.

[16] These are my reasons for concurring in the orders made on 18 April 2013.

PHILLIPS JA

[17] I have read in draft the reasons for judgment of my brother Morrison JA and agree with his reasoning. I have nothing to add.

BROOKS JA

[18] I too have read the draft reasons for judgment of Morrison JA. I agree with his reasoning and have nothing to add.