[2014] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2012

MOTION NO 18/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

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

Raphael Codlin and Miss Annishka Biggs instructed by Raphael Codlin and Company for the applicant

Nigel Jones and Miss Kashina Moore instructed by Nigel Jones and Company for the respondent

16 December 2013 and 24 January 2014

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

MORRISON JA

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

BROOKS JA

[3] On 27 September 2013, this court ruled that ASE Metals NV (ASE), a corporate entity with its registered offices in Belgium, was entitled to summary judgment against Exclusive Holiday of Elegance Limited (Exclusive Holiday), a company incorporated and operating in Jamaica. The sum involved is US$885,000.00, being the sum that the court found that the parties had agreed that Exclusive Holiday should pay for goods that ASE had sold to it. Exclusive Holiday is aggrieved by the decision, and on 16 October 2013, filed the present motion seeking permission to appeal to Her Majesty in Council. Such permission is provided for in section 110 of the Constitution of Jamaica.

[4] ASE contested the motion on two main bases. It first filed a notice of preliminary objection to the motion. Its objection is that the notice of motion, not having been served on it within 21 days after the judgment of the court, is out of time and therefore cannot be entertained. Secondly, it argued that the judgment of this court, granting summary judgment to one of the parties, did not constitute a final decision in a civil matter, and therefore does not grant a right to appeal to Her Majesty in Council.

[5] The court reserved its decision on the preliminary point and heard the substantive application, promising to give its decision at a later date. Subsequent to reserving, it received further written submissions from Mr Codlin on behalf of Exclusive Holiday. Having reviewed record and all the submissions the court now fulfills its promise.

The preliminary objection

[6] The preliminary objection arose because, although Exclusive Holiday filed its notice of motion within 21 days of the delivery of the judgment, it did not serve a notice of its intention to apply on ASE within that time frame. The 21-day period is stipulated by section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (hereafter called "the Order in Council").

[7] Mr Jones, on behalf of ASE, submitted that service within 21 days is a pre-condition for the court to have jurisdiction to hear the motion. He argued that failure to satisfy that condition doomed the motion to failure. Learned counsel relied, as authority for his submissions, on **The University of Ceylon v E F W Fernando** S C 568 (delivered 31 July 1957).

[8] Mr Codlin drew a distinction between the filing of the notice of motion and the hearing of the application. He submitted that the notice of motion is not the application, and that the application is what is made to the court pursuant to the notice of motion. He argued that it is the notice of motion that must be filed within 21 days of the judgment sought to be impugned whilst the application is itself heard on a date fixed by the court. Learned counsel submitted that section 3 does not require notice to be given of the applicant's intention to file the notice of motion. It is notice of the hearing of the application, he submitted, which must be served on the respondents to the application. It is only on receiving such a notice, he continued, that the

respondents can reasonably be expected to take such steps as they may wish to take. Mr Codlin submitted that the objection was without merit.

[9] The preliminary objection requires an interpretation of section 3. The section states as follows:

> "3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgment appealed from, and the applicant shall give all other parties concerned notice of his intended application."

The specific question to be answered in that assessment is whether the 21 days stipulated in the section also refers to the time within which notice is to be given to the other parties concerned.

[10] If the answer is in the affirmative then any service of the notice after the expiry of the 21 days would render the court impotent to hear the motion. This is because it has no authority to extend the time stipulated in the section (see **Chas E Ramson Ltd and Another v Harbour Cold Stores Ltd** SCCA No 57/1978 (delivered 27 April 1982)).

[11] The essence of Mr Jones' submission is that if the application should be made within 21 days of the date of the judgment, notice of intention to make that application can only be given before the expiry of that time. There are cases in which that interpretation has been presumed to be correct as the question that was assessed by the court is whether the notice given was specific enough.

[12] In **Robertson v Isaacs** (1982) 30 WIR 114, counsel for the respondent to an application for permission to appeal to the Privy Council, took a preliminary objection to the procedure adopted by the applicant. The objection was summarised by Peterkin CJ of the Court of Appeal of Eastern Caribbean States. The summary is at page 116g of the report:

> "He argued that he should have been served with a copy of the notice of motion itself within 21 days, and contended that the notice which was served on him was the notice which should have been served when one appealed directly to the Privy Council, and not the notice applying to this court for leave. In short, that the notice served on him was not sufficient and was not in compliance with r 4."

Rule 4 to which the learned judge referred, is identical in its terms to section 3 of the Order in Council.

[13] The difference between **Robertson** and the present case is that, unlike Exclusive Holiday, Mr Robertson did give notice to the other party of his intention to file the notice of motion. Isaacs' complaint was that the notice was not in the appropriate form and therefore could not have been considered as having been given. The issue raised in that case was, therefore, more in respect of the sufficiency rather than the timing of the service of the notice. The court ruled that the notice was a sufficient compliance with the rule and dismissed the preliminary objection. The authorities that were discussed in relation to the objection were not concerned with appeals to the Privy Council.

[14] There is, however, dictum in **Lesmond v R (No 2)** (1967) 10 WIR 259 which suggests that service of the notice of motion may be done after the expiry of the 21

days. The relevant rule in that case was also in terms identical to section 3. There, the notice of motion was filed on the 21st day. Oral notice of the motion was, however, given thereafter, and written notice was not given until the day before the hearing. Lewis CJ, in delivering the judgment of the Court of Appeal of West Indies Associated States, commented on the situation but did not categorise the late service as being fatal to the application. He said at page 260D:

> "...petitions of this nature and applications which require to be notified to the other parties should be served promptly, as soon as the application has been lodged in this court."

Permission to appeal was refused on other grounds. The fact that **Lesmond** involved a criminal conviction does not distinguish it from the present case. The Order in Council does not draw a distinction between civil and criminal cases in that regard.

[15] It must be said that there is an inconsistency in Mr Codlin's submissions that the notice of motion is not the application for the purposes of the notice to the respondents to the application. If it is, as he submits, that the application is what is made to the court pursuant to the notice of motion, then it would be necessary for the notice of motion to be filed in advance of the expiry of 21 days and for the application to be heard by the 21st day. This is because section 3 requires the application to be made within 21 days. That is certainly not what the section envisages.

[16] It is undoubtedly generally accepted that where an application is to be made within a specific time, that requirement is fulfilled when the document setting out the application is filed with the registry, despite the fact that it is heard on a subsequent

date. That principle is recognised, although in a different context, in rule 11.4 of the Civil Procedure Rules 2002 (the CPR) which states as follows:

> "Where an application must be made within a specified period, it is so made **if it is received by the registry** or made orally to the court within that period." (Emphasis supplied)

Part 11 of the CPR has been stipulated to apply to this court (see rule 1.1(10) of the Court of Appeal Rules).

[17] Although no case directly on the point has been brought to the attention of the court, it would appear that the 21 days stipulated in the section does not specifically refer to the time for service on the other parties mentioned in the section. Mr Codlin's submission that notice is to be served in advance of the hearing of the application does not run afoul of section 3 and is more practical than the situation suggested by Mr Jones. It is more practical, and it is in fact the usual practice, that the notice to the other parties specified in section 3, be given by way of service of a copy of the notice of motion that has been filed in this court. The applicant should, however, as was stipulated by Lewis CJ in **Lesmond**, serve a copy of the notice of motion as soon as possible after filing the original in court.

[18] The Ceylonese case of **Fernando**, cited by Mr Jones, is distinguishable from the present situation. This is because **Fernando** dealt with a rule which specified the time for service of the relevant document. That rule stated:

> "Application to the court for leave to appeal shall be made by petition, within thirty days from the date of the judgment to be appealed from, **and the applicant shall, within fourteen days from the date of such judgment, give**

> **the opposite party notice of such intended application**." (Emphasis supplied)

That rule, unlike section 3, is very specific in its requirement for service.

[19] For those reasons the preliminary objection fails.

The substantive application

[20] In order to be able to get permission from this court to appeal to Her Majesty in Council, Exclusive Holiday has to satisfy the provisions of section 110(1)(a) of the Constitution of Jamaica. As the submissions concerning this point turn on the interpretation of the section it is first necessary to set it out. It states:

> "110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases-
>
> (a) Where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, **final decisions in any civil proceedings**;" (Emphasis supplied)

[21] Exclusive Holiday asserts that it qualifies under section 110(1)(a). It asserts that it satisfies the requirements of that section and is, therefore entitled, as of right, to appeal to Her Majesty in Council. Mr Codlin submitted firstly, that the sum involved was well in excess of the stipulated sum. He also argued that section did not require satisfaction of the value requirement as well as the decision to be a final decision in civil proceedings. Learned counsel further submitted that, even if both requirements had to

be satisfied, the decision of this court in ASE's favour was a final decision and so both requirements had been satisfied in this case.

[22] Learned counsel argued that whereas a decision at first instance in an application for summary judgment may be considered an interlocutory decision, any decision by this court on appeal from such a decision would be a final decision. The difference, he submitted, is that there is no further appeal that can be made in the local judicial system.

[23] Mr Jones submitted that although the value requirement imposed by the section had been satisfied, this was not a final decision in a civil matter. He submitted that, the decision of this court, which is sought to be appealed, being an order for summary judgment, was interlocutory. On his submission, the judgment therefore fell outside of the ambit of section 110(1)(a). Learned counsel cited **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23 in support of his submissions. Mr Jones argued that as Exclusive Holiday had relied solely on the ground of entitlement under section 110(1)(a), its application must fail.

[24] An application for permission to appeal to Her Majesty in Council must satisfy one of the provisions of section 110 of the Constitution. Section 110(1) allows for appeals as of right to the Privy Council. Although appeals are said to be of right, permission to appeal must still be sought and obtained from this court. The reason for seeking permission is to confirm compliance with the section. This was explained by the Privy Council in **Ross v Bank of Commerce (Saint Kitts Nevis) Trust and**

Savings Association [2010] UKPC 28. Their Lordships said, in part, at paragraph 5 of their opinion:

> "The purpose of seeking leave to appeal from the court appealed from was to confirm that the appeal was as of right, and to impose such limited conditions as might be permitted by the local Constitution and law.

[25] It is now generally accepted, that the value of the property in dispute is to be considered cumulatively with the decision being a final decision in civil proceedings. In other words, that the property value requirement had to be satisfied **and** the decision had to be a final decision in civil proceedings. The majority judgment in **Ledgister and others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1 discusses the issue and the authorities bearing on the point.

[26] As there is no dispute that this is a civil matter, the question which arises is whether this court's decision, which Exclusive Holiday seeks to appeal from, is in fact, a final decision. The decision of this court, as set out in **Jamaica Public Service Company Limited v Samuels**, addresses that question. It is definitive on the point that an application for summary judgment is an interlocutory application, in that it would not result in a final decision, regardless of the outcome. As a consequence, the decision, even though it may result in a judgment bringing the litigation to an end, does not constitute a final decision. In this regard Morrison JA stated at paragraph [23] of the judgment in that case:

> "Summary judgment in fact seems to me to provide a classic example of the operation of the application principle, since if it is refused, the judge's order would clearly be interlocutory

> and so, equally, where it is granted, the judge's order remains interlocutory."

[27] Contrary to Mr Codlin's submission, there is no qualification of that principle concerning the physical location of the court that grants the decision. The statutory framework allows appeals (with some qualification) in interlocutory matters to this court (see section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act), while section 110(1) implicitly precludes them, as of right, for appeals to the Privy Council.

[28] Based on the above, the present position is that a party who wishes to appeal to Her Majesty in Council against a judgment granting summary judgment against it is not seeking to appeal against a final decision. Such a party is, therefore, not entitled as of right to permission to appeal. That is the position in which Exclusive Holiday has been placed in the circumstances of this case. Its application for permission to appeal must, therefore, fail.

Stay of Execution

[29] Exclusive Holiday, as a consequential order to the grant of permission to appeal, also sought a stay of the execution of the judgment, until the appeal to the Privy Council was concluded. In light of the necessary refusal of its application for permission, its application for a stay of execution must also fail.

Conclusion

[30] The preliminary objection to the application must be refused on the basis that section 3 of the Order in Council may be satisfied even if the applicant serves notice of

the application after the expiry of 21 days. Nonetheless, the fact that the judgment that Exclusive Holiday seeks to appeal from is a summary judgment, and therefore not a final decision in a civil matter, disqualifies it, as of right, from appealing to the Privy Council under section 110(1)(a) of the Constitution. As Exclusive Holiday has not relied on any other provision apart from section 110(1)(a), its application for permission to appeal must be refused. It is, therefore, not entitled to a stay of execution of the judgment.

PANTON P

ORDER

(1) The application for leave to appeal to the Privy Council is refused;

(2) Costs to the respondent to be taxed if not agreed.