[2013] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

APPLICATION NO 8/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE–BESWICK JA (Ag)

BETWEEN	**ELITA FLICKENGER (Widow of the deceased Flickenger)**	**APPLICANT**
A N D	**DAVID PREBLE (T/as XTABI RESORT CLUB & COTTAGES)**	**1ST RESPONDENT**
A N D	**XTABI RESORT LIMITED**	**2ND RESPONDENT**

Ainsworth Campbell and Andrew Campbell for the applicant

Christopher Samuda and Miss Danielle Chai instructed by Samuda and Johnson for the respondents

22, 23 April and 14 June 2013

LAWRENCE–BESWICK JA (Ag)

[1] On 22 April 2013, we heard an application to discharge the orders of a single

judge of this court and on the following day, 23 April 2013, we made the following orders:

(a) the application to discharge the orders of a single judge is allowed;

(b) permission to file the record of appeal out of time is granted and the record filed on 6 December 2012 shall stand as properly filed; and

(c) no order as to costs.

We promised to put our reasons in writing and this we now do.

[2] On 10 January 2013, the honourable judge of appeal refused two applications concerning this appeal. The first was for an extension of time within which to file the record of appeal. The second was to include an affidavit sworn to by Mr Ainsworth Campbell, attorney-at-law, on 16 January 2009, as part of the record of appeal. This affidavit purportedly contained relevant evidence from the court below which did not appear in the notes of evidence taken by the learned trial judge and which was not referred to in his written judgment.

[3] The trial concerned a claim by the applicant, Ms Elita Flickenger for loss which she alleges she suffered as a result of the drowning death of her husband, Mr Robert Flickenger, in 1995, whilst they were guests at the Xtabi Resort Club and Cottages, Westmoreland, operated by Mr David Preble.

[4] The trial commenced on 26 November 2002 and continued over the course of several days, ending almost five years later on 25 July 2007, when judgment was

reserved. More than three years passed, and on 10 November 2010, judgment was delivered in favour of the respondents.

[5] An appeal was filed on 23 December 2010 and the record of appeal ought to have been filed on or before 8 June 2012. On 5 June 2012, the applicant filed an application seeking an order to extend the time to file the record of appeal and supplementary record of appeal for a period of three months. That order was granted on 22 June 2012.

[6] On 21 September 2012, the applicant applied for the time within which to file the record of appeal and supplementary record of appeal to be extended for a period of a further three months. In the affidavit supporting that application, counsel, Mr Campbell, stated that despite his sustained effort it was impossible for him to prepare the record of appeal within the extended time. He had been preparing for what he described as a very tedious and difficult appeal for hearing in the Court of Appeal. Further, this record itself was voluminous, having some 600 pages and there was no money in the applicant's account to secure other assistance in the preparation of the record. Although it was only the pages in the record of appeal that needed to be numbered, the chronology and skeleton arguments had not yet been completed but were being prepared.

[7] The grounds also stated that the applicant was experiencing difficulty in locating some of the exhibits from the trial, though the affidavit did not refer to that.

[8] On 6 December 2012, the applicant filed an application to include in the record of appeal, the affidavit evidence of 16 January 2009 and of 6 December 2012, of attorney-at-law Mr Ainsworth Campbell, which purportedly constituted evidence given at the trial but which did not appear in the notes of evidence recorded by the learned trial judge. Both applications were heard on 11 December 2012 by a single judge of appeal and on 10 January 2013, both were refused.

Submissions

[9] Counsel for the respondent, Mr Samuda, in an affidavit opposing these applications, stated that the reasons proffered for the delay in filing the record of appeal were unacceptable, as, in his view, Mr Campbell had had sufficient time to address all his stated problems. He was not aware of the exhibits not being available at the civil registry nor had there been any request for his firm to assist in providing those exhibits.

[10] Miss Chai, in presenting submissions on behalf of the respondents, relied on a number of authorities, including decisions of this court, which provided that certain criteria must be considered by the court in determining whether leave should be granted in an application for an extension of time. She argued that those criteria had not been met.

[11] Counsel submitted that the learned judge of appeal did not err in either law or in fact in refusing the application and that his order should not be disturbed.

[12] Mr Campbell, on behalf of the applicant, urged the court to reverse the order of the learned single judge of appeal and extend the time to file the record of appeal not only because the said criteria had been met, but also because there was every indication that all the evidence in the case had not been considered by the trial judge. The justice of the case demanded that the case should be heard on all its merits after due consideration of the totality of the evidence. The applicant should not be chased from the judgment seat.

[13] Mr Campbell submitted that witnesses Asher Williams and Dwight Flickinger had testified concerning important issues in the case and an analysis of their evidence was critical. The learned trial judge had found that an element of negligence had not been proven, but these two witnesses had provided evidence, to which the learned judge had not referred, that should have been considered in that regard.

[14] Mr Williams had testified as to the usual condition of the seas at the time of year when Mr Flickenger drowned and the evidence of Mr Flickinger, brother of the deceased, contained in his affidavit of 18 June 2005, spoke to a description of the premises the day after his brother had died, and testified to an absence of any warning notices on the premises as to the dangers to be found in the seas by the resort. Photographs had been attached.

[15] Counsel, Mr Campbell, also argued that the learned judge of appeal had failed to give sufficient consideration to the overriding principle that the court must do justice between the parties. He urged this court to consider that during the course of the trial,

counsel for the respondent had himself been tardy in meeting a deadline prescribed by the court, for the filing and delivery of submissions.

Analysis and discussion

The Rules and principles

[16] The Court of Appeal Rules 2002 ('the Rules') provide at rule 1.7(2)(b) that the court may extend the time for compliance with any order or direction of the court. Rule 2.11(1) empowers a single judge of appeal to make an order under a procedural application such as this application and such an order may be varied or discharged by the court, according to rule 2.11(2).

[17] The Rules do not make specific provisions as to the method of determining an application to extend time for compliance with any rule. However, guidance in that regard is found in the several authorities to which both counsel referred, in particular in ***Peter Haddad v Donald Silvera*** SCCA No 31/2003 delivered 31 July 2007.

[18] After considering these authorities, the learned single judge of appeal opined that the relevant principles to be applied were as follows:

> "a. in the absence of specific provisions in the rules, the court, in exercising its discretion should do so in accordance with the overriding objective;
>
> b. generally speaking, the rules of the court must be obeyed and litigants and their legal representative ignore the rules at their peril;

c. a successful party is entitled to the fruits of its judgment and so the party aggrieved by that judgment must act promptly in pursuing its appeal;

d. the interests of the parties and the public in certainty and finality of legal proceedings, make the court more strict about time limits on appeals;

e. in order to justify the court extending the time limited for carrying out a procedural step in the appellate process, there must be some material on which the court can exercise its discretion;

f. normally, if no excuse is offered for the default, no indulgence should be granted;

g. an indulgence may be granted even if the excuse does not amount to a good reason but generally speaking, the weaker the reason the more likely the court will be to refuse to grant the extension of time;

h. the application should address the length of the delay, the reason for the delay, the merits of the appeal and the likely prejudice, or absence thereof, to the respective parties; and

i. strict guidelines as to the consideration of these applications should be avoided."

[19] The learned single judge of appeal then proceeded to apply the principles to this case. He concluded that the delay in filing the record was lengthy, and the reasons for the delay were not good. He then addressed the merits of the grounds of appeal and concluded that most of the grounds concerned the learned trial judge's treatment of the evidence and his findings of fact. The determination of liability rested to a large extent on the findings of fact which had been in favour of the respondents and the learned

single judge of appeal was of the view that the applicant would have an "uphill task" to persuade a court to disturb those findings of fact.

[20] The learned judge of appeal thereafter, in the exercise of his discretion, refused the application. He concluded that "the interests of the administration of justice, as well as the general interests of the parties, especially those of the respondents, require that the case be brought to an end". This application therefore challenges the exercise of the discretion of the learned single judge.

The law

[21] It is well established that an appellate court must not interfere with a judge's exercise of his discretion merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. That general principle was discussed in ***Hadmor Productions Ltd and Others v Hamilton*** **and** ***Others*** [1982] 1 All ER 1042.

[22] There, Lord Diplock discussed the grounds under which the appellate court could properly interfere with the exercise of that discretion. Those included the ground that the judge's exercise of his discretion was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a

change of circumstances after the judge made his order that would have justified his acceding to an application to vary it.

[23] In exercising the function of this court to review the manner in which the learned single judge exercised his discretion, we examined the factors which he considered in assessing the extent of the delay in filing the record, the reason for the delay, the resulting prejudice, if any, to the parties and the merits of the appeal. These factors would have influenced the manner in which the discretion was exercised.

The delay

[24] ***Biss v Lambeth, Southwark and Lewisham Area Health Authority (Teaching)*** [1978] 1 WLR 382 *and* ***West Indies Sugar v Stanley Minnell*** (1993) 30 JLR 542 were considered in the finding by the learned single judge of appeal that inordinate delay can be regarded as being prejudicial to the continuation of a trial.

[25] The learned judge, confined his consideration regarding the extent of the delay to the time interval between when the record was first due, and when it was filed, and concluded that there had been a delay of six months in filing the record. This in his view was a lengthy and inordinate delay.

[26] It is accurate that some six months had passed between the date when the record ought to have been filed on 8 June 2012 and when it was filed (without leave) on 6 December 2012. However, an extension had earlier been granted on 22 June 2012 which allowed for the proper filing of the record three months later in September. This means that the extension which was actually being sought in the application before

the learned single judge was for the period between September 2012 and December 2012, an interval calculated by the parties as amounting to 10 weeks.

[27] The determination of what amounts to inordinate delay must depend not only on a stated period of time but also, on surrounding circumstances relevant to such a determination. A particular period of time may amount to inordinate delay in one circumstance and yet may be reasonable and acceptable in another circumstance.

[28] We considered this 10 week delay in filing against the background of other delays in the matter. There was a delay of over three years between the last day of hearing of evidence in 2007 and the delivery of judgment in 2010. There was another delay which was occasioned by the actions of the respondents and which was highlighted in the judgment of the learned trial judge, where he said that at the trial, the submissions of the respondents were themselves late and he made no indication that leave had been granted for that delayed submission.

[29] In referring to delays in the course of the trial of the matter, the learned trial judge said at para 2 of his judgment

> "The first submissions should have been made by Counsel for the defendants, since the defence had called witnesses. The claimant's counsel did present his submissions in a timely fashion having waited for a considerable period for the Defendant's submissions. Regrettably, the submissions for the Defendant were received just before the end of the Easter Term of [2009]."

[30] In finding that the delay was lengthy and was for no good reason, the learned single judge of appeal stated that the delay in compliance was six months. He made no mention of having considered the other relevant delays and whether they should or whether they did influence him in the exercise of his discretion.

Prejudice

[31] There was no stated finding on this issue, save to say that delay was in itself prejudicial. The prejudice alleged by counsel for the respondents, concerning economic and reputational loss, had been based on hearsay evidence.

Merits of the appeal

[32] The learned single judge of appeal in analysing the issues in the trial and the merits of the appeal was guided by the established legal principle that this court does not easily disturb findings of fact based on evidence given by witnesses at the trial.

[33] In summarising the grounds of appeal, the learned single judge referred to the allegations that the learned trial judge had not considered or indeed even recorded certain vital evidence. In concluding that it was unlikely that the judgment could be overturned, no mention was made of the effect which any such allegedly overlooked evidence could have on the findings of fact and on the merits of the appeal.

[34] In his judgment, the learned trial judge had made reference to the evidence he considered but made no mention of the evidence of the witness Asher Williams concerning the normal condition of the sea at that time of year. Nor did he refer to, or

discuss the evidence of, Mr Dwight Flickinger on the absence of written warning signs on the property, yet he accepted the evidence of a witness whom he described as being barely literate as to the written signs on the premises which warned of dangers of the surf.

[35] It is of interest that there is exhibited a copy of email correspondence dated 11 March 2011 from the learned trial judge to both counsel in the matter in which he stated that he had only been able to locate his notes of evidence for the trial from 20 January 2006 and asked counsel to provide him with any notes they may have for the days before 20 January 2006 so that he could certify them.

[36] Although there is no evidence as to when the testimony was taken of those witnesses, who Mr Campbell describes as giving material evidence, we are mindful of the fact that there is no mention of their evidence in the judgment and also mindful of the fact that the case commenced in 2002, several years before 2006, which is the date from which the learned trial judge was able to locate his notes. Those notes which were not located would contain evidence of hearings from the first day of trial until 20 January 2006. The written judgment of the learned trial judge shows there were six hearing dates in this period of time.

Conclusion

[37] In exercising his discretion, the learned single judge did not make mention of some evidence as has been outlined above. He appeared to have not taken into account, material evidence which was before him. His deliberation was therefore

without the benefit of relevant and important considerations of fact. In these circumstances we set aside the order which he made refusing an extension of time within which to file the record of appeal and also to file the affidavit of Mr Ainsworth Campbell purportedly containing evidence which had been omitted from the learned trial judges notes of evidence.

[38] We so conclude against the background of a delay of over three years in the delivery of the judgment by the learned trial judge and a delay of approximately two years for the written submissions by the respondents. Justice between the parties requires the appeal to be heard and to include the examination of allegations that vital evidence was not recorded or considered by the learned trial judge.

[39] The record of appeal was filed out of time and without leave on 6 December 2012, before the application was heard, because, according to counsel, he was confident that leave would have been given. That confidence has been shown to have been misplaced.

[40] We agree with the view of the learned single judge of appeal, that it is time for this litigation to come to an end. It is in order to ensure that this matter suffers no further delay and for the reasons set out above that we made the orders in paragraph [1] as well as the following case management orders:

(1) the appeal will be heard over a period of two days during the week of 11 November 2013;

(2) the oral submissions of the appellant and of the respondent will be limited to three hours each with response of the appellant restricted to 15 minutes if necessary;

(3) the appellant is to file and serve written submissions and the bundle of authorities on or before 23 September 2013;

(4) the respondents are to file and serve written submissions and the bundle of authorities on or before 7 October 2013;

(5) the parties are to agree to a joint supplemental record of appeal which is to include the affidavits of Mr Ainsworth Campbell, sworn to on 16 January 2009 and 6 December 2012. The said supplemental record to be filed on or before 21 October 2013; and

(6) this case management order is to be prepared, filed and served by the appellant.