[2012] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 20/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**VINCENT GAYNAIR**	**1ST APPELLANT**
AND	**CHARLES ROSS**	**2ND APPELLANT**
AND	**NEVILLE HENRY**	**3RD APPELLANT**
AND	**NEGRIL BEACH CLUB LTD**	**1ST RESPONDENT**
AND	**NEGRIL INTERVAL OWNERSHIP CLUB**	**2ND RESPONDENT**
AND	**RAZ OFER**	**3RD RESPONDENT**
AND	**OFER HELFMAN**	**4TH RESPONDENT**
AND	**MARGARET CARSWELL**	**5TH RESPONDENT**
AND	**MICHAEL CAUSWELL**	**6TH RESPONDENT**
AND	**JULIAN EDWARDS**	**7TH RESPONDENT**

Jerome Spencer instructed by Patterson Mair Hamilton for the appellants

Maurice Manning instructed by Weiden Daley of Hart Muirhead Fatta for the respondents

4, 8 and 15 June 2012

HARRIS JA

[1] On 8 June 2012 the following order was made:

> "There is no valid appeal before this court. The notice of appeal filed is struck out. Costs are awarded to the defendants."

Having promised to put our reasons in writing, we now do so.

[2] Messrs Vincent Gaynair, Charles Ross and Neville Henry are owners of strata lots in Proprietors Strata Plan 88. On 21 February 2010 they were among the elected members of the strata executive committee (committee). Raz Ofer was an owner of a strata lot and a director of Negril Beach Club Ltd and Negril Interval Ownership Club which are owners of strata lots. He was also an elected member of the committee. On 9 February 2011, he wrote to the committee requesting that an extraordinary general meeting be convened.

[3] On 2 April 2011, an extraordinary general meeting was held, Mr Ofer having scheduled the meeting. At that meeting an executive committee was appointed. Messrs Gaynair, Ross and Henry and three others were replaced by Mr Ofer Helfman, Mrs Margaret Carswell, Mr Michael Causwell and Mrs Julian Edwards.

[4] On 4 May 2011, a claim was brought in the name of the Proprietors of Strata Plan # 88 against the newly elected members of the strata executive committee, save and except Messrs Helfman and Causwell, Mrs Carswell and Mrs Edwards, claiming essentially that the meeting of 2 April 2011 was unlawful and resolutions passed by the members of the committee were invalid. On 16 May 2011 the claim was amended by

removing the Proprietors of Strata Plan 88 as claimant and substituting Messrs Gaynair, Ross and Henry as claimants and adding Mr Helfman, Mrs Carswell, Mr Causwell and Mrs Edwards as defendants. The parties will be referred to as claimants and defendants hereinafter.

[5] On 6 July 2011 the claimants filed an application for an injunction seeking to restrain Mr Helfman, Mrs Carswell, Mr Causwell and Mr Edwards from "interfering with the operations of Proprietors Strata Plan #88 ('PSP 88') and its management office until trial or further order".

[6] On 27 October 2011, the application came on for hearing before the learned judge. She ruled as follows:

> "1. Preliminary objection is upheld, and the matters in dispute are referred to the Commission of Strata Corporations under section 3(A) of the Registration (Strata Titles) (Amendment) Act, 2009.
>
> 2. The Claimants' Application for Court Orders and of Urgency filed on 6th July 2011 is dismissed.
>
> 3. Costs of this application to the Defendants, to be taxed if not agreed.
>
> 4. The Defendants' Attorneys-at-Law to prepare file and serve the formal order hereon."

[7] A notice of appeal was filed by the claimants on 20 February 2012, the learned judge granted them permission, on 3 February 2012, to appeal.

[8] On 29 February 2012, a notice of an objection to the notice of appeal was filed by the defendants. The objection effectively challenged the legal force of the notice of appeal. Mr Manning, for the defendants, argued that the relief sought by the application on which the order of 27 October 2011 was made, relates to an injunction and an appeal arising therefrom is not procedural, despite the claimants obtaining leave to appeal from the learned judge. The order from which the claimants sought to appeal being one in respect of an injunction, by virtue of by section 11(1)(f)(ii) of the Judicature (Appellate Jurisdiction) Act, permission to appeal is not required, he argued.

[9] As required by the rules, an appeal, he submitted, ought to have been filed within 42 days of the service of the order. The claimants, not having filed an appeal within the time limited for doing so, ought to have sought an extension of time so to do, the time having not been extended, a proper appeal was not before the court, he argued.

[10] Mr Spencer submitted that the order made by the learned judge was a procedural appeal, it having been decided on a preliminary point. He sought to bolster this submission by asserting that although an order made under rule 1.1(8)(c)(i) of the Court of Appeal Rules, granting an interim injunction, would not give rise to a procedural appeal, an order refusing an injunction gives rise to a procedural appeal. He sought to contrast the provisions of rule 1.1(8)(c)(i) with rule 1.1(8)(d) and submitted that if the draftsman had intended to exclude an order refusing an interim

injunction from the ambit of a procedural appeal he would have expressly done so. The order, being a procedural appeal, is one concerning an interlocutory matter requiring permission and accordingly, required leave to appeal, he contended. The requisite period for filing such an appeal, he argued, is 14 days from the date on which permission was granted. The application for permission to appeal was rightly made and having been granted, the appeal is properly before this court, he contended.

[11] The critical issue in this matter is whether a valid appeal is before the court. In assessing the competing contentions of the parties as to the validity of the document filed, it would be appropriate to first look at rule 1.1(8) of the Court of Appeal Rules (COAR) and section 11(1)(f)(ii) of the Judicature (Appellate Jurisdiction) Act.

[12] Rule 1.1(8) of the COAR defines a procedural appeal in the following terms:

> "`**procedural appeal**' means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes –
>
> (a) any such decision made during the course of the trial or final hearing of the proceedings;
>
> (b) an order granting any relief made on an application for judicial review (including an application for leave to make the application) or under the Constitution;
>
> (c) The following orders under CPR Part 17 –
>
> (i) an interim injunction or declaration;
> (ii) a freezing order as there defined;
> (iii) a search order as there defined;
> (iv) an order to deliver up goods; and
> (v) any order made before proceedings are commenced or against a non-party;

(d) an order granting or refusing an application for the appointment of a receiver; and
(e) an order for committal or confiscation of assets under CPR Part 53; …"

[13] Section 11.1(f) of the Judicature (Appellate Jurisdiction) Act requires permission to appeal against an interlocutory order but exempts such requirement in certain cases. It provides:

"No appeal shall lie –

(a) – (e) …

(f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except –

(i) …

(ii) where an injunction or the appointment of a receiver is granted or refused; … "

As can be readily observed, section 11(i)f(ii) specifically refers to the granting or refusal of any injunction.

[14] A comparative review of rule 1.1(8)(c)(i) and 1.1(8)(d) shows that rule 1.1(8)(c)(i) merely speaks to the exclusion of an order on an interim injunction from being a procedural appeal, while, rule 1.1(8)(d) unequivocally eliminates an order granting or refusing an appointment of a receiver as ranking as a procedural appeal. Possibly, rule 1.1(8)(c)(i), not having expressly spoken in clear terms as to the refusal of an injunction, it may be taken that the rule does not embrace an order refusing an

injunction and such order could be classified as a procedural appeal. However, section 11(1)(f)(ii) of the Act is explicit. It excludes an order granting or refusing an injunction from the requirement of obtaining permission to appeal. Rule 1.1(8)(c)(i) could not render ineffective the clear intent of section 11(1)(f)(ii) of the statute. Assuming that there is a conflict between the rule and the statute, and it is not admitted that there is, the rule cannot operate to defeat the intent of the legislature. If there is conflict, the statutory provision must prevail. It is clear that an order for refusal of an injunction falls within the purview of section 11(1)(f)(ii) of the Act. The language of the Act compels the conclusion that permission to appeal is not required where the order from which an appeal lies is grounded in an injunction.

[15] The nature of the learned judge's order is not an interlocutory order requiring leave to appeal, as the order must be taken as one made after some consideration of the application for the injunction was given. Her order that "the Claimant's Application for Court Orders and Urgency filed on 6th July 2011 is dismissed", is without doubt a refusal of the injunction falling within the scope of section 11(1)(f)(ii) of the Act. Consequently, Mr Spencer's submission that the matter is a procedural appeal is undoubtedly unsustainable. I must at this point state that the case of ***Bright & Co (Limited) v The River Plate Construction Company (Limited)*** (1901) 17 TLR 708 cited by him, offers the claimants no assistance. That was a case in which an action was dismissed, the statement of claim having been struck out as disclosing no reasonable cause of action. The order made was treated as interlocutory requiring leave to appeal notwithstanding an injunction was claimed. There can be no dispute

that striking out of the claim would have been an interlocutory matter in which leave to appeal would have been required. The fact that a claim for an injunction existed is irrelevant. In the case under review, the order sought to be appealed against relates to an interim injunction and although it was against an interlocutory order, by operation of section 11(1)(f)(ii), leave to appeal was unnecessary.

[16] The final question is whether the document filed as a notice of appeal could be pursued by the claimants. It is now necessary to refer to rule 1.11(1) which makes provision for the filing and service of a notice of appeal. It reads:

> "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 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."

[17] As specified by the rule, an appeal, which is not procedural, nor one which requires permission, must be filed within 42 days of the date on which the order, from which an appeal lies, is served on the appellant. The defendants who were ordered to prepare, file and serve the order made by the learned judge on 27 October 2011,

served the order on 8 November 2011 after having filed same. The service of the order having been made, the 42 days would have expired on 20 December 2011. The document filed on 20 February 2012 had obviously been filed outside the prescribed time for doing the requisite act. The failure of the claimants to have acted in accordance with rule 1.11(1)(c), imposed upon them an obligation to have made an application for an extension of time to appeal. The relevant application and an order not having been made, the court is obliged to deny them jurisdiction to entertain an appeal. As a consequence, the notice of appeal is struck out.

[18] The foregoing are our reasons for striking out the appeal.