[2019] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00093

APPLICATION NO COA2019APP000188

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**LEONARD GREEN**	**APPELLANT**
AND	**SONIA CUNNINGHAM**	**RESPONDENT**

Garth McBean QC instructed by Chen Green & Co for the appellant

Mrs Ayisha Robb-Cunningham instructed by Davis Robb & Co for the respondent

8, 10 and 28 October 2019

MORRISON P

[1] I have read in draft the reasons for judgment of my brother F Williams JA. I agree with his reasoning and conclusion. There is nothing that I wish to add.

F WILLIAMS JA

Background

[2] This matter came before us at first as an application for permission to appeal. That permission was sought to appeal orders made on 27 September 2019 by a judge of the Supreme Court ("the learned judge"). These are the orders complained of:

> "1. The Interim Injunction granted on the 12th June 2019 extended on the 25th June 2019 and further extended to the 15th July 2019 is discharged.
>
> 2. With respect to the substantive matter before the Court it is ordered that it be transferred to the Corporate Area Civil Court which is the appropriate Jurisdiction.
>
> 3. Leave to appeal refused.
>
> 4. No order as to costs."

[3] By claim form dated 11 June 2019, the applicant had sued the respondent claiming that the respondent was unlawfully demolishing and then re-constructing the dividing fence between their adjoining properties located at Lady Kay Drive, in the parish of Saint Andrew without notice to or consultation with the applicant. Allegations of trespass were also made and a declaration and an injunction sought.

[4] The learned judge having refused leave to appeal in making the orders set out above, the applicant made his application before us. As is well known, a party applying to this court for permission to appeal is required to cross the threshold stipulated by rule 1.8(7) of the Court of Appeal Rules (CAR) (formerly rule 1.8(9)). That rule reads as follows:

> "1.8
>
> (7) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success." (Emphasis added)

[5] As several decisions of this court have explained, that test calls for an applicant to demonstrate that he has a real (as opposed to a fanciful) prospect of success. In the case of **Duke St John-Paul Foote v University of Technology and Elaine Wallace** [2015] JMCA App 27A, for example, Morrison JA (as he then was), writing on behalf of the court in that case, made the following observation at paragraph [21]:

> "[21] This court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule 1.8(9) of the CAR (see, for instance, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras [26]-[27]). So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal."

[6] At the close of submissions, counsel for the parties consented for the hearing of the application to be treated as the hearing of the appeal, given the narrow issues to be decided in any substantive appeal. We dealt with the matter accordingly. Therefore, the applicant became "the appellant" and will be referred to by the latter descriptor for the remainder of this judgment.

Summary of submissions for the appellant

[7] For the appellant, Mr McBean QC, as usual, wasted no time in succinctly making submissions on two points. First, he submitted that there appears to have been no consideration or determination by the judge as to whether the claim was limited to the jurisdiction of the Parish Court, in making the order for the matter to be transferred. He submitted as well that there was no application by either party for the matter to have been transferred. Second, he submitted that the claim was not limited to a claim under the Dividing Fences Act; but that it also included a claim for trespass, damages for which (if the appellant was successful at trial) could possibly exceed the monetary jurisdiction of the Parish Court. He observed that the matter was transferred when the trial (at which all the issues could be ventilated) was imminent.

Summary of submissions for the respondent

[8] On behalf of the respondent it was submitted, *inter alia*, that the learned judge's orders were sound and that the appellant did not have a good chance of success on any appeal as the respondent had acted under section 10 of the Dividing Fences Act ("the Act") in seeking to prevent damage caused by the appellant's tenants' dogs (even though the notice of application for court orders did not mention the Act). The learned judge had also acted properly in discharging the injunction and in transferring the matter to the parish court.

Discussion

[9] In this matter, the learned judge discharged the injunction on her own motion; and transferred the claim to the Parish Court. There are no reasons from the learned judge as to why this course was adopted. The parties were also unable to assist the court in that regard. There were no agreed notes of the learned judge's reasons, which both sides say was given orally. It appears, however, that the learned judge took the view that the claim was best heard pursuant to the Act and that jurisdiction lies in the Parish Court. Counsel for the respondent argued that the learned judge was correct, because section 10 of the Act was applicable. Having reviewed the Act, we found ourselves unable to accept, as sustainable, the contention that the respondent's claim was properly founded on section 10. Looking at the marginal note to that section, at first blush it seemed that that submission might possibly have been acceptable. The marginal note reads: "Consequences of damage to dividing fence by an occupier of an adjoining holding". However, a reading of the section itself along with parts of the respondent's affidavit evidence, reveals that that section is inapplicable to the case being put forward by the respondent. Section 10 of the Act reads as follows:

> "**10.** Where any damage shall have been done to a dividing fence which is 'sufficient', within the meaning of section 5, by any animal which is suffered to be on the landbounded by such dividing fence by the occupier thereof, or by fire which has originated from the negligence of the occupier of one holding bounded by such fence, such occupier shall bear the entire cost of repairing and reinstating such fence, and until the same shall have been repaired and reinstated shall not impound any animals trespassing on his land, the property of the adjoining occupier whose holding was separated from that of the first named occupier by the fence damaged or destroyed, and shall not be entitled to any compensation for damage sustained by

> him by any such trespass, and if he refuse, or for an unreasonable time neglect, to repair and reinstate such fence, the adjoining owner may do the necessary work on his behalf, and recover the cost of it against him as money paid at his request." (Emphasis added)

[10] It will be seen that this section is limited to cases involving damage to a dividing fence that is caused by animals or by fire. This must be compared with paragraphs 7, 10, 12 and 13 of the respondent's affidavit sworn to on 19 June 2019. Those paragraphs read as follows:

> "7. On Easter Sunday in 2007, I got home from church to see the chain link portion of the dividing fence mentioned in paragraph 5 hereof demolished. I spoke to the Claimant about this and he retorted that I now have a view. After a proper investigation of the reason my fence was demolished, I received information that the Claimant was clearing the land being 8A Lady Kay Drive when a huge tree fell on my fence. The Claimant took no steps to either compensate me for the damaged chain link portion of the fence or to erect a new fence.
> …
>
> 10. Sometime in summer 2008 whilst I was overseas, I was made aware that both the chain link portion and the concrete portion of the dividing fence fell to the ground seemingly from the fact that the Claimant in his construction dug below ground level on his portion of the land in order to construct a car porte [sic] and garage door. This seemingly destroyed the foundation on which my fence was built.
> …
>
> 12. The construction which began at 8A Lady Kay Drive in 2007 ended sometime in 2011. The property was thereafter tenanted. The tenants at that time had dogs who [sic] would constantly stray onto my land and damage my plants and dispose of their personal litter on my lawn. The dogs had unlimited access to my property because it was unsecured.
>
> 13. In an attempt to rid myself of the nuisance created by the dogs of the Claimant's tenants coupled with the need for my safety and privacy in my yard, I made the decision to restore the fence I once had…"

[11] Clearly, damage to the fence having been caused by something other than animals and fire, section 10 is not applicable. That puts section 10 out of her reach as a basis for her defence.

The transfer of the matter to the Parish Court

[12] Regrettably, in our consideration of this matter, we did not have the benefit of the learned judge's reasons for making the orders that were made. This compounded the fact that, on our perusal of the documents that have been filed in court and that were before the learned judge, we could find no indication of an application made by either of the parties to have the matter transferred as the learned judge did. That position was confirmed by the attorneys-at-law for the parties. This caused us some concern. We are aware that the power exists for a judge of the Supreme Court to make orders of his or her own initiative. That power is set out in rule 26.2 of the Civil Procedure Rules (CPR). However, there are certain restrictions governing the exercise of that discretion and power. This is how that section reads:

> "**Court's power to make orders of its own initiative**
>
> 26.2 (1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
>
> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.

(4) Where the court proposes –

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to do so,

the registry must give each party likely to be affected by the order at least 7 days [sic] notice of the date, time and place of the hearing." (Emphasis added)

[13] It seems to us that, given the fact that neither party had applied for the matter to be transferred, the better course would have been for the learned judge to have held a hearing at which that issue could have been considered, giving at least the minimum notice required by rule 26.2(4)(b). However, even if the matter was to have been considered then and there at the hearing on 27 September 2019, there is nothing that we have seen that convinced us that a reasonable opportunity was given to the parties to have considered, taken instructions and submitted on a matter that originally was clearly not within their contemplation. We noted as well that transferring the matter to the Parish Court, when there was a firm trial date a few weeks away in the Supreme Court, would have had the effect of depriving the parties of a near and certain date to thrash out all the issues involved; whilst replacing that with the uncertainty and delay that would attend putting the matter on the mention list in a Parish Court for a trial date some time in the future to be set. While action by the court of its own initiative, in appropriate circumstances, and following the appropriate procedure is to be encouraged, we were not convinced that the transfer of the matter in this case fully accords with the stipulated procedure or the overriding objective.

[14] It was for these reasons that, on 10 October 2019, we made the following orders:

> "1. The applicant is granted permission to appeal.
>
> 2. The hearing of the application is treated as the hearing of the appeal.
> 3. The appeal is allowed. The order for the matter to be transferred to the Corporate Area Parish Court is reversed and the parties are to proceed to trial in the Supreme Court on 28 October 2019.
> 4. The interim injunction granted on 12 June 2019; extended on 25 June 2019 and further extended on 15 July 2019 is hereby restored and extended to 28 October 2019.
> 5. No order as to costs."

EDWARDS JA

[15] I too have read the reasons for judgment of my brother F Williams JA and agree with his reasoning and conclusion.