[2013] JMCA App 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 151/2010

APPLICATION NO 73/2011

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

BETWEEN	**ISLAND RESOURCES LIMITED**	**APPLICANT**
A N D	**ALBERT SIMPSON**	**RESPONDENT**

Miss Allion Campbell for the applicant

Mrs Melrose Reid for the respondent

15, 17, 19, July and 6 December 2013

PANTON P

[1] On 19 July 2013, we refused the application for leave to appeal herein and awarded costs to the respondent Simpson to be agreed or taxed. We promised our reasons in writing, and we now fulfill that promise.

[2] On 7 May 2010, Frank Williams J entered judgment in favour of the respondent Simpson in the sum of US$4,333.00 with interest in respect of claim 2006 HCV 00512 and for £4,000.00 with interest in respect of claim 2005 HCV 01012.

[3] Mr Simpson had rented commercial property in Ocho Rios, St Ann, from the applicant, Island Resources Limited for the purpose of operating a restaurant. He claimed that the premises leaked and resulted in damage to his property. He sued for property damage, loss of profits and the recovery of US$4,333.00 paid by him to the applicant as "security deposit".

[4] The learned judge found, among other things, that the taking of a security deposit was contrary to the provisions of the Rent Restriction Act, and that no evidence had been presented to the court to show how that sum had been applied. He also found that water had come through the roof and damaged the property of the respondent as alleged. However, he found that the respondent was contributorily negligent in not exercising "due diligence" which, he felt, would have helped to reduce, if not eliminate entirely, his losses. In this regard, the learned judge ruled that the respondent was liable for 20% of his damage.

[5] On 13 October 2010, the applicant filed an application in the Supreme Court seeking leave to appeal, and to stay execution of the final judgment. That application was supported by an affidavit filed by Mr Richard Lake, a director of the applicant.

Frank Williams J refused this application in March 2011. He also denied leave to appeal against the refusal.

[6] On 31 March 2011, a notice of application for leave to appeal was filed in the Court of Appeal. The grounds for the application were stated thus:

> "a) The learned trial Judge gave judgment without having fully reviewed all the evidence in the matter;
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> b) The learned Trial Judge gave judgment in the proceedings without having considered the submissions that had been duly filed in the matter on behalf of the Defendant;
>
> c) The Defendant has an appeal with a good prospect of success."

Thereafter, several changes took place as regards the representation of the parties. It has been observed that notices of change of attorneys were at times filed in the Supreme Court, but not in the Court of Appeal. At the same time, there were continued hearings before the Supreme Court as regards execution of the judgment. These circumstances, it seems, account for the delay in the hearing of the application for leave to appeal.

[7] However, on 21 December 2012, the applicant filed a further amended notice of application for court orders in which it sought leave to appeal the decision of Frank Williams J and a stay of execution of the final judgment entered in respect of claim 2006 HCV 00512, that is, the claim for the sum of US$4,333.00. Leave was also sought

to "amend and regularize the Notice of Appeal filed herein". The grounds for the application were stated thus:

> "a. The learned trial Judge gave judgment without having fully reviewed all the evidence in the matter;
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> b. The learned trial Judge gave judgment in the proceedings without having considered the submissions that have been duly filed in the matter on behalf of the defendant;
>
> c. The learned trial Judge gave judgment on a matter that was already finally decided by a Resident Magistrate; and
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> d. The Defendant has an appeal with a good prospect of success."

[8] This application was supported by an affidavit filed by Miss Allion Campbell, attorney-at-law, who appeared for the applicant. It purports to state the history of the matter before the court, and refers specifically to an error that had been made in July 2010 when the final judgment of the court was sent to the parties in the form of a consent order. There has been no indication as to the reason for this error. Although this error was corrected in due course, it would have contributed somewhat to the delay in these proceedings while the attorneys-at-law and the registrar were in correspondence.

[9] Miss Campbell's affidavit repeats a good portion of the contents of Mr Richard Lake's affidavit which was referred to earlier. Significantly, Miss Campbell's affidavit attaches an affidavit of Mr Kipcho West, attorney-at-law, who had conduct of the matter at trial.

[10] The following important points emerge from these affidavits:

- The applicant was challenging the decision of the learned judge as regards the legality of the "security deposit".

- The applicant was saying that the learned judge had before him evidence in respect of how the security deposit was applied.

- The applicant's submissions were presented to the court within the time frame set by the learned judge and so ought to have been considered by him.

[11] Miss Campbell, in support of the application, pointed to what she termed "material errors" in the final order, where the judgment was described as having been by consent. This situation, she said, "slowed the process" and accounted for the late filing of the notice of application for leave to appeal. As regards the substance of the proposed appeal, Miss Campbell submitted that the learned judge arrived at his decision without having considered all the evidence, particularly that which was contained in a list of documents that had been submitted to the court. Furthermore, he did not consider the submissions that had been filed with the registrar of the Supreme Court within the time specified.

[12] Mrs Reid vigorously opposed the granting of leave. She submitted that the applicant had breached all the relevant rules so far as invoking the appellate process is concerned. Quite apart from that, she said that the affidavits and the submissions from the applicant amounted to a collateral attack on the learned judge. She submitted further that this was an abuse of the process of the court and should not be encouraged or entertained.

[13] It was noted that the "material errors" which Miss Campbell said slowed the process of the filing of the appeal did not form the basis for a ground in support of the application. In view of the submissions made, however, a comment on this aspect is necessary. The error had to be corrected, and, surprisingly, it seems that it took more than two months for the correction to be done. Prudence ought to have dictated to the applicant that an appeal should have been filed against the judgment within the time dictated by the rules, notwithstanding the error. After all, the judgment had already been handed down by the learned judge, and it was a source of grievance to the applicant. The fact that the judgment indicated that it had been by consent ought to have heightened the sense of unease and grievance in the applicant and spurred it into quick action. Alas, that was not to be.

[14] Ground (a) states that the judge had not reviewed all the evidence. However, in view of the material placed before us, we found that there was no merit in that ground. One complaint was that there was a list of documents which contained evidence that was not considered by the learned judge. The evidence included a certificate which purported to show that the premises were exempt from the provisions of the Rent Restriction Act. This complaint ignored the fact that the certificate was not put into evidence. The result of the proceedings before the learned Resident Magistrate (alluded in ground c above) was also not put into evidence before the learned judge. In the circumstances, the learned judge could not have considered what he did not see or receive. As it turned out, the only evidence placed before him on behalf of the applicant came from Mrs Donna Ann Ventura, and it was duly considered.

[15] The non-presentation of these facts before Frank Williams J also affects the prospect of success in an appeal, as there would be the need for a companion application to adduce fresh evidence. This application would most likely fail for the simple reason that the evidence was available at the time of the hearing.

[16] Ground (b) highlighted an unfortunate situation as the submissions ought to have been brought to the attention of the judge. However, we came to the conclusion that those submissions would not have made a difference as regards the decision of the learned judge as the evidence would still have been lacking.

[17] In the circumstances, the application failed and we made the order stated in para [1].

MORRISON JA

[18] I have read in draft the judgment of the learned President. I agree with his reasoning and have nothing to add.

LAWRENCE–BESWICK JA (Ag)

[19] I have had the privilege of reading the judgment in draft of the learned President. I agree with his decision and reasons and would only add the following comments.

[20] This appeal is based primarily on the complaint by the applicant, Island Resources Limited, that the learned trial judge came to his decision without consideration of all of the available evidence and of the written submissions of its attorneys-at-law.

[21] However, the evidence to which the attorneys-at-law referred had not in fact been tendered at the trial. It was comprised of documents which had not been exhibited and of findings purportedly made at proceedings before the Resident Magistrate's Court, when the parties were engaged in a related matter.

[22] In his judgment, the learned trial judge stated:

> "Written submissions were ordered by the court to be submitted by 4:00 pm on 26 February 2010. Only the claimant complied with this order." (page 3)

This was not in fact accurate as the defendant had also complied with the order, unknown to the learned judge. Mr Kipcho West, an attorney-at-law representing the defendant, Mr Simpson, filed an affidavit in this matter, stating that Island Resources Limited "through its attorneys submitted its written submissions on 26 February 2010, by filing the same in the Civil Registry and further submitted a filed copy by letter to the Registrar of the Supreme Court..." (para 4). This has not been disputed. Neither the registry staff nor the registrar delivered the submissions to the learned trial judge.

[23] The applicant complains that the learned judge did not consider the submissions because he did not receive them although they had been properly delivered to the

registry and also to the registrar of the court. The concern expressed by the applicant that the learned judge did not receive the submissions is understandable.

[24] The written submissions which counsel for Island Resources Limited submitted at the conclusion of the trial were exhibited in this application. However, they were based on material which had not been put into evidence at the trial. Those submissions could not have properly assisted the learned judge in coming to his decision based as they were on information which had not been admitted as evidence at the trial.

[25] Here, the failure of the judge to peruse the submissions did not change the outcome of the trial. Conceivably however, there could be circumstances where it could be otherwise. I must therefore make a comment which might be regarded as being obvious but which regrettably, it appears, must nonetheless be said, and it is this. All documents pertinent to the adjudication of a matter before the court must be delivered to the adjudicating officer in a timely manner to provide the opportunity for mature consideration of their contents. Any failure of the assigned court officers to promptly transmit relevant documents to the respective adjudicating officer can have dire, unjust and irreversible consequences. There should be no recurrence of the type of omission that occurred in this matter where there was a failure to deliver important documents to an adjudicating officer in a prompt and careful manner. The preservation of the confidence reposed in the system of justice demands nothing less.