[2022] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE FRASER JA
THE HON MR JUSTICE LAING JA (Ag)

SUPREME COURT CIVIL APPEAL NO COA2022CV00046

APPLICATION NO COA2022APP00094

BETWEEN	**KEISHA KAYE CLARKE (Administrator ad litem of Estate Kishauna Ann-Marie Clarke, Deceased, intestate)**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**1ST RESPONDENT**
AND	**DR WINSTON ISLES**	**2ND RESPONDENT**
AND	**LITTLE TOKYO RESTAURANT COMPANY LIMITED**	**3RD RESPONDENT**

Ms Marion Rose-Green, Ms Andrea Lannaman and Ms Sara-Lee Scott instructed by Marion Rose-Green and Co for the applicant

Matthew Royal instructed by Myers, Fletcher & Gordon for the 1st respondent

2nd and 3rd respondents not appearing or being represented

19 and 23 September 2022

BROOKS P

[1] This is an application for an extension of time in which to file a notice and grounds of appeal. The application arises from a decision of Master Thomas in the Supreme Court on 4 February 2022. In that decision, the learned Master ordered

wasted costs to be paid by mesdames Marion Rose-Green and Co ('MRGC'), the attorneys-at-law representing the applicant, Keisha Kaye Clarke ('Ms Clarke'). The costs were to be paid to the first respondent, the University of Technology Jamaica ('UTECH'). The learned Master not only gave leave to appeal that order but appointed Ms Clarke as administrator so as to pursue the litigation. However, the notice and grounds of appeal were not filed within the stipulated time. As a result, the applicant is obliged to make the present application.

[2] The background to the present application will be set out before considering its merits.

The background facts

[3] The litigation commenced on 13 March 2015, with a claim that Ms Sharon Mott ('Ms Mott') filed against UTECH, Dr Winston Isles and Little Tokyo Restaurant Company Limited. She sought damages on behalf of the estate of her daughter Kishauna Ann-Marie Clarke, who had died. By June 2019 the required mediation had not taken place and UTECH filed an application, on 26 June 2019, for summary judgment or in the alternative to strike out Ms Mott's claim.

[4] The application came on for hearing on 7 April 2021 before J Pusey J in the Supreme Court. Ms Mott's attorneys-at-law, MRGC resisted the application and relied on an affidavit filed by one of the attorneys-at-law in that firm, which asserted, in part, that Ms Mott "is still ready and willing to participate in mediation".

[5] On 7 May 2021, J Pusey J, among other orders, refused UTECH's application for summary judgment but ordered that unless Ms Mott made arrangements to have the mediation scheduled within 14 days, the claim would stand as struck out. That is when the matter unravelled.

[6] In attempting to comply with J Pusey J's order, MRGC wrote to UTECH's attorneys-at-law, Myers, Fletcher and Gordon ('MFG'), inviting them to agree to a date

for mediation. Having secured an agreed date, MRGC, on 21 May, tried to contact Ms Mott. They discovered on that day that she had died over four and a half years earlier, on 23 October 2016.

[7] MRGC was then obliged to communicate that information to MFG. Having done so, MRGC also filed an application for Ms Clarke to be appointed in place of Ms Mott as the representative for the claim. UTECH responded by filing an application seeking, judgment as well as wasted costs for its application filed in June 2019 and wasted costs for that application, which was filed on 29 September 2019. Having considered the applications before her, the learned Master made, among others, the orders set out in paragraph [1] above.

The application

[8] Ms Rose-Green, of MRGC, on behalf of Ms Clarke, argued that the application for an extension of time ought to be granted on the bases that:

a. the delay in making the application was not inordinately long;
b. there was a good explanation for the delay;
c. the grounds of appeal had merit;
d. there was no prejudice to UTECH; and
e. the justice of the case favoured the granting, rather than the refusal, of the application.

The opposition

[9] Mr Royal, in opposing the application, said that the appeal had no merit as the learned Master applied the correct principles in awarding wasted costs against MRGC.

The applicable principles

[10] The general principle is that the court's timelines ought to be observed. The learned Master's order was an interlocutory one and the circumstances are such that leave was required to appeal her order. Accordingly, pursuant to rule 1.11(1)(b) of the Court of Appeal Rules ('CAR'), an appeal of such an order must be filed within 14 days of the grant of permission to appeal. The court, however, in appropriate cases, may exercise its discretion to extend timelines where there has been non-compliance (see rule 1.7(2)(b) of the CAR). The criteria for whether or not to extend time are now well known, having been clearly set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 ('**Leymon Strachan**'), and cited in numerous cases since. The essence of the requirements of any applicant in Ms Clarke's position is to satisfy this court that:

(i) the length of the delay is not inordinate;

(ii) there are good reasons for the delay;

(iii) there is an arguable case for an appeal; and

(iv) if the application is allowed, the degree of prejudice to the other parties is not oppressive.

The court exercises some flexibility in respect of requirement (i) and even in the absence of a good reason for the delay (although a reason must be given), it is not bound to reject an application for an extension of time. As Panton JA, as he then was, said in **Leymon Strachan**, "the overriding principle is that justice has to be done."

[11] This judgment will assess Ms Clarke's application along the lines of the guidance provided by **Leymon Strachan**.

The analysis

Requirements (i) and (ii): The length of the delay and the reasons for the delay

[12] Although MRGC ought to have filed the notice and grounds of appeal by 21 February 2022, they did not attempt to do so until 14 April 2022 and did not file the present application until 28 April 2022. The time, in the circumstances of this case, was unreasonably long.

[13] The reasons given for the delay are untenable. It was said that MRGC was awaiting a written judgment and the service on them of a copy of the learned Master's perfected order. Counsel were present at the time that the learned Master delivered her decision. They could and should have formulated their grounds of appeal and sought their own copies of the formal order. Those shortcomings will, however, not be used to prevent an analysis of the merits of the proposed appeal.

Requirement (iii): Whether there is an arguable appeal

[14] MRGC filed 18 grounds of appeal which focused on:

1. Whether the learned Master erred when she ordered wasted costs against MRGC (grounds a, b, c, g, i, j, n, o, q, r);
2. Whether MRGC was given sufficient time to prepare its case, thereby being deprived of a fair hearing (grounds d and h);
3. Whether UTECH provided evidence that there was material non-disclosure on MRGC's part (grounds f, k, l, m, p
4. Whether the learned Master's decision should have awaited the end of the trial to ensure proper assessment of damages, if any (ground e).

[15] The essence of MRGC's complaint is that the learned Master was wrong in awarding wasted costs in that the application that went before her asserted that there was material non-disclosure of Ms Mott's death. Instead, Ms Rose-Green submitted, there was no assertion of non-disclosure. The learned Master, learned counsel submitted, granted the wasted costs on a basis that MRGC had not been called to face.

[16] The submissions cannot be accepted. Not only was the learned Master not bound to the four corners of the notice of the application in order to grant the orders sought, but the application did address the basis on which the learned Master made her orders on this aspect of the case. UTECH, in its application for wasted costs, outlined at ground 10 thereof, that MRGC "knew or reasonably ought to have known that Ms Mott was deceased at the time of opposing [Utech's application]". UTECH went further at ground 12 to refer to the affidavit of Sara-Lee Scott, an attorney-at-law from MRGC. In that affidavit filed on 22 September 2020, Ms Scott represented that "[Ms Mott] is still ready and willing to participate in mediation". Ground 13 of the application stated:

> "The material non-disclosure of [MRGC] amounts to an *improper, unreasonable or negligent act or omission* on their part."

[17] The learned Master found that the actions of MRGC were at least negligent. She said, in part, in paragraph [56]:

> "…I am of the view that the firm [MRGC] ought to have obtained their client's instructions in relation to UTECH's application to strike out and for summary judgment. This was necessary particularly having regard to the fact that [MRGC] had not had any communication with [Ms Mott] since 2016. In circumstances where [UTECH's] application was seeking to strike out for failure to prosecute the claim since 2016, it was incumbent on [MRGC] to locate [Ms Mott], advise her of the seriousness of the application and ascertain her readiness to proceed…. Having not made contact with [Ms Mott], I agree with [counsel for UTECH] that there was no basis for [MRGC] to represent that [Ms Mott] was still ready and willing to proceed. Though [Ms Mott] may have been willing, she may not have been ready,

> and as it unfolded, her death rendered her neither ready nor willing to proceed. I therefore find that [MRGC's] conduct in these circumstances could be said to be improper, and if not improper, negligent, in that they failed to do what any competent attorney would do after being served with the application to strike out and for summary judgment."

[18] That finding is not unreasonable. The learned Master was exercising a discretion that she was empowered to exercise and she made no error in principle. Her decision should not be disturbed. It is noted that in **National Commercial Bank Jamaica Limited v Lamech M E Gooden** [2021] JMCA Civ 11A, Straw JA spoke to that discretion and set out the basis on which wasted costs may be ordered. She said, in part, in paragraph [4]:

> "…The court's discretionary power to make orders for wasted costs is engaged, where costs are incurred as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or where the court considers it unreasonable to expect a party to pay costs in light of any act or omission (see rule 64.13 of the Civil Procedure Rules)."

[19] It is significant that there is a well-established principle by which MRGC would be liable to UTECH separate and apart from the context of wasted costs. **Yonge v Toynbee** [1910] 1 KB 215, to which the learned Master referred in her written judgment, is authority for the principle that attorneys-at-law who take on to themselves to act for a party in an action, thereby impliedly warrant, that they have authority to do so, and therefore were personally liable to pay the costs thereby incurred by other parties to the action.

[20] In **Yonge v Toynbee** the facts were briefly set out by Buckley LJ on page 228. He said, in part:

> "**The facts here are that the solicitors originally had authority to act for Mr. Toynbee; that that authority ceased by reason of his unsoundness of mind**; that, subsequently, they on October 30, 1908, undertook to

> appear, and on November 6 appeared, in the first action, and, after that was discontinued, did on December 21 undertake to appear, and did on December 30 enter an appearance, in the second action; and that they subsequently, on February 22, 1909, delivered a defence pleading privilege, and denying the slander, **and did not until April 5 inform the plaintiff that, as the fact was, their client had become of unsound mind. During all this time they were putting the plaintiff to costs, and these costs were incurred upon the faith of their representation that they had authority to act for the defendant.** They proved no facts addressed to shew that implied contract was excluded." (Emphasis supplied)

[21] Buckley LJ went on to state that "the appellant is entitled to succeed and to have an order against the solicitors for damages, and the measure of damage is, no doubt, the amount of the plaintiff's costs thrown away in the action". Swinfen Eady J concurred in the view that the solicitors were liable. On page 231, he cited with approval the judgment of lord Esher in **Firbanks Executors v Humphreys** 18 QB D 54:

> "…The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred'…."

Swinfen Eady J went on to explain the special position that solicitors hold with the court. He said at page 233:

> "I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one."

That position, although not identical, is similar to the position of attorneys-at-law in the present regime.

[22] The learned Master said that **Yonge v Toynbee** was cited to her as being the authority for the principle that the death of a client terminates his attorney-at-law's retainer. As has been demonstrated above, that is the applicable legal principle. Importantly, however, the case also shows that despite MRGC being ignorant of Ms Mott's death, their conduct in filing an affidavit which suggested that they had instructions, which they did not, and appearing before J Pusey J to resist UTECH's application, which they had no authority to do, caused UTECH to incur unnecessary costs for which MRGC is liable.

[23] For these reasons, Ms Clarke does not have any real prospect of success in appealing the learned Master's decision. It would be futile to allow them to pursue an appeal. The application for an extension of time in which to file a notice and grounds of appeal should, therefore, be refused.

Requirement (iv): The degree of prejudice to the other party

[24] In the circumstances, the prejudice against UTECH need not be analysed.

Requirement (v): The decision that justice requires

[25] The decision that justice requires is to refuse the application. A litigant is entitled to know at the earliest opportunity whether or not he will succeed in his cause. Ms Clarke has no real prospect of success on appeal. She should be told as quickly as is possible. It is true that it is MRGC that is liable for the wasted costs, but the appeal is in Ms Clarke's name and, in the normal run of things, she would be the party liable for the costs of the appeal.

Conclusion

[26] MRGC's application for an extension of the time in which to file a notice and grounds of appeal should fail as the proposed appeal has no real prospect of success. The learned Master was entitled to find that MRGC was negligent in purporting to act for Ms Mott when it was not authorised to do so. MRGC's actions caused UTECH to suffer loss and it is entitled to recover compensation for that loss from MRGC.

Costs

[27] The application for extension of time, although necessarily filed in Ms Clarke's name, was solely to benefit MRGC. UTECH is entitled to the costs of this application. MRGC should be ordered to pay those costs.

D FRASER JA

[28] I have read the draft judgment of Brooks P and agree.

LAING JA (AG)

[29] I too have read the draft judgment of Brooks P and agree.

BROOKS P

ORDER

1. The application for an extension of time within which to file a notice and grounds of appeal is refused.
2. Costs of the application to the first respondent.
3. The costs are to be paid by Marion Rose-Green and Co.