[2019] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 167/2018

BEFORE:	**THE HON MR JUSTICE BROOKS JA** **THE HON MRS JUSTICE MCDONALD-BISHOP JA** **THE HON MISS JUSTICE P WILLIAMS JA**

BETWEEN	**TYRONE SEAN LEWIS, ANNETTE JEAN BLOUNT, COURTNEY GEORGE LEWIS, TANYA RITCH (TRADING AS LEWIS & BLOUNT CONSTRUCTION DEVELOPERS)**	**1ST APPLICANT**
AND	**TANCOUR CONSTRUCTION JAMAICA LIMITED**	**2ND APPLICANT**
AND	**NATIONAL CONTRACTS COMMISSION**	**RESPONDENT**

Courtney George Lewis and Tyrone Sean Lewis in person

Miss Annaliesa Lindsay instructed by John G Graham and Company for the respondent

15 January 2019

MCDONALD-BISHOP JA

[1] This is an application brought by the applicants, Tyrone Sean Lewis and others, trading as Lewis & Blount Construction Developers ("Lewis & Blount") and Tancour Construction Jamaica Limited ("Tancour"), for permission to appeal from an order of Palmer-Hamilton J (Ag) (as she then was), made on 13 July 2018, in favour of the

National Contracts Commission ("the respondent"). The learned judge granted summary judgment for the respondent with costs on a claim, which had been brought by the applicants, against the respondent, in the Supreme Court.

[2] The learned judge also refused the applicants' oral application for permission to appeal.

The claim

[3] On 1 December 2014, the applicants commenced a claim against the respondent. On 2 December 2015, following an order of the Supreme Court granting permission to the applicants to amend their claim form and particulars of claim, they amended their claim and outlined the damages that were being sought against the respondent as follows:

> "a) Special damages against the [respondent] in the sums of $162, 638,050.00;
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> b) Damages for breach of Fiduciary Duty;
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> c) Damages for breach of Agreement;
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> d) Damages for conspiracy to cause pain, suffering and injure [sic];
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> e) Damages for unlawfully and maliciously destroys or damage with intent to destroy;
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> f) Damages for breach of trust and confidence during her period of service;
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> g) Damages for breach of fundamental rights of, on or to the [applicants];
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> h) Interest at such a rate and for such a period as the Honourable Court thinks fit costs; and

i) Further or other relief."

[4] The respondent filed an acknowledgment of service on 10 December 2015, and a defence to the amended claim on 15 January 2016, denying liability to the applicants for the damages claimed, or at all. The applicants filed a reply to the defence on 26 January 2016.

[5] The bundle filed in this court reveals, however, that on 17 January 2017, following the filing of the acknowledgment of service, the defence and the reply, the applicants filed another amended claim form with amended particulars of claim. In addition to the claim for damages set out in the previously amended statement of case, they claimed the following:

> "That the [respondent] may make a vesting instrument in the prescribed form and shall thereafter enter a memorandum thereof in the Register Book reflecting the transformation of Tyrone Sean Lewis, Annette Jean Blount and Courtney George Lewis trading as Lewis and Blount Construction Developers # 405/2007 and the said Courtney George Lewis and Tanya Ritch trading as Lewis and Blount Construction Developers #5436/2008), the [Lewis & Blount] that as converted on [sic] incorporated now as a public limited liability company the [2nd applicant] in whom the promissory note of conveyance drafting vests the power, right and authority that is to transfer the name of the [1stapplicant] reputation and goodwill onto its National Contracts Commission certificate of registration into the [2nd applicant's] name so that the [applicants] can renew their certificate."

[6] There was no response to this amended claim and particulars of claim by the respondent. The standing of this amended statement of case is, therefore, not quite

clear. However, given that counsel for the respondent had included it in the record for the purposes of these proceedings, coupled with the fact that the applicants are without the aid of a legal representative to assist them in the presentation of their case, the court has seen it fit, in the interests of justice, to have regard to the amended statement of case filed on 17 January 2017, in determining whether permission to appeal should be granted.

The background to the summary judgment application

[7] The record reveals that Lewis & Blount Construction Developers is (or was) a partnership with two separate registration numbers and two different sets of partners, recorded at the office of the Registrar of Companies. They are: registration no 5436/2008 with partners being, Courtney Lewis and Tanya Ritch trading as Lewis & Blount Construction Developers, registered on 25 September 2008 and registration no 405/2007 with those partners being, Annette Blount, Tyrone Lewis and Courtney Lewis also trading as Lewis & Blount Construction Developers and registered on 26 January 2007.

[8] The respondent was established under section 23B of the Contractor-General Act with its principal object being the promotion of efficiency in the process of the awarding and implementation of government contracts and ensuring transparency and equity in the awarding of such contracts. In order to achieve these objects, one of the functions of the respondent, as set out in section 23D of the Contractor-General Act, is to register and classify prospective contractors according to the level and scope of government contracts to which such registration applies.

[9] Upon its application on 16 March 2011, Lewis & Blount was permitted registration with the respondent on the Register of Public Sector Contractors in the building construction category, at grade 4. A certificate of registration was issued (certificate number: LE 7300/03-11/1-4) in the name of Lewis & Blount with an expiration date of 15 March 2012.

[10] On 21 February 2012, prior to the expiration of the certificate of registration which had been issued to Lewis & Blount, Tancour was incorporated under the Companies Act as a public limited company, with company number 83479.

[11] Upon the incorporation of Tancour, the applicants applied to the respondent to have the certificate of registration that was issued in the name of Lewis & Blount changed to that of Tancour. The reason given for the request was that Lewis & Blount had been converted to Tancour and was the same entity for all intents and purposes. Lewis & Blount wished to have the name change effected on the certificate of registration prior to its expiration on 15 March 2012, so that re-registration could be effected in the name of Tancour.

[12] The respondent refused the application for Tancour to be substituted on the certificate of registration. In its view, Tancour should first satisfy the mandatory requirements for registration. The respondent's position was set out in detail in a letter to Mr Courtney Lewis dated 25 April 2014, in his capacity as Chief Executive Officer of Tancour.

[13] Tancour failed to meet those requirements and, so, the respondent did not issue a certificate of registration in its name. This was despite the contention of the applicants that the entities are one and the same and that Tancour is entitled to the reputation and goodwill of Lewis & Blount.

[14] The applicants' core arguments on which their case was substantially based, as articulated by Mr Courtney Lewis in presenting the case before this court with the assistance of Mr Tyrone Lewis, may be briefly outlined as follows:

i. The respondent acted contrary to an agreement contained in letter dated 28 March 2011, which shows an agreement to re-register Lewis & Blount whose name was merely changed to that of Tancour's;

ii. A letter from the office of the Registrar of Companies, dated 24 February 2012, shows that Lewis & Blount was converted to Tancour upon the incorporation of Tancour. The letter clearly indicated that, "the partnership of Courtney Lewis and Tanya Ritch, trading as Lewis and Blunt [sic] Construction Developers under the Business Names Act has now been incorporated under the Companies Act as a limited liability company (Tancour Construction Jamaica Limited)";

iii. The conversion of the partnerships into Tancour is also evidenced by a document entitled, "Promissory Note of Conveyance Drafting"

and dated 28 October 2011, which was submitted to the respondent;

iv. The applicants had given the respondent express instructions to transfer the reputation and goodwill of Lewis & Blount to Tancour by changing the certificate of registration issued in the name of Lewis & Blount, to the name of Tancour, prior to its expiration, which the respondent refused to do;

v. There is nothing in the Contractor-General Act which provides that any entity converted or transferred must be seen as "a relatively new entity". Nothing in the relevant law precludes the respondent changing the name on the certificate of registration from the name of Lewis & Blount to the name of Tancour;

vi. The respondent, by refusing to change the name of Lewis & Blount on the certificate of registration, acted unlawfully and by so doing, "the [respondent's] injury [sic] [the applicants] with excessive controls and breaching the trust and confidence with [the applicants] out off [sic] its disregard to liberty and livelihood";

vii. The respondent has, "infringe[d] on the rights and liberty of the [applicants'] association to its National Contracts Commission certificate of registration activity before the 15, day of March 2012..."; and

viii. The refusal of the respondent to transfer the name to Tancour on the certificate of registration so that it could have been renewed on or before March 2012, "undermined [the applicants'] right to its agreement terms" and thereby caused loss and damage to the applicants' business for which they ought to be compensated in damages.

[15] The claim was stoutly resisted by the respondent, who, on 25 February 2016, filed an application for court orders, pursuant to rules 15.2 and 26.3 of the Civil Procedure Rules, 2002 ("the CPR"), in the following terms:

> "1. That the claim against the [respondent] be struck out as it discloses no reasonable cause of action against it.
>
> 2. In the alternative, summary judgment to be granted in favour of the [respondent].
>
> 3. ..."

[16] The respondent relied on the affidavit evidence of its chairman, Mr Raymond McIntyre, filed on 25 February 2016. He deponed, among other things, that the averment of the applicants that the respondent had an agreement with them was "wholly untrue, as the [respondent] only facilitated the registration of an entity known as Lewis & Blount Construction Services [sic]" and that registration was issued for a period of one year. That entity, he maintained, had satisfied the respondent of its requirements to be registered.

[17] Mr McIntyre further deponed that the criteria to be satisfied for Tancour's registration were outlined to it and, in addition, information regarding the registration process is outlined on the respondent's website. Tancour, he said, was informed of these mandatory requirements necessary for registration in or about 5 July 2013, and it failed to meet them. As a result, the respondent was not put into a position to properly consider its registration. It is the failure of Tancour to meet the requirements for registration which led to its non-registration and not any failure on the part of the respondent.

[18] The respondent's contention was that the bases of the claim were not known to law, and were vague, incoherent and ill-founded. It contended further that there was no known cause of action that had been alleged on the face of the pleadings.

[19] The respondent's argument, therefore, was that the applicants' statement of case disclosed no reasonable grounds for bringing the claim, disclosed no reasonable cause of action against it and the applicants had no real prospect of succeeding on the claim, or on any issue.

[20] Furthermore, the respondent contended that the complaint of the applicants on the most liberal of interpretation is one founded on the respondent's exercise of its public function pursuant to the Contractor-General Act. Therefore, the remedy would be by a claim for judicial review and not by ordinary action (see **O'Reilly and others v Mackman and others** [1983] 2 AC 237).

[21] For all these reasons, the respondent argued that it was in keeping with the overriding objective for the claim to be struck out or summary judgment entered in its favour.

[22] There was no affidavit filed by the applicants, in response to the respondent's notice of application. So, there was, in effect, no evidence from the applicants to counter the facts deponed to by Mr McIntyre that Tancour had failed to meet the requirements set out by the respondent for its registration.

[23] It was against this background that the learned judge entered summary judgment in favour of the respondent. This is taken to mean, in effect, that in her view the applicants had no real prospect of succeeding on the claim or on any issue.

The application before this court

[24] There are no reasons from the learned judge made available to this court by the parties, and so, in considering whether permission to appeal should be granted, this court is at large to consider the case afresh (on a rehearing).

[25] The applicants, through Mr Courtney Lewis who submitted on their behalf, have urged this court to find that the learned judge erred as this is a case that warrants a trial of the issues. This is in the light of the suffering being endured by the applicants as a result of the failure of the respondent to issue a certificate of registration in the name of Tancour. Tancour, according to him, is, in reality, Lewis & Blount by a different name, and so, there is no difference between the two entities. The respondent, he said, ought to have sought guidance on the matter from the court before denying the

applicants’ request to effect the change of name on the certificate of registration. The respondent acted unlawfully in failing to comply with the applicants’ request, he submitted.

[26] This was not a case, the applicants maintained, that should have been dealt with summarily; there should be a trial of all issues. The learned judge, therefore, erred when she entered summary judgment for the respondent. For these reasons, the appeal has a real prospect of success and, so, permission to appeal should be granted.

[27] Miss Annaliesa Lindsay, on behalf of the respondent, maintained that the learned judge was correct to enter summary judgment and the application for permission to appeal should be denied as the applicants have no real chance of succeeding on appeal. She pointed to the fact that the application does not show clearly the proposed grounds of appeal. This defect is indeed noted. However, the court will not treat it as a bar to the consideration of the application given the standing of the applicants as self-represented litigants and the absence of written reasons from the learned judge.

[28] It is quite evident that the applicants' contention, broadly speaking, is that the learned judge erred in viewing the case as one fit for summary judgment. The overarching issue for resolution by this court, if the appeal were to proceed, would be whether the learned judge erred in so concluding.

[29] Miss Lindsay’s submission was that the respondent is bound to act within the scope of the legislation by virtue of which it was established and it had not failed to carry out its functions within the ambit of the law by refusing to issue a certificate of

registration in the name of Tancour. She maintained that a partnership, is separate and distinct in law from a company and, so, the respondent was not wrong to treat the applicants as separate and distinct entities for the purposes of registration.

[30] Counsel further argued that any complaint against the respondent as a public authority ought to have been brought by way of judicial review, which the applicants have failed to do and the time has passed for such a claim to be brought.

[31] There was ample evidence before the learned judge, she argued, to demonstrate that the applicants had no real prospect of success on the claim and have not demonstrated that they have any real prospect of success on the appeal. Therefore, the application for permission to appeal should be refused.

Analysis

[32] Having considered each party's case that was advanced before Palmer-Hamilton JA (Ag), the submissions advanced on their behalf in this court as well as the applicable law, we agree with the submissions of the respondent that there is no real chance of the applicants succeeding on appeal. In our view, summary judgment was properly entered and the concomitant award of costs to the respondent is justifiable. We say so for the following reasons.

Principles governing application for leave to appeal

[33] Rule 1.8(7) of the Court of Appeal Rules, 2002 ("the CAR") states that, as a general rule, permission to appeal in civil cases will only be given if the court considers that the appeal will have a real chance of success. It stands to reason then, that for the

applicants to succeed on the application before this court, they must satisfy the court that the learned judge erred as a matter of law in the exercise of her discretion, when she granted summary judgment in favour of the respondent.

[34] Given that this court is being called upon to disturb the exercise of the learned judge's discretion, the guiding principles enunciated by Lord Diplock in the oft-cited case of **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042 and as reiterated by Morrison JA (as he then was) in **The Attorney General of Jamaica v John McKay** [2011] JMCA 26, at paragraph [19], must be borne in mind.

[35] What is abundantly clear from the authorities is that the appellate court must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.

[36] In **Sagicor Bank Jamaica Limited v Taylor-Wright (Jamaica)** [2018] UKPC 12, the Privy Council, in speaking to the use of the summary judgment machinery, provided sufficient guidance to a court in determining whether the machinery should properly be invoked. Their Lordships instructed, in so far as is immediately relevant:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a

proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.

18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:

> 'The court may give summary judgment on the claim or on a particular issue if it considers that -
>
> (a) The clamant has no real prospect of succeeding on the claim or the issues; or
>
> (b) The defendant has no real prospect of successfully defending the claim or the issues.'

That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

> '(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.

> …
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.'
>
> Para.8.9A further provides:
>
> 'The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.'
>
> 20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: ..."

[37] It is with this guidance in mind that the applicants' case that was presented to the learned judge has been examined. It is quite clear that there was no agreement between the applicants, or any of them and the respondent that the respondent would re-register Lewis & Blount upon the expiration of the March 2012 certificate of registration or register Tancour in its stead. The letter pointed to by Mr Courtney Lewis as evidencing this agreement has no such meaning or effect. The respondent could not be held liable for any breach of agreement with the applicants or any of them.

[38] The letter from the Registrar of Companies advising that Lewis & Blount is now incorporated as Tancour has nothing to commend it in law as a basis to hold that the

respondent was obliged to treat the applicants as one entity with merely a change of name. The same applies to the document entitled promissory note of conveyance drafting.

[39] It is trite law that a company is a different legal entity with a different legal personality from a partnership of persons doing business under a business name. A court would be hard pressed to conclude that the respondent was wrong in law to hold that Tancour could not simply be substituted on the certificate of registration for Lewis & Blount. It follows that the applicants has no chance of success in persuading this court to hold on appeal that the respondent acted unlawfully and in breach of the applicants' rights to insist that Tancour satisfy the relevant mandatory requirements for registration.

[40] Tancour has failed to comply with the requests of the respondent. There is no basis in fact or in law, which would merit an award of damages to them, or any of them, as a result of the respondent's refusal to issue a certificate of registration in the name of Tancour.

[41] The applicants were bound to fail on all aspects of their claim against the respondent as the statement of case has not disclosed any viable cause of action against the respondent.

[42] In such circumstances, the finding by the learned judge that summary judgment was appropriate cannot be disturbed.

[43] The applicants, therefore, have no real chance of success on appeal.

[44] In the light of this conclusion, the court sees no need to consider whether, as contended by Miss Lindsay, on behalf of the respondent, the wrong procedure was adopted by the applicants in pursuing the claim by ordinary claim in private law rather than by way of an application for judicial review.

Conclusion

[45] All the arguments advanced by Mr Courtney Lewis on the applicants' behalf have been considered, but unfortunately, there is nothing in them that could justify this court interfering with the decision of Palmer-Hamilton J (Ag) in granting summary judgment in favour of the respondent with costs. The learned judge would have been justified in holding that the applicants have no real prospect in succeeding on the claim.

[46] The applicants would face an insurmountable challenge in seeking to convince this court, if permission to appeal were granted, that the learned judge had exercised her discretion wrongly. Accordingly, the applicants do not have a real prospect of succeeding on appeal in their contention that she erred in law by not allowing the case to proceed to trial.

[47] For the foregoing reasons, the order of the court shall be as follows:

i. The application for permission to appeal the order of Palmer-Hamilton J (Ag) made on 13 July 2018, is refused.

ii. Costs to the respondent to be taxed if not sooner agreed.