[2017] JMCA App 19

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 136/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**ICILDA MYRIE**	**1ST APPLICANT**
AND	**DONOVAN BAKER**	**2ND APPLICANT**
AND	**TENLOY BAKER**	**3RD APPLICANT**
AND	**ALICE FAGON**	**RESPONDENT**

Lawrence Phillpotts-Brown for the applicant

Lawrence Haynes for the respondent

11 July 2017

BROOKS JA

[1] This is an application by Ms Icilda Myrie and her sons, Mr Donovan Baker and Mr Tenloy Baker (hereafter together called "the applicants"), for an extension of time in which to file notice and grounds of appeal. The applicants wish to appeal from the judgment of Evan Brown J who, on 29 October 2015, ordered:

> "1. That possession is granted to the Claimant of all that parcel of land situate at Spring Gardens, St. Thomas and bounded as follows:

On the East by the Main Road from Middleton to Morant Bay. On the West by lands belonging to Stephen Buckley and IRIS SINCLAIR. On the North by lands belonging to IRIS SINCLAIR and on the South by lands belonging to Stephen Buckley and measuring about 981.27 square metres more or less and more particularly described in a Survey Identification Diagram by Commissioned Land Surveyor Rixon E. Richards dated 25th May, 2008.

2. That a mandatory injunction is directed to the Defendants by themselves, their servants or howsoever otherwise to pull down, demolish and remove any building, outhouse wall or foundation constructed upon the said parcel of land.

3. Damages to the Claimant in the sum of One Hundred Thousand Dollars ($100,000.00)

4. Costs to the Claimant to be taxed if not agreed."

[2] In assessing such applications, it is necessary to apply the principles set out by Panton JA, as he then was, in the case of **Leymon Strachan v The Gleaner Company Limited** (unreported) Court of Appeal, Jamaica Motion No 12/1999, judgment delivered on 6 December 1999 which were quoted by Morrison JA, as he then was, in **Jamaica Public Service Limited v Rosemarie Samuels** [2010] JMCA App 23. Morrison JA said, in part, at paragraphs [28] and [29]:

> "[28]...I think it is only necessary to refer to **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999, judgment delivered 6 December 1999) in which all the modern authorities are conveniently gathered. This is how Panton JA (as he then was) stated the legal position:

'The legal position may therefore be summarised thus:

(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider-

(i) the length of the delay;

(ii) the reasons for the delay;

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

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.'

[29] It seems to me to be clear from this, if I may say so with respect, perfectly accurate statement of the legal position that, among other things, the question of the merits of the proposed appeal is an important one...."

[3] Both Mr Philpotts-Brown for the applicants, and Mr Haynes for Ms Fagon, accepted the accuracy of the criteria for assessing this application. In applying those criteria to this case, we start with the first, which is the length of delay. We see that in this case the applicants delayed seven months or, on Mr Haynes' calculation, 215 days,

which is a wholly inordinate period of time to have waited to make this application. We are also of the view that no good reason had been given. The applicants stated that their reasons for the delay are inadvertence and the change of legal representation. However, the authorities show that inadvertence by itself is not an acceptable reason and, in this case, we have no explanation as to where the inadvertence lay or what comprised it, whether it be oversight or some other factor.

[4] There are two main aspects to the important question of merit, or whether the appeal has a realistic prospect of success. The first aspect to be considered is the learned trial judge's decision to proceed with the trial despite the applicants' application for an adjournment on the date that the matter was set for trial. The learned judge had a discretion as to whether or not to grant their application for an adjournment for them to have applied for relief from sanction.

[5] The applicants have not shown any basis on which this court, if it were to hear an appeal, would disturb the learned trial judge's exercise of his discretion. The applicants appeared before him not having obeyed the order to file witness statements and without any ready application for relief from sanction.

[6] On the second aspect, we see that, on the face of it, the case in the court below turned on whether or not the parcel of land which Ms Fagon claimed is a separate parcel from that which the applicants claimed. Ms Fagon claimed that there were in fact two separate parcels, while the applicants asserted that the land claimed by Ms Fagon was part of a single parcel of land which belonged to them.

[7] The surveyor's report, which was ordered by the court as an investigative tool in clarifying the issues between the parties, suggests that there are in fact separate parcels having separate valuation numbers according to the Commissioner of Lands. There was also evidence before the learned trial judge from Miss Fagon and her brother to support the surveyor's report. There seems, therefore, to be no arguable case for appeal on the merits. There was no evidence from the applicants before the learned trial judge, and none has been placed before us, which contends that the surveyor was wrong in his analysis which supported Ms Fagon's case.

[8] It is accepted that there will be significant prejudice to the applicants who will have their structure, which they built on the land, torn down, but their situation results from their failing to obey the orders of the court to file the witness statements, and, importantly, to cease construction. Ms Fagon will also be prejudiced if this application were to be granted. She would be denied, at least for a time, of the fruits of her judgment. But prejudice by itself is not determinative of the application. As was said in the **Commissioner of Lands v Homeway Foods** [2016] JMCA Civ 21, it is the consideration of all the various aspects, mentioned in **Leymon Strachan v Gleaner Company**, which decides the achievement of the overriding objective (see paragraphs [125] to [126] of **Homeway Foods**.

[9] Considering the overall status of the matter and the justice of the case, this application, we rule, should be refused and Ms Fagon be empowered to enforce her judgment.

[10] The orders of the court are as follows:

1. Application for extension of time for filing and serving a notice of appeal is refused.

2. Costs to the respondent to be agreed or taxed.