[2012] JMCA App 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 12/2011

APPLICATION NO 176/2012

BETWEEN	**RODNEY RAMAZAN**	**1ST APPLICANT**
AND	**OCEAN FAITH N.V.**	**2ND APPLICANT**
AND	**OWNERS OF MOTOR VESSEL (CFS PAMPLONA)**	**RESPONDENTS**

Written submissions filed by Nigel Jones & Co for the applicants

Written submissions filed by DunnCox for the respondents

20 December 2012

(Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] The applicants, Rodney Ramazan and Ocean Faith N.V., had a judgment, in their favour, overturned by this court. Consequently, the respondents, Owners of the Motor Vessel (CFS Pamplona), filed and served a bill of costs claiming the sum of $1,651,293.74 in respect of their legal fees and expenses incurred in connection with the appeal. The applicants failed to file their points of dispute in respect of the bill of

costs within the prescribed time and, as a result, the registrar of this court issued a default costs certificate in the sum mentioned above.

[2] The applicants now seek to set aside the default costs certificate and ask that their points of dispute document, which was filed late, be permitted to stand. Their application is based on their assertions that:

(1) it was a clerical error which caused the late filing;

(2) the points of dispute were filed only one day after the default costs certificate was issued;

(3) there is a clearly articulated dispute about the appropriate amount of costs; and

(4) the respondent had filed the bill of costs over four months late and so would not be prejudiced if the bill were to be set for taxation.

[3] The respondents resist the application on the basis that no good reason has been given for the application to be granted. They submit that in order for the court to set aside a default costs certificate, the applicants must disclose a good reason for the failure to file and serve the points of dispute within the prescribed time. The respondents assert that the clerical error of misplacing the bill of costs, as the applicants have asserted occurred, does not constitute a good reason. Consequently, the application should be dismissed.

[4] There is no dispute that the default costs certificate was properly issued by the registrar. The only question is whether the applicants have demonstrated that they are entitled to an opportunity to contest the bill of costs at a taxation hearing.

The law

[5] The law in relation to bill of costs, as it is to be applied in this court, is guided by parts 64 and 65 (with some exceptions) of the Civil Procedure Rules 2002 (CPR). Rule 1.18(1) of the Court of Appeal Rules ("the CAR") stipulates the application. It states:

> "(1) The provisions of CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and in particular to the amendments set out in this rule."

[6] The relevant rule in the CPR is 65.22, which deals with setting aside default costs certificates. It states:

> "65.22 (1) **The paying party may apply to set aside the default costs certificate**.
> (2) The registrar must set aside a default costs certificate if the receiving party was not entitled to it." (Emphasis supplied)

For the purposes of this judgment the applicants are the paying party and the respondents are the receiving party.

[7] The respondents have cited authorities, emanating from England, in support of their submission that the court does have the power to set aside a regularly issued default costs certificate. Those decisions, namely **Chitolie v The Commissioners of Customs and Excise** [2002] EWCA Civ 1580 and **Dr Adu Aezick Seray-Wurie v The Mayor and Burgess of the London Borough of Hackney** [2002] EWCA Civ 909, turn on a differently worded rule, which the English CPR uses. The relevant portion of that rule (CPR 47.12) states:

> "(1) The court must set aside a default costs certificate if the receiving party was not entitled to it.
>
> (2) **In any other case, the court may set aside or vary a default cost certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue**." (Emphasis supplied)

The cases may only provide assistance if rule 65.22 is interpreted to have a similar effect to that of its English counterpart.

[8] Despite the difference in the wording of the respective rules, it seems to me that rule 65.22(1) does contemplate an application being made to the court in circumstances such as in the instant case. This court, although a creature of statute, must be able to exercise control over its process. That control would extend, I find, to:

> (1) extending the time for filing points of dispute; and
>
> (2) setting aside a default costs certificate that has been issued in circumstances where it would be unjust to allow the bill of costs to remain uncontested.

Rule 1.7 of the CAR gives guidance in this regard. Paragraph (2)(b) of that rule allows the court to extend the time limited for compliance with any rule. It states that the court may:

> "(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;"

Rule 1.7(7) allows the court to vary or revoke an order which it has made. It states:

> "The power of the court to make an order includes a power to vary or revoke that order."

[9] An application to set aside the default costs certificate would not be by way of an appeal from the decision of the registrar and would, therefore, it appears, be considered a procedural application. In such a case, I find that it may be dealt with by a single judge of the court, by virtue of the power to make orders in procedural applications (rule 2.11(1)(e)).

[10] Rule 65.22 does not stipulate any restriction on the paying party seeking to set aside the default costs certificate. The paragraph is broad in its application. Paragraph 65.22(2) stipulates a mandate for the registrar but, in my view, does not otherwise prevent the registrar from setting aside a certificate. It does not say that the registrar must set aside in a certain case, "but not otherwise". I am fortified in this view by the fact that by rule 65.20 (4) the registrar may permit a paying party who does not file points of dispute in time, to participate in the taxation proceedings. Such proceedings could only be a taxation hearing that follows from points of dispute being in place. I accept, however, that the rule could have been made clearer. I also note that a request has previously been made for the rules committee to address the matter (see **Charela Inn Ltd v United Church Corporation and Others** 2004 HCV 02594 (delivered 8 July 2011)).

[11] I therefore find that the registrar has the discretion to set aside a default costs certificate, even if the receiving party was not found to be not entitled to it, as stipulated in rule 65.22(2). The court, or a single judge thereof, may also exercise that discretion.

[12] On that finding, it would seem that the interpretation and application of rule 47.12 of the English Civil Procedure Rules may be of some assistance. That rule speaks to setting aside the default costs certificate, "if it appears to the court that there is some good reason why detailed assessment proceedings should continue". Despite the difference in wording in rule 65.22 in the CPR, I find that, in our jurisdiction, a default costs certificate may be set aside for "good reason".

[13] In **Seray-Wurie**, the English Court of Appeal, in considering an application to set aside a default costs certificate that had been regularly issued, identified the factors that would be relevant to the application. In reviewing the decision of the judge at first instance, in respect of the application, the court said at paragraphs 10, 11 and 12:

> "10. The claimant sought permission to appeal against his order, and we have a transcript of the judgment of Gibbs J on the application. **He said that the point at issue was whether there was any realistic prospect of a successful appeal against the setting aside of the default costs certificate. He took into consideration the fact that service of the defendants' points of dispute was not effected by 1st October and that the default certificate was rightly obtained on 2nd October. On the other hand he said that an attempt had been made to serve in time, that within three days an application had been lodged to set aside the default certificate, and that the points of dispute in fact came into the claimant's possession on 6th October. He thought it was difficult on the facts to imagine a more prompt application to set aside the certificate** (for the significance of promptness in this context see CPR 47 PD.11, section 38.2(2)).
>
> 11. When the judge considered **the effect of the overriding objective, he said that there was a**

> **clearly articulated dispute about the amount of costs**. For the purposes of this judgment he was content to assume that the council had been late in submitting its points of objection, but it did dispute them and **there was clearly a dispute to be determined**. The overriding objective necessarily implied that dealing with a case justly included actually dealing with the case. If the deputy judge had made any other order, he would have shut out the council entirely from pursuing the disputed points in relation to costs, and both sides agreed that the amount of costs were very substantial indeed.
>
> 12. In these circumstances, whilst assuming that the disputed facts (some of which related to the hearing before the deputy costs judge) were found in the claimant's favour, **there was no possibility of any reasonable costs judge reaching any other conclusion**. There was therefore no realistic prospect of an appeal succeeding. Permission to appeal was accordingly refused.

[14] The above quotation identifies specific issues, which should be considered in deciding whether a good reason existed for setting aside a default costs certificate. Without attempting to stipulate mandatory requirements it would seem that those issues would include:

> (1) the circumstances leading to the default;
>
> (2) consideration of whether the application to set aside was made promptly;
>
> (3) consideration of whether there was a clearly articulated dispute about the costs sought;
>
> (4) consideration of whether there was a realistic prospect of successfully disputing the bill of costs;

I find also that rule 2.20(4) of the CAR which requires a consideration of the principles of relief from sanctions applies in these circumstances. The rule states:

"(4) CPR rule 26.8 (relief from sanctions) applies to any application for relief."

It would seem that an application to set aside a default costs certificate easily qualifies as an application for relief. In assessing the instant case I shall use the benchmark set out in rule 26.8, albeit in a somewhat adjusted order.

Application to the instant case

(a) Was the application made promptly?

[15] The applicants have not been dilatory in their approach to correcting their original default. The default costs certificate was issued on 28 June 2012 and the applicants' points of dispute document was filed on 29 June 2012 after, allegedly being misplaced by the attorneys-at-law representing them. Although the present application was filed on 15 August 2012, it does appear that the applicants had sought to make a prompt application. Ms Kashina Moore deposed on behalf of the applicants that an application, intended to be filed in this court, was in error, filed in the Admiralty Division of the Supreme Court. That was done on 9 July 2012. Based on that evidence, which is supported by copies of the documents that were filed in the Supreme Court, I would not penalise the applicants for the August filing.

(b) Was the application supported by evidence on affidavit?

[16] As was mentioned above, Ms Kashina Moore did provide affidavit evidence in support of the application. She did not, however, state when it was that the attorneys-

at-law were served with the default costs certificate or when it was that the filing error was discovered. These omissions should not be considered fatal.

(c) Is there a good explanation for the failure?

[17] With regard to the explanation for the failure, Ms Moore only stated that the failure was due "to clerical error resulting in the [bill of costs] being misplaced after it was served on [the attorneys-at-law] it was not brought to the attention of the responsible Attorney until it was found". This may not necessarily be considered a good explanation, but I would not consider it fatal to the application. It also communicates the concept that the default was not intentional.

(d) Has the party generally complied with other orders, rules and directions?

[18] There does not seem to be any previous delay or default by the applicants.

(e) Was the default the party's or that of its attorneys-at-law?

[19] Ms Moore's affidavit shows that the default was as a result of inefficiency on the part of the attorneys-at-law. Nothing indicates any default on the part of the applicants themselves.

(f) Can the default be remedied within a reasonable time?

[20] The document has already been prepared and filed. All that is required is an order allowing it to stand as filed.

(g) How soon can the taxation be held?

[21] The holding of the taxation would be dependent on the court's list and I am informed by the registrar of this court that one could be held between February and March 2013. This is not an unduly long period in the scheme of things.

(h) What effect would the granting of relief or not have on each party?

[22] Granting the relief would delay the payment of the costs to the respondent. It is to be noted, in this context, that the respondent filed its bill of costs seven months from the date on which it was first entitled to file, and four months after the period prescribed by rule 65.18(2). If, however, the applicants are correct in their assertions that the bill of costs is more than one million dollars in excess of the appropriate sum, the prejudice to them would outweigh the prejudice that the grant would have on the respondent.

(i) Is there a real prospect of success in having the claimed costs reduced?

[23] Ms Moore asserts in her affidavit that the bill of costs claims rates which are in excess of those to which the legal representatives of the respondents would be entitled. In addition to that complaint, the points of dispute reveal that a major complaint of the applicants is that much of the work done on behalf of the respondents could have been done by junior counsel. Further claims have been made for appearance by two counsel when it does not appear that a certificate for two counsel was granted. I would agree that the points of dispute have been clearly articulated and have a realistic prospect of success.

(j) What do the interests of the administration of justice demand?

[24] The interests of the administration of justice consider more than just the respective interests of the parties to the dispute. This is not, however, a matter which would further increase the growing backlog of appeals in this court. The taxation list is a much shorter list and therefore I hold that the administration of justice would not be severely prejudiced.

[25] Based on all the above, I hold that the application ought to be allowed.

Order

[26] (1) The default costs certificate, issued herein on 28 June 2012, is set aside.

(2) The applicants' points of dispute, filed herein on 29 June 2012, is permitted to stand as filed.

(3) The respondents' bill of costs shall be taxed by the registrar of this court, and the applicants shall be allowed an opportunity to participate in the taxation proceedings and, in particular, in respect to their points of dispute.

(4) Costs of the application to the respondent. Such costs are to be taxed if not agreed.