[2011] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 168/2009

APPLICATION NO 21/2010

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA (Ag.)

BETWEEN	**DESMOND ROBINSON**	**1ST APPLICANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND APPLICANT**
AND	**BRENTON HENRY**	**1ST RESPONDENT**
AND	**SARAH (BUTT) HENRY**	**2ND RESPONDENT**

Curtis Cochrane instructed by the Director of State Proceedings for the applicants

Garth Lyttle instructed by Garth E. Lyttle and Company for the respondents

22, 26 February 2010 and 7 October 2011

PHILLIPS JA

[1] The appellants (applicants) filed an application pursuant to rule 2.11(2) of the Court of Appeal Rules (CAR) to vary or discharge the order of the single judge of appeal, Morrison JA, who on 25 January 2010 refused to stay the execution of the judgment of Thompson-James J (Ag) (as she then was), given on 24 November 2009.

Morrison JA in refusing the application stated that, "Rule 2.14 of the CAR makes it clear that an appeal does not operate as a stay of execution and the Affidavit filed in support of this application advances no reason why a stay should be granted."

[2] On a claim by the respondents against the applicants that they had paid all custom duties payable on a damaged BMW 1.8 litre motor car imported into Jamaica from England, duties having been assessed and paid on the basis of their declarations that the vehicle had been extensively damaged and written off by the insurers and that they had purchased it as salvage, Thompson-James J (Ag) gave her judgment. She ordered, inter alia, that no further custom duties than the $1,188,158.37 assessed were payable; that the respondents were entitled to the return of their motor vehicle; that the applicants were to pay the respondents the sum of $1,520,000.00 at 6% interest from 31 January 2006 to 24 November 2009 (representing losses suffered and expenses incurred); and that the applicants' counter-claim for the outstanding duties payable, namely $7,576,491.99 was dismissed. Notice of appeal was duly filed on 24 December 2009.

[3] The applicants challenged the findings of the judge with regard to her rejection of certain evidence on the basis of the witness' competence, that the seizure of the motor car was unlawful, and that section 31G of the Evidence Act was applicable to certain evidence. The grounds of appeal stated, inter alia, that the learned judge had misinterpreted section 31G of the Evidence Act and sections 19(2), 19(8) and 28 of the

Customs Act, misapplied sections 13 and 33 of the Constabulary Force Act and misunderstood certain competing contentions in the case relating to the provenance of the motor car. The applicants asked for the decision of the learned judge to be reversed and for judgment to be entered in their favour.

[4] When the application for the stay of execution came before Morrison JA, the affidavit filed in support of the application comprised five paragraphs which only contained formal information of the fact of the judgment of Thompson-James J (Ag), the fact that she had granted a stay of execution of the judgment for a period of six weeks which was about to expire, that the notice of appeal had been duly filed and served, which was attached, and prayed that the single judge would grant the order in terms of the application. It was therefore not surprising that Morrison JA refused the application indicating that the filing of the notice of appeal did not operate as a stay of execution of the judgment, as the fact and contents of the notice, in essence, were all that had been submitted for the exercise of his discretion.

[5] When the application came before the court, further information had been supplied, namely the affidavit of Curtis Daniel Cochrane, one of the attorneys-at-law with conduct of the trial in the claim in the court below, sworn to on 1 February 2010 with exhibits, and an affidavit of Garth Lyttle, attorney-at-law representing the respondents, in opposition to the affidavit sworn to on 1 February 2010 with exhibits. After hearing submissions, we made an order discharging the order of Morrison JA and

staying the execution of the judgment of Thompson J (Ag) until the hearing of the appeal or until further order of the court. Costs of the application were ordered to be costs in the appeal. We recommended that the appeal be heard in the Easter term of 2010 and we promised to put our reasons in writing at a later date. This is the fulfillment of that promise and we sincerely apologize for the delay in delivering the same. We understand that the appeal has not yet been heard, but is now scheduled to be heard in the Michaelmas term of 2011.

[6] The affidavit in support of the application set out the following:

As to the applicants' case, that:

(i) The motor vehicle (BMW) was owned by Black Horse Limited of the United Kingdom.

(ii) The 1st respondent had the car on a hire purchase agreement with Black Horse Limited with a repayment schedule of over 48 months.

(iii) The 1st respondent was still paying for the motor vehicle and had not missed a payment.

(iv) The 1st respondent did not get permission to remove the motor vehicle from the United Kingdom.

(v) Black Horse Limited still possessed "the financial title" to the BMW.

(vi) The BMW was off-loaded from the ship, the "Pilgrim".

(vii) The motor car was in good condition and had been driven from the ship to the holding area.

As to the respondents' case, that:

(i) The 1st respondent was not familiar with Black Horse Limited.

(ii) The 1st respondent did not recall the exact agreement with Black Horse Limited.

(iii) The 1st respondent did not recall the monthly payments but when the motor car was exported to Jamaica the monthly payments had been completed.

(iv) The 1st respondent had advised Black Horse Limited of the exportation of the motor car to Jamaica.

(v) The car could not be driven from the wharf.

(vi) The car was involved in an accident and had been extensively damaged, so the 1st respondent had purchased the salvage and brought the same to Jamaica.

(vii) The 1st respondent had transferred the vehicle from the wharf by wrecker as it could not be driven and it was taken to a garage in Highgate, in the parish of St Mary where the vehicle had been repaired.

As to the findings of the learned judge, that:

(i) The vehicle may not have arrived in the island as salvage, as the 1st respondent claimed, but it was not a new car that had been imported.

(ii) The evidence of Miss Sidonie Foster (who worked at Kingston Wharves Ltd and had inspected the vehicle) was to be preferred in that regard to that of the 1st respondent, in that the vehicle was not new but used, although in good condition.

(iii) The evidence of Mr Naylor (who had been employed to Black Horse Limited as an Area Fraud Manager) could not be relied on as it did not satisfy the conditions specified in section 31G of the Evidence Act.

(iv) A computer printout was never supplied to the court.

(v) The evidence of Mr Dalton-Brown (who had inspected the vehicle at the request of the police) in respect of a diagnosis report which he had prepared, similarly did not satisfy the conditions of the Evidence Act. Additionally, he did not have the necessary expertise to determine whether the vehicle registration document had been tampered with and thus was a fraudulent document.

[7] The applicants' attorney deposed that the learned judge had misinterpreted and misapplied section 31G of the Evidence Act, as the applicants had not attempted to put a computer-generated document into evidence through the witness Mr Naylor. There were serious challenges to the facts as found by the learned judge and the law applied thereto, and without a stay of execution of the judgment, the State could lose the revenue due to it, and the financial interest of Black Horse Limited in the motor vehicle could be jeopardized. Mr Cochrane further deposed that the officers of the Financial

Investigation Division had reasonable and probable cause to seize the motor vehicle and prayed for the stay to be granted pending the appeal.

[8] Mr Lyttle, in his affidavit in response, made specific mention of certain findings of the learned judge in his client's favour, namely: that at the time of seizure of the motor vehicle, it was in the immediate possession of the 1st respondent and not Black Horse Limited; that the vehicle was a used vehicle which was supported by the witness for the appellant, Miss Foster and was consistent with the 1st respondent's contention; that the references to evidence obtained from the computer by Mr Naylor related to information put into the computer by someone else and was therefore not helpful; and that the denial by Mr Dalton-Brown in evidence that the engine of the motor vehicle must be important with regard to the CC rating of the vehicle and the assessment of the duty imposed thereon was not credible. It was therefore the contention of the attorney on affidavit, that as the witnesses for the applicants had all been discredited, and the learned judge having found that they lacked the skill and competence to give the quality evidence that was necessary to negative the case put forward by the respondents, then the applicants could not justify the seizure and continued detention of the respondents' motor vehicle. In those circumstances, it was stated, the respondents would suffer irreparable harm if the motor vehicle was not returned to their custody. Additionally, interest continued to accrue on the judgment debt, increased expenses were being incurred in respect of renting a car of equal size and comfort, and parts required to make the vehicle roadworthy were also increasing in

cost. As a consequence of all of the above, Mr Lyttle asked that the application be dismissed.

[9] The main relevant findings of the judge have been referred to in the affidavit evidence set out previously. She also found that the BMW motor vehicle was available and if the court found that the applicants were entitled to the same it could be returned to them, which she noted had not be challenged. She found that the vehicle had been seized when the 1st respondent had attended on the Revenue Department to have it licensed and that the respondents had made demand for its return but the applicants had not complied. She found that the respondents had hired a motor vehicle from one Richard Simpson subsequent to the seizure of the BMW. Having rejected the evidence of the witnesses, Mr Naylor and Mr Dalton-Brown, she decided that she could not find that the customs officer was wrong in imposing the duty that was imposed. She found that the evidence of Mr Robinson, the Regional Director of Special Investigations at the Financial Investigation Division of the Ministry of Finance amounted only to a suspicion of fraud which was not sufficient for a finding of fraud by her. She concluded by indicating that although there were inconsistencies and discrepancies in the respondents' case, she did not find that they affected the finding of the unlawful seizure of the motor vehicle.

[10] The learned judge set out what in her view was the applicable law. She explained the meaning of detinue and conversion. She set out excerpts of section 2 and

sections 3, 15(1) and 210(1) of the Customs Act, sections 13 and 33 of the Constabulary Force Act and section 31G of the Evidence Act. She made it clear that the claim for conversion must fail as the vehicle is available for return to the respondents. She stated that the officers of the Revenue Protection Division were clothed with the same powers as the officers of the Jamaica Constabulary Force and if in the exercise and performance of their duties they act maliciously and without reasonable and probable cause, the respondents would be entitled to judgment. The duty claimed by the applicants was three times the amount paid, due to the applicants' belief that the vehicle registration documents had been tampered with presenting an incorrect CC rating and were therefore fraudulent. As indicated, however, the learned judge did not accept that evidence and stated in her reasons for judgment, "It is not sufficient to cry fraud. It must be specifically pleaded and proven." She found the seizure to have been carried out on mere suspicion on the part of Mr Robinson, found no basis for the seizure of the motor vehicle, and on a balance of probabilities found the seizure of the motor vehicle to be unlawful and that no more customs duties were payable. Sums, however, were ordered to be paid for loss of use of the vehicle over a specified period. The claims for repair and for travel expenses as special damages were not proved and so were disallowed. The vehicle was ordered to be returned to the respondents.

Submissions

[11] Counsel for the applicants stated in his written submissions that he agreed with the position taken by the learned single judge of appeal and the reasons advanced by

him, but entreated the court pursuant to the interests of justice and the overriding objective to consider the additional evidence which had been placed before the court. Counsel indicated that he was relying on the Civil Procedure Rules 2002 (CPR), the CAR and the common law. Counsel specifically referred to particular evidence, which he submitted was contradictory with regard to the condition of the motor vehicle, namely that it had sustained damage to the roof, body and bonnet, that the car was partially stripped down and purchased as salvage; then there was evidence that there was severe damage to the salvage although there was no "wheel body damage", but there was dirt all over the body; and then there was evidence that there were extensive repairs done to the body. Counsel argued that the learned judge could not accept the evidence of Miss Foster, which included a statement that the car was driven off the ship, that it was a used vehicle but in good condition, and yet accept the respondents' internally conflicting evidence, as stated above, that it was salvage and had to be moved by a wrecker. Counsel submitted that the contradictions were many and no reasonable tribunal should have arrived at the conclusions that the learned judge did.

[12] Counsel referred to and relied on Part 1 of the CPR and rules 1.7 and 2.11(2) of the CAR. He submitted that the rules have not sought to fetter the discretion of the court and the discretion ought to be exercised in their favour. He referred to the general principles applicable in the exercise of the discretion to grant or refuse a stay of execution of a judgment pending appeal, laid out with clarity in the Halsbury's Laws of England, 4th edn, volume 17 at para 455. He relied also on **Wilson v Church** (No.2)

(1879) 12 ChD 454, **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887, **Winchester Cigarette Machinery Ltd v Payne and Another (No 2)** Times Law Reports, 15 December 1993 and **Flowers, Foliage and Plants of Jamaica Limited and Jennifer Wright and Douglas Wright v Jamaica Citizens Bank Limited** (1997) 34 JLR 447, and submitted that the State would lose its revenue, the third party its interest in the vehicle and, on the basis of the evidence disclosed and on any analysis of the reasons for judgment, "it would be a travesty of justice" not to grant the order as prayed.

[13] On the other hand, counsel for the respondents argued that there was no chance whatsoever of success on appeal as the appeal had no merit. The court had rejected the evidence of the applicants' witnesses and their case depended on the actions and credibility of those witnesses.

The disposal of the application

[14] Rule 2.11 of the CAR permits a single judge of this court to order a stay of execution of a judgment pending the hearing of an appeal or until further order. The power of the court to grant or refuse the stay is discretionary. Under rule 2.11(2), any order made by a single judge may be varied or discharged by the court. This latter rule does not appear to be circumscribed in any way, which is why we allowed the further filing of affidavits subsequent to the ruling of the single judge of appeal. However, we would not recommend that such an approach be adopted generally, as the court may in

its discretion refuse to consider new material which could have been placed before the single judge of appeal. In this case, no material whatsoever was placed before him and so we decided in the interests of justice to proceed as we have done, but it is not to be taken as a precedent to be followed.

[15] In **Linotype-Hell Finance Limited v Baker** (supra), a case often relied on in these courts with approval, Lord Staughton had laid down two limbs as the threshold for a stay to be granted, namely that the applicant must show that he has some prospect of success on appeal and that without a stay he would be ruined.

[16] We must indicate at the outset that we considered ourselves seriously hampered by the fact that we had not seen the notes of evidence in the case, as only the judge's notes were made available to the court. Also, we have not seen any of the exhibits which were referred to in the judge's reasons for judgment and, particularly, would have wished to have had sight of exhibits 13 and 4, which were the motor vehicle registration documents in the United Kingdom and the hire purchase agreement between the respondents and Black Horse Limited respectively. We are also mindful of the fact that we ought not to, at this stage, give our view on the merits of the case, as the matter is on appeal, when all the issues in controversy will be decided. There does, however, appear to be some inconsistency in the findings of the learned judge, particularly with regard to the condition of the motor vehicle when it arrived into the country and left the wharf, which would affect the applicable duties payable thereon.

There is also the question of the scope of the onus on the officers pursuant to the Customs Act and the Constabulary Force Act. We have also taken note of the fact that the learned judge rejected the evidence tendered on behalf of the applicants, save and except Miss Foster. She did so, mainly, we presume, on the basis of what may have been inadmissible documentary hearsay, that is, computer-generated evidence, which was not submitted to the court. But there seems to have been no finding in relation to other evidence adduced which may have been capable of being lawfully given by those persons, and no findings with regard to their credibility or otherwise.

[17] We accept that some of the findings made by the learned judge may be difficult to overturn on appeal, but we cannot say by way of a perusal of all the information before us that the appeal is wholly unmeritorious and unlikely to succeed. There does appear to be some prospect of success, in keeping with the criteria as mentioned above, laid down in **Linotype-Hell Finance Limited v Baker**. With regard to the second limb set out therein, although we are mindful that payment of the sums might not lead to 'ruin' in respect of an agency of the Government of Jamaica, and that the affidavit evidence of the applicants does not say that the respondents are impecunious, and that therefore any sums paid may be irrecoverable, we do recognize that persons who only reside in the jurisdiction for four months out of every year, are readily able to dispose of the motor vehicle, and could be difficult to locate and therefore to execute judgment on and to collect taxes from them. So, one must keep in mind the principle stated clearly in the dictum of Cotton LJ in **Wilson v Church**, that is, that when a party

is exercising his undoubted right of appeal the court ought to see that the appeal if successful is not nugatory. On the other hand, the 1st respondent is protected by the imposition of interest on the judgment sum of 6%, he has access to transportation, the motor vehicle is in safe custody and available to be given to the respondents at the outcome of the appeal, if so directed by the court. However, the court must also be cognizant of the fundamental concept in the administration of justice, as stated by Ralph Gibson LJ in **Winchester Cigarette Machinery Ltd v Payne and Another** namely, that there must be a good reason for depriving a plaintiff from obtaining the fruits of his judgment. In later cases, the courts in exercising their discretion whether to refuse or to grant a stay, have adopted a more liberal approach and have utilised a balancing exercise within the context of the interests of justice (see **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065), endeavouring to ascertain where the greatest risk of irremediable harm might lie and to make an order which is less likely to produce injustice (**Combi (Singapore) Pte v Ramnath Sriram and Sun Limited** [1997] EWCA 2164).

[18] As a consequence of all of the above, we were of the opinion that the stay ought to be granted and we ruled in favour of the applicants accordingly. We also recommended that the matter be determined with some dispatch, and that the appeal be set down for hearing in the following term. The application was therefore granted as set out in paragraph 5 herein, with costs of the application being costs in the appeal.