[2015] JMCA App 11

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 155/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)
THE HON MRS SINCLAIR-HAYNES JA (Ag)

BETWEEN:	**TIKAL LIMITED**	**1st APPLICANT**
	WAYNE CHEN	**2nd APPLICANT**
	RICHARD CHEN	**3rd APPLICANT**
AND	**AMALGAMATED (DISTRIBUTORS) LIMITED**	**RESPONDENT**

Ms Gillian Mullings instructed by Nigel Jones and Co for the applicants

Jalil Dabdoub instructed by Dabdoub, Dabdoub and Co for the respondent

20 January and 6 February 2015

BROOKS JA

[1] On 18 August 2014, G Brown J refused an application by Tikal Limited (Tikal), Mr Wayne Chen and Mr Richard Chen (collectively referred to below as "the applicants") to set aside a default judgment entered against them by Amalgamated (Distributors) Limited (Amalgamated). Brown J also refused the applicants permission to appeal.

[2] The applicants were aggrieved by these orders but did not file their application for permission to appeal within the time prescribed by the rules of this court. They

therefore applied for an extension of time in which to apply for permission to appeal as well as permission to appeal. We heard their applications on 20 January 2015 but refused them. At that time, we promised to put our reasons in writing.

[3] I have had the privilege of reading, in draft, the judgment of my learned sister Sinclair-Haynes JA (Ag). She has set out, in detail, the circumstances leading to the refusal by Brown J and I need not rehearse them here, except insofar as is necessary for the purpose of placing my reasoning in context.

[4] The facts, briefly, are that in April 2010 Tikal Limited (Tikal) was heavily indebted to Amalgamated (Distributors) Limited for goods Amalgamated had supplied to it. On 21 April, Tikal entered into a settlement agreement with Amalgamated, whereby, in exchange for Amalgamated continuing to supply goods to it and foregoing filing suit immediately for the recovery of the debt, Tikal would settle the debt by the payment of monthly instalments. The payment was guaranteed by Messrs Wayne Chen and Richard Chen, directors of Tikal.

[5] Tikal defaulted on its agreement and Amalgamated demanded payment of the entire debt, ostensibly in pursuance of a term of the settlement agreement. Amalgamated also claimed for the guarantees to be honoured. The debt was not paid and Amalgamated filed the claim that led to the judgment in default.

[6] In order for the applicants to secure permission to appeal, they are obliged to show that an appeal would have a real prospect of success. The core of such success is

their being able to show that they have a defence to Amalgamated's claim that would justify the default judgment being set aside.

[7] Ms Mullings, on their behalf, argued the strongest ground of defence that the applicants' had, namely that Amalgamated had not followed the steps prescribed in the settlement agreement, so as to justify filing the claim. Ms Mullings submitted that Amalgamated failed, in at least two ways, to follow the agreed procedure.

[8] Firstly, although the agreement required Amalgamated to give immediate notice to Tikal, in the event that Tikal failed to make payments in accordance with the agreement, Amalgamated waited several months before it sent the notice. Secondly, learned counsel argued, instead of giving Tikal 10 days' notice to clear the arrears, as the settlement agreement stipulated, Amalgamated demanded immediate payment of the total outstanding balance.

[9] These breaches, Ms Mullings argued, meant that the entire balance did not become due, and Amalgamated was not entitled to sue for it. The principal not having become liable, on that argument, the demand on the guarantors was therefore, unwarranted and premature.

[10] These arguments cannot succeed. As Sinclair-Haynes JA (Ag) has painstakingly explained in her judgment, a fair interpretation of the relevant section (section 4) of the settlement agreement does not support the applicants' contentions. Firstly, the section

does not stipulate that notice must be given immediately upon the expiry of 30 days of default by Tikal. The section states:

> "If default shall be made in the payment due and payable by the Debtor under Clause 2 of this Agreement **for a period exceeding thirty (30) days from the date it is due and payable the Creditor shall forthwith give notice of default** to the Debtor in writing and **if amount remains outstanding for a further period of ten (10) Business days** from the date on which notice of default is given, then and in any such case the whole of the instalments under this Agreement including the outstanding Debt and Future Credit shall forthwith become immediately payable to the Creditor;" (Emphasis supplied)

[11] The allowance for a period "exceeding" 30 days does not allow for an interpretation that the notice must be given on the 31st day or else no valid notice could thereafter be given. The fact that Amalgamated waited several months before it gave the notice cannot be held against it. Its notice was issued, in accordance with the settlement agreement, when Tikal was in excess of 30 days in default.

[12] The second flaw in the applicants' contention is that it is not correct to say that section 4 requires Amalgamated to give 10 days' notice to pay the outstanding sums. The section stipulates what would automatically occur after 10 business days, if Tikal did not pay those sums. The fact that Amalgamated claimed "immediate repayment of the total balance outstanding" could not prevent the provisions of section 4 from coming into effect. The evidence is clear and unchallenged that Tikal did not pay within 10 business days of its receipt of the notice. As a result, the entire sum became due,

and Amalgamated was entitled, not only to claim on the guarantors, but also to sue for the monies due.

[13] The applicants, therefore, had no basis on which to have Brown J set aside the default judgment. Accordingly, an appeal against his refusal would have no real prospect of success. It would therefore be a waste of judicial time to grant permission to appeal.

[14] It is for those reasons that I agreed that the application should be refused.

McDONALD-BISHOP JA (Ag)

[15] I have had the privilege of reading, in draft, the judgments of my learned colleagues, Brooks JA and Sinclair-Haynes JA (Ag). They have sufficiently addressed all the material issues of fact and law that led to our refusal of the application for extension of time within which to appeal. Their reasons and conclusions accord fully with my own and so I have nothing that I could usefully add.

SINCLAIR-HAYNES JA (Ag)

[16] On 11 January 2012, Amalgamated (Distributors) Limited (Amalgamated), (the respondent), obtained judgment in default against the applicants, Tikal Limited (1st applicant), Wayne Chen (2nd applicant) and Richard Chen (3rd applicant) for failing to enter an acknowledgment of service. On 31 January 2014, the applicants filed an

application to set aside the default judgment. The matter was heard by G Brown J who refused the application on 18 August 2014.

[17] The applicants sought an extension of time within which to apply for leave to appeal as well as permission to appeal that decision. We heard their application on 20 January 2015 and refused it with costs to Amalgamated. These are my reasons for agreeing with the refusal.

Background

[18] The 1st applicant, was on 21 April 2010, indebted to Amalgamated in the sums of US$226,497.00 and J$16,987,311.93 for goods sold and delivered to the 1st applicant. The 2nd and 3rd applicants are the directors and principals of the 1st applicant. On the said 21 April 2010, the 1st applicant entered into a settlement agreement whereby Amalgamated agreed not to sue for the outstanding sums if payments were made in accordance with the terms of that agreement. The 2nd and 3rd applicants executed guarantees for the payment of the debt.

[19] The 1st applicant promised to pay by monthly instalments. The manner of payment was stipulated in the agreement. Amalgamated resumed trading with it. Within four months of signing, the 1st applicant, however, failed to abide by the terms of the said agreement and was at all material times in breach of it, in spite of Amalgamated's several demands for payment. This of course led to the institution of proceedings resulting in the default judgment. G Brown J refused leave to appeal but the applicants did not file their application to this court until 11 September 2014, which

was after the time stipulated by the Civil Procedure Rules (the CPR), hence this application.

The delay in filing the appeal

[20] The Court of Appeal Rules state the time within which appeals from the Supreme Court to the Court of Appeal must be filed. Rule 1.11 provides:

> "(1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15-
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;
>
> (b) where permission is required, within 14 days of the date when such permission was granted; or
>
> (c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant.
>
> (2) The court below may extend the times set out in paragraph (1)."

[21] In his affidavit filed in this court, the 2nd applicant acknowledged that the applicants had also been tardy in filing their application for leave to file their appeal but asserted that this delay was not lengthy. He attributed the delay to the fact that he received the judge's decision by way of letter on 19 August 2014. The applicants took time to consider whether the decision should be appealed and forgot that there was a timeline within which to do so. On 3 September 2014, they instructed their lawyer to proceed.

The question of delay and prejudice

[22] The application was stoutly resisted by Amalgamated who contended that the court must consider the applicants' dilatory conduct throughout the proceedings. Mr Owen Streete, Amalgamated's financial controller, deponed that continued delays will further prejudice Amalgamated as it will be prevented from "*enjoying the fruits of its labour.*" He said that the inability of Amalgamated to access its funds over a protracted period had affected its cash flow and profitability.

[23] Chronological scrutiny of the applicants' conduct was necessary. There had been delay by the applicants in complying with timelines at every stage, including the filing of the acknowledgment of service, the application to set aside the default judgment and the application for leave to appeal. The applicants' attorney was served with the claim on 21 December 2011. As a result of the applicants' failure to file an acknowledgment of service, Amalgamated filed a request for default judgment on 11 January 2012, which was entered on that day.

[24] The 2nd applicant deposed that he became aware of the default judgment on 27 June 2013 but the applicants only filed its application to set aside the said default judgment on 31 January 2014. Affidavits in support were filed on 12 June 2014. There was no attempt by the applicants to provide the learned judge with any explanation for failing to file an acknowledgment of service in accordance with the CPR.

[25] The delay in applying to set aside the default judgment was inordinate. The application was made two years and almost two weeks after default judgment was

entered and two years and three weeks after the applicants were required to file an acknowledgment of service. It cannot be advanced nor was any attempt made to advance any argument that the applicants applied to the court as soon as it was reasonably practicable to do so as is required by the CPR.

[26] A "without notice" application for provisional charging orders was filed by the respondent on 12 April 2013. The applicants' then attorneys, Hart Muirhead Fatta, filed a notice of change of attorney-at-law on 17 April 2013. On 4 June 2013 a provisional charging order was granted over properties owned by the 2nd applicant and his wife Diana Thorburn. On 26 June 2013, Ms Thorburn applied to have the said order discharged on the ground that she was a joint owner of the properties. The application was heard on 10 and 13 September 2013. It was discharged on 13 September 2013.

[27] On 23 November 2013, Nigel Jones and Company indicated by filing a notice of change of attorney that they represented the applicants. On 31 January 2014 the applicants caused an application to set aside the default judgment to be filed with an affidavit of the 2nd applicant in support of the application. The application was heard by G Brown J on 1 and 14 July 2014 and the learned judge refused the application on 18 August 2014.

[28] The applicants' tardiness commenced on 5 January 2012 at the point where they were required to file the acknowledgment of service. Amalgamated's application was seemingly ignored until 31 January 2014. But did the applicants have a valid reason for the inordinate delay in applying to set aside the default judgment?

Is the delay excusable?

[29] In respect of the court below, the reason the 2nd applicant proffered for the tardiness in not applying to set aside the judgment is that he became aware of the judgment whilst he was in the process of transferring a property. He averred that the applicants always intended to defend the matter. He said that the documents were served on his commercial attorney, Mrs Jennifer Messado, and he thought the matter was being defended. He became aware that Amalgamated was seeking to enforce the judgment by way of the provisional charging order.

[30] It is also his evidence that Mrs Messado had sought to get the settlement document from his former commercial attorneys, Patterson Mair Hamilton, in order to instruct counsel, however she did not receive the file. His attempts at obtaining the documents likewise proved futile. He was therefore not in possession of all the documents that were necessary to instruct counsel.

[31] Ms Kashina Moore's version as to why the 2nd applicant failed to defend the matter as outlined in her affidavit of 12 June 2014 was however somewhat at variance with his. It is useful to quote. She said:

> "4. That I am advised by the 2nd applicant and I verily believe that he became aware of [sic] Default judgment on or about June 27, 2013 which is after the Provisional Charging Order was lodged against several titles in the name of himself and his wife.
>
> 5. 2nd applicant advised and I verily believe that he thought that the matter was being defended by Jennifer Messado & Co. and he was surprised

that Default judgment was entered against him and the other Defendants.

6. That I am further advised that same was communicated to him by Mrs Jennifer Messado of Jennifer Messado & Co. I am further advised and verily believe that Mrs Messado was alerted by a letter dated June 27, 2013 written by Mr. Delroy Chuck of Delroy Chuck & Co. I exhibit hereto a copy of the letter marked 'KKM1' for identity.

7. 2nd applicant further advised and I verily believe that having learnt of the application to charge his property, his focus was on preventing the provisional charging order from being made final and did not, at that time, make or instruct his attorneys to make an application to set aside the Default judgment."

[32] I am of the view that the reason offered by Ms Moore on the 2nd applicant's behalf for ignoring the default judgment is not that he was in dire financial straits and was attempting to save his matrimonial home. He simply chose to concentrate on a particular application.

[33] The applicants' application for extension of time to appeal G Brown J's decision filed on 11 September 2014 was only two weeks out of time. The delay in applying for leave to file the appeal cannot be considered inordinate but must be viewed in light of the applicants' history of disregard for timelines and the flimsy excuses given by the 2nd applicant concerning the instant application. I am led to form the view that the applicants have scant regard for the rules of the court and believe they can be flouted with impunity.

[34] This court has, however, repeatedly stated that disregard for timelines will not be countenanced. It was made plain by Smith JA in ***Peter Haddad v Donald Silvera*** SCCA No 31/2003 delivered 31 July 2007 that:

> "it is beyond debate that 'one of the main aims of the CPR and their overriding objective is that civil litigation should be undertaken and pursued with the proper expedition'."

[35] The principles governing applications to extend time are now settled. In ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (Motion No 12/1999, judgment delivered 6 December 1999) Panton JA, as he then was, enunciated:

> "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."

[36] Morrison JA in ***Jamaica Public Service Company Ltd v Rose Marie Samuels*** [2010] JMCA App 23 considered the position taken by Panton JA, as he then was, to be correct and he adopted same.

Is there an arguable case for an appeal?

The appeal

[37] The following grounds of appeal were advanced:

> "The grounds of Appeal are:-
>
> (1) The honourable Judge in Chambers erred insofar as he failed to properly consider that even on the affidavit evidence filed by the Claimant the contemporaneous documents suggests [sic] that the Claimant waived its right to demand payment from the Appellants.
>
> (2) The honourable Judge in Chambers erred insofar as he failed to construe the Settlement Agreement strictly.
>
> (3) The honourable Judge in Chambers erred insofar as he found that the Appellants have no real prospect of successfully defending the claim."

And the following findings of law were challenged:

> "(1) The honourable Judge in Chambers erred when he determined that there was no issue of the Respondent having waived its right to demand payment under the Settlement Agreement.
>
> (2) The honourable Judge erred insofar as he failed to construe the Settlement Agreement strictly.

(3) The honourable Judge in Chambers erred when he determined that the Respondent has no reasonable prospect of successfully defending the claim."

Ground 1

> **"The honourable Judge in Chambers erred insofar as he failed to properly consider that even on the affidavit evidence filed by the Claimant the contemporaneous documents suggests [sic] that the claimant waived its right to demand payment from the appellants."**

[38] Mr Dabdoub pointed out that that issue was not raised in the applicants' defence. Indeed, the issue of waiver was not pleaded. In the circumstances, the learned trial judge could not deliberate on whether the applicant had a real prospect of succeeding on the issue of waiver since it was not pleaded. There is no evidence of any application before the judge to amend the defence to include the issue of waiver. Ms Mullings quite rightly indicated that there was no intention to pursue this ground, if permission to appeal were granted.

Ground 2

> **"The honourable Judge in Chambers erred insofar as he failed to construe the Settlement Agreement strictly."**

[39] The 2nd applicant, in his affidavit in support of the notice of application for court orders, complained that Amalgamated failed to follow the procedure outlined by section 4 of the settlement agreement. He contended that the settlement agreement required Amalgamated to give the applicants immediate notice setting out the amount owing if the debt remained outstanding for 30 days. Amalgamated was required to give the

applicants a further 10 days from the date of the notice to pay the outstanding balance. It was only upon giving the requisite notice and the sum remaining unpaid that the entire sum became immediately payable. According to the applicants, this notice is a precondition of the debt becoming due.

[40] Section 4 reads:

> "If default shall be made in the payment due and payable by the Debtor under Clause 2 of this Agreement for a period exceeding thirty (30) days from the date it is due and payable the Creditor shall forthwith give notice of default to the Debtor in writing and if [sic] amount remains outstanding for a further period of ten (10) Business days from the date on which notice of default is given, then and in any such case the whole of the instalments under this Agreement including the outstanding Debt and Future Credit shall forthwith become immediately payable to the Creditor;"

[41] The applicants contended that under the settlement agreement the applicants were entitled to be served with two notices. In its defence, the 1st applicant averred that it did not receive a notice of default signed by an officer of Amalgamated. The 2nd and 3rd applicants asserted that no obligation on them arose in the absence of a formal written demand being made upon them as contemplated by sections 3 and 5 of the Guarantee dated 21 April 2010. According to the applicants, section 3 is buttressed by section 5.

[42] Ms Mullings, on behalf of the applicants submitted that the notice did not comply with the requirements of section 4. Under section 4 of the agreement, Amalgamated was required to give the applicants 10 days' notice. She pointed out that

Amalgamated's letter to the 1st applicant demanded "immediate repayment of the total balance". She argued that a demand for payment to be made forthwith is therefore not proper notice. Additionally, the applicants claimed that section 2 required that the demand against the 2nd and 3rd applicants should take a specific format.

[43] Examination of the sections of the Guarantee relied on is necessary. Section 2 states:

> "Any demand or statement of monies due under or in connection with this Guarantee and Indemnity, signed as correct by any duly authorised officer of Amalgamated shall, save for manifest error, be conclusive evidence as against the Guarantor of the indebtedness of the Principal Debtor to Amalgamated and binding on the Guarantor."

Section 3 provides:

> " … should the Guaranteed Obligations or any part thereof not be recoverable from the Guarantor by way of guarantee for any reason whatsoever… the Guarantor shall upon first written demand by Amalgamated as the case may require under this provision, make payment of the Guaranteed Obligations by way of a full indemnity."

Section 5 states:

> "All sums payable by the Guarantor hereunder whether principal, interest or otherwise shall be paid to Amalgamated in full in the currency and manner specified by Amalgamated in its written demand without any deduction…"

[44] On 25 August 2010, Amalgamated sent the following letter to the 1st applicant for the attention of the 2nd and 3rd applicants. The letter reads:

> **"Re: Settlement Agreement**
>
> We have been repeatedly requesting payment of the monthly installments as set out in the First Schedule, but to

date, except for the month of January 2010 which was short-paid, we have not received any further payment.

We have been very patient and understanding over all these years, but we are now left with no alternative but to give you formal notice of default in accordance with Clause 4 of this Agreement, and request the immediate repayment of the total balance outstanding of US$228,194.85 (see attached schedule).

We look forward to your urgent response to this letter and for an amicable settlement of this matter.

Kindly sign and return the enclosed copy of this letter in acknowledgement of receipt."

[45] On 28 July 2011, copies of the following letter were sent by Amalgamated's attorney- at-law to the 2nd and 3rd applicants:

"**Re: Tikal Limited, debt owed to Amalgamated Distributors Limited, Guaranteed by Wayne Chen and Richard Chen**

We act for Amalgamated Distributors Limited.

Our instructions are that Tikal Limited remains indebted to our client in the balanced sum of U$168,949.19 as at July 11th, 2011. We are also instructed that pursuant to a settlement agreement Tikal Limited was to liquidate its debt to our client by monthly installments. We note from the Settlement Agreement date[d] April 21st, 2010 that both your good self and Mr. Richard Chen stood as guarantors for the performance and payment of the outstanding sums.

As you are well aware despite repeated requests and demands Tikal Limited remains indebted to our client and has failed to service its obligations. As a result of the foregoing, we now hereby **formally demand** on you, as guarantor of Tikal Limited to immediately make payment of the guaranteed obligations in the sum of U$168,949.19 being the balance as at July 11th, 2011 plus interest in the sum of $32.40 per diem from the 11th of July 2011 to the

> date of payment together with our clients [sic] legal costs. Please note that in the event you liquidate this debt forthwith, legal costs will be 10% of the debt amount plus GCT; in the event this matter has to go to litigation then legal costs will be in the vicinity of 25% of the debt amount plus GCT.
>
> If you fail to make the required payments within seven (7) days of the date hereof we shall immediately institute legal proceedings without further reference to you." (Emphasis as in the original)

[46] It is true that the letter of demand to the 1st applicant does not mention that the debt is to be paid within 10 days of the receipt of the letter, but it is also true that no attempt was made to act on the said notice before the expiration of 10 days. Although it was not stated that 10 days' notice was given, the applicants had been afforded more than 10 days. By way of letter dated 12 September 2010, 17 days after the notice was sent, the 2nd applicant responded to the said demand. He apologised and requested time to pay the outstanding amount.

[47] It is evident that Amalgamated had not taken any step up to that point to act on the notice. It is important that section 4 does not stipulate that the notice must allow 10 days for payment. What it says, is that if the outstanding amounts remain unpaid for 10 days after notice is given, the whole becomes due. By the time he had sent that letter the provision in section 4 had already come into effect and the entire debt had become due.

[48] On 28 July 2011, formal letters of demand for payment were sent to the 2nd and 3rd applicants as guarantors of the 1st applicant and they were given the required seven

days within which to pay. They alleged no "manifest error" which would serve to undermine the validity of those letters of demand.

[49] The applicants could not therefore properly assert that they had been deprived of the right to 10 days before action was taken against them. In fact, Amalgamated had given them much latitude in the enforcement of its right to payment. The applicants' attorney, Mrs Jennifer Messado, wrote to Amalgamated by way of letters dated 8, 15 and 25 August 2011, apologising for the applicants' failure to pay. I was of the view that the applicants did not have a meritorious defence. This ground therefore had no reasonable prospect of success.

Ground 3

> **"The Honourable Judge in Chambers erred insofar as he found that the appellants have no real prospect of successfully defending the claim."**

[50] Having found as I had that the applicants' defence lacked merit, it followed that the defence had no real prospect of succeeding. Rule 1.8 (9) of the Court of Appeal Rules states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[51] Harrison JA in ***Paulette Bailey and Edward Bailey v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies*** SCCA No 103/2004 Motion No 05/2005, delivered 25 May 2005 at page 4

observed that the principle enunciated by Lord Woolf in ***Swain v Hillman*** [2001] 1 All ER 91 that there must be a 'realistic' as opposed to a 'fanciful' prospect of success is in *pari materia* with rule 1.8(9).

[52] It is useful to quote Lord Woolf MR's oft quoted definition of 'real' in ***Swain v Hillman*** at page 91 paragraph j that:

> "The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success… they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[53] Potter LJ in ***E D and F Man Liquid Products Ltd and Patel & ANR*** [2003] EWCA Civ 472 at paragraph [8] observed that the distinction between "real" as opposed to "fanciful" made by Lord Woolf MR in ***Swain v Hillman*** accords with the requirement that the defence on which the applicant relies must carry some degree of conviction.

Conclusion

[54] In light of the applicants' unsatisfactory delay at every stage, I formed the view that acceding to their application for extension of time to apply for permission to file their appeal would not be in keeping with the overriding principle, which is to do justice. In addition, the applicants proposed defence had no real prospect of succeeding and therefore to allow permission to appeal would be an exercise in futility.