[2017] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 114/2015

APPLICATION NO 87/2017

BETWEEN	**THE TRANSPORT AUTHORITY**	**APPLICANT**
AND	**AMY HYACINTH BOGLE**	**RESPONDENT**

Mrs Angele Powell-Hylton instructed by Campbell McDermott for the applicant

Garth Lyttle instructed by Garth Lyttle & Co for the respondent

26 September and 19 October 2017

IN CHAMBERS

PHILLIPS JA

[1] The applicant is seeking an extension of time to file skeleton arguments, written chronology of events and a record of appeal. This application is being sought on the basis that although there was some delay in making the application for an extension of time, that delay was not inordinate and it had a good reason for the same. Moreover, it was the applicant's contention that its appeal has merit and that it would be severely prejudiced if it is not placed in a position to argue its appeal.

Background

[2] The respondent is the owner and driver of a 1989 white Toyota Mark II motor car registered 5912FQ. On 5 February 2011, while the respondent was driving her motor car along Waltham Park Road in the parish of Kingston, an accident occurred involving her motor car and a motor truck registered 9931DS driven by Mr Lloyd Bowen, a transport authority inspector. She claimed that the said transport authority inspector wilfully and negligently drove the motor truck into the front of her car, causing extensive damage to the motor car and also causing her physical injury. After the accident, the respondent's motor vehicle was placed on a wrecker by the transport authority inspectors and driven away. The respondent was prosecuted by Miss Pauline Saunders, a transport authority inspector, with operating her private passenger vehicle as a public passenger vehicle without a road licence, and no insurance coverage. Both charges were dismissed by a parish court judge in the Traffic Court, and an order was made that the vehicle should be returned to the respondent. However, to date, the whereabouts of the respondent's motor car remain unknown. The respondent claimed that the failure to return her motor car resulted in her being forced to rent a motor car at $6,000.00 per day between 15 February 2011 to 9 October 2015.

[3] Subsequently, the respondent filed two claims, the first of which was filed in 2011 in which the respondent sought to recover damages for negligence arising from the traffic accident and the second claim, filed in 2012, was for damages for detinue and conversion. The second claim had not been served on Mr Lloyd Bowen and Miss

Pauline Saunders, and so had not been pursued against those defendants but was pursued against the applicant.

[4] Both claims were heard by K Anderson J on 7, 8 January, 5, 6 and 7 October 2015. The learned judge found, in reliance on **Carl Brown and Another v Constable Clive Nicholson** [2013] JMSC Civ 151 and **George and Branday Ltd v Lee** (1964) 7 WIR 275, that the respondent's claim for detinue had failed because the respondent had failed to prove that she either personally or through anyone acting on her behalf, such as an attorney, made at any time, an unqualified demand for the return of her motor car. He further indicated that enquiries made by her as to the whereabouts of her vehicle were not equivalent to making an unqualified demand.

[5] The learned judge granted the respondent's claim for conversion on the basis that the applicant had failed to prove that the respondent's motor car was lawfully seized or that she had failed to satisfy all the prerequisites for the actual release of her motor car on bond. In assessing damages for conversion, the learned judge noted that while the respondent had produced receipts to the court proving that payments for a rental car were made, the applicant had not relied on any contention that the respondent had failed to adequately mitigate her loss, and instead chose to rest its case as regards the issue of damages. Since the respondent's motor car was not recovered, the learned judge found that in the interests of justice the respondent should be awarded $400,000.00 for the value of the said motor car. He also found that the respondent had successfully proved her claim for damages for negligence and pain. In all these circumstances on 9 October 2015, K Anderson J made the following orders:

"1. The [respondent] is awarded damages for conversion in the sum of Ten Million Four Hundred Thousand Dollars ($10,400,000.00) with interest at a rate of 3% from [M]ay 14, 2012 (the date of service of Claim Form) to the 9th day of October, 2015 (the date of Judgment).

2. The [respondent] is awarded General Damages for negligence in the sum of Three Hundred and Fifty Thousand Dollars with interest at a rate of 3% from February 16, 2011 (date of service of Claim Form) to the 9th day of October, 2015 (the date of Judgment).

3. The [respondent] is awarded Special Damages for negligence in the sum of Ninety Two Thousand Five Hundred Dollars ($92,500.00) with interest at a rate of 3% from November 22, 2011 (date of service of Claim Form) to the 9th day of October, 2015 (the date of Judgment).

4. The Costs of this Claim are awarded to the [respondent] and are to be taxed, if not sooner agreed."

The appeal

[6] On 20 November 2015, the applicant lodged an appeal against K Anderson J's decision, seeking to set it aside with costs being awarded to the applicant, on the following grounds:

"(a) The learned judge erred by making an award of Ten Million Dollars ($10,000,000.00) for loss of use of the Respondent's motor vehicle in that the learned judge admitted into evidence receipts tendered through the Respondent prior to the [applicant] being served with the Supplemental List of Documents listing the receipts. The [applicant] was not given an opportunity under Rules 28.19 of the Supreme Court of Jamaica Civil Procedure Rules, 2002, to serve a notice on the Respondent to prove the authenticity of the receipts.

(b) The learned judge erred in awarding an inordinately high figure for damages in relation to the value of the Respondent's vehicle at the time of the judgment, in circumstances where there was no evidence before the learned judge as to the value of the vehicle.

(c) The learned judge erred in finding that the [applicant] had raised a positive defence to the claim requiring the burden of proof to be reversed, in that the learned judge misguided himself by applying case law that was not relevant to the instant case.

(d) The learned judge erred in finding that it was for the [applicant] to prove that the Respondent did not attempt to retrieve her vehicle by entering into the required bond.

(e) The learned judge erred in his findings that the [applicant] unlawfully seized and detained the Respondent's vehicle without lawful cause, in circumstances where the evidence before the Court supported a finding to the contrary.

(f) The learned judge erred in placing too much weight on the Respondent's evidence and too little weight on that of the witnesses for the [applicant].

(g) The learned judge erred in awarding the Respondent loss of use of her motor vehicle from the day it was seized until the date of judgment, in that the learned judge failed to give any weight to the Respondent's duty to mitigate her loss notwithstanding the [applicant] cross examining the Respondent on the same.

(h) The learned judge misguided himself on the law relating to admissibility of documents under Section 31 E (4) of the Evidence Act, in that the learned judge admitted into evidence documents which the Respondent objected to. The learned judge did not place the burden on the Respondent to prove any of the requirements under the said section. The learned judge erred in placing the burden on the [applicant] to prove why the documents should not be admitted without the maker being called to give evidence.

(i) The learned judge erred in not placing any weight on the inference that the contract between the Respondent and Mr. Tingling for the rental of a motor car was illegal."

[7] On 17 February 2016, the applicant filed an application for a stay of execution of the judgment of K Anderson J, which was subsequently amended and filed on 8 March 2016, until the determination of the appeal. On 21 March 2016, Sinclair-Haynes JA granted the stay of K Anderson J's order. On 23 June 2016, the respondent filed an application to set aside the order Sinclair Haynes JA. On 19 July 2016, this court set aside the order made by Sinclair-Haynes JA and also ordered that the amended application for stay of execution of the judgment filed 8 March 2016 be set for hearing on 26 July 2016 at 10:00am. On that date, the application was heard by Edwards JA (Ag, as she then was) she made the following orders:

"1. Order 1 of the judgment of the Honourable Justice K. Anderson made on the 9th of October 2015 is stayed pending the determination of the appeal on the condition that the [applicant] commissions an assessment to be done by a qualified motor-vehicle assessor, agreed to by the parties, of the value of vehicles of similar make, model and year as that of the [respondent's] vehicle with a view to payment being made to the [respondent] of that equivalent sum if less than the award of Four Hundred Thousand Dollars ($400,000.00) until the determination of the appeal where the difference in the sums will then be paid to the [respondent] if the appeal against the award of Four Hundred Thousand Dollars ($400,000.00) fails.

2. Costs is costs in the appeal."

[8] On 16 June 2017, the applicant filed an amended notice of application seeking the following orders:

"1. That the time for filing the [applicant's] Skeleton Arguments, Written Chronology of Events and Record of Appeal be varied and extended;

2. That the [applicant] be allowed to file its Skeleton Arguments, Written Chronology of Events and Record of Appeal within fourteen (14) days of the hearing of this application;

3. Further, or in the alternative, the [applicant] be granted relief from any sanctions imposed pursuant to its failure to comply with the Court of Appeal Rules;

4. Costs of this application to be costs in the appeal;"

[9] This application was made on the following grounds:

"1. Pursuant to Rule 1.7(2)(b) of the Court of Appeal Rules;

2. Pursuant to Rule 26.8 of the Civil Procedure Rules;

3. That the failure to comply by the [applicant] has not been intentional;

4. That the [applicant] has a good reason for its failure to comply with the rules;

5. That the [applicant] is in a position to comply with the rules by the date specified herein;

6. The Respondent will not be unduly prejudiced by the delay;

7. The Court may utilize this hearing as the Case Management Conference and fix the date for the Appeal;

8. That the Applicant will be unduly prejudiced if the orders herein are not granted."

[10] The applicant filed an affidavit in support sworn to by Mrs Angele Powell-Hylton and filed on 19 May 2017, wherein she deponed that although there was delay in filing

skeleton arguments, written chronology of events and the record of appeal, there were good reasons for this delay. She deponed that during the trial process, the applicant was represented by the Director of State Proceedings. The Director of State Proceedings had therefore filed notice and grounds of appeal on 20 November 2015 and had also filed an application for a stay of execution of the judgment on 17 February 2016 with the relevant affidavits in support. She further stated that on 13 March 2017, the offices of Campbell McDermott received instructions from the applicant to conduct the appeal on its behalf, and having been given those instructions, her offices began perusing the file. On 5 April 2017, the offices of Campbell McDermott filed a notice of change of attorneys-at-law and served the same in the respondent. On 1 May 2017, a letter dated 6 April 2017 was received by registered mail at the offices of Campbell McDermott from the Court of Appeal including a copy of a notice to the parties pursuant to rule 2.5(1)(b)(ii). She further deponed that the said letter advised that the notice to parties was sent by fax to the Director of State Proceedings on 14 February 2017, but after perusing the file, a copy of that notice had not been found. She stated it the offices of Campbell McDermott were only made aware of a lack of compliance with the rules on 1 May 2017 when they received a letter from the Registrar of the Court of Appeal indicating the same. She also stated that the time for compliance with these rules was prior to them being engaged by the applicant. The delay was unintentional and was due to the time taken to obtain the file from the applicant's previous attorneys and the time to instruct new attorneys. The applicant could comply with the Court of Appeal Rules (CAR) within 14 days of the hearing of this application and moreover, the

applicant would be unduly prejudiced if the extension of time is not granted and the respondent would not be prejudiced by any delay.

[11] On 24 July 2017, the respondent filed an affidavit in response indicating that no appeal had been lodged against the award of general damages in the sum of $350,000.00 or special damages in the sum of $92,000.00. Edwards JA made an order requiring the applicant to pay the sum of $400,000.00 to the respondent representing the value of the motor car or to obtain a valuation of a similar vehicle, then pay the valuation sum to the respondent, pending the hearing of the appeal. She further deponed that the applicant had failed to obey the court's orders and that she is severely prejudiced by its non-compliance with the court order, since she is still without a motor car, she is still suffering pain from the injuries she had received during the accident; and the sums that she had paid for the rental of a motor car were acquired by removing money from her savings and borrowing money from her business, leaving her severely impoverished. She urged this court to refuse the applicant's application for an extension of time.

Submissions

[12] Counsel for the applicant agreed that there was a delay of about five months but argued that it was not inordinate and there was indeed a good reason for it. The reason for this delay counsel contended was that her office was only engaged for the appeal after completion of the trial process. The time for compliance with filing of these documents had already passed. While they were in the process of gathering the file from the previous attorneys they were not served with the notice until 1 May 2017.

Counsel indicated that Sinclair-Haynes JA had stayed the entire order, while Edwards JA had granted a stay only in relation to order number one of K Anderson J's judgment. Another reason for their failure to file the required documents in the specified time was because there was no proof on the file they had received, that a notice was sent to the Director of State Proceedings.

[13] Counsel contended that she had an appeal with a real prospect of success because the learned judge admitted into evidence receipts, prior to a notice being served that they intended to tender those receipts into evidence and without the evidence of the maker of those receipts being taken. Counsel indicated that the applicant had filed an objection to those documents being tendered and admitted into evidence. The applicant had no opportunity to challenge the authenticity of those receipts or cross-examine its maker.

[14] Mr Lyttle, counsel for respondent, submitted that there was no good reason for the delay, and furthermore, the application for extension of time is not being made in good faith, because there had been no compliance with the order made by Edwards JA that the applicant should pay $400,000.00 to the respondent, or obtain a valuation for a vehicle of a similar make and pay the applicant the sum stated in the valuation report.

[15] Counsel for the respondent asserted that the maker of the receipts, Mr Tingling, did attend court but that the applicant's attorney had indicated to the court that she no longer required his evidence and so he gave no evidence. The fact that the applicant

did not require Mr Tingling to give any evidence was pointed out to the learned trial judge.

[16] Counsel for the applicant in response indicated that while it is true that both parties had agreed that MSC McKay (Ja) Limited would be selected as the valuator, a valuation had not yet been conducted as counsel for the respondent insisted that the chassis and engine number of the motor car examined should be included in the report and it was difficult to comply with such a request. Counsel also indicated that the order, on the face of it, did not require the applicant to pay out funds. Counsel further submitted that it would be prejudicial to the applicant to consider the failure to complete the valuation as evidence of non-compliance. Moreover, there was no indication that only order number one of K Anderson J's order was stayed, as the entire order was appealed against.

Discussions and analysis

[17] Rule 2.11(1)(e) of the Court of Appeal Rules permits me, as a single judge, to make orders "on any other procedural application including an application for extension of time to file skeleton submissions and records of appeal". In deciding whether to exercise her discretion to grant the application for extension of time, McDonald-Bishop JA in **The Commissioner of Lands v Homeway Foods Limited and Another** [2016] JMCA Civ 21, adequately summarised the principles to be utilised as follows:

> "(i) Rules of court providing a timetable for the conduct of litigation must, *prima facie*, be obeyed.

(ii) Where there has been non-compliance with a timetable, the court has a discretion to extend time. The court enjoys a wide and unfettered discretion under CAR, rule 1.7(2)(b) of the CAR to do so.

(iii) The court, when asked to exercise its discretion under CAR, rule 1.7(2)(b), must be provided with sufficient material to enable it to make a sensible assessment of the merits of the application.

(iv) If there is non-compliance (other than of a minimal kind), that is something which has to be explained away. *Prima facie*, if no excuse is offered, no indulgence should be granted.

(v) In exercising its discretion, the court will have regard to such matters as:

(a) the length of the period of delay;

(b) the reasons or explanation put forward by the applicant for the delay;

(c) the merits of the appeal, that is to say, whether there is an arguable case for an appeal; and

(d) the degree of prejudice to the other party if time is extended.

(vi) Notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for extension of time.

(vii) The overriding principle is that justice is done."

[18] There was indeed a delay of about five months, however, I cannot say that in these circumstances that this delay was inordinate. While I would hesitate to classify the reasons for the delay as good, reasons have been provided nonetheless. The length and the reasons for the delay must be considered together with whether there is merit in the appeal. While it is indeed arguable as to whether there was an agreement to

admit the receipts, there was an objection filed to those receipts being tendered and admitted into evidence and there seems to have been no resolution and/or finding on this issue. As a consequence, there is some merit in the argument made by counsel for the applicant that the learned judge erred in admitting the receipts into evidence notwithstanding section 31E of the Evidence Act and rule 28.19 of CPR. While it is true that if this application is granted, the respondent may be subjected to some delay, on the other hand, the applicant may be subjected to severe prejudice if the appeal is stifled with no prospect of proceeding any further, because of a failure to comply with the requirement to file and serve skeleton arguments, chronology of events and a record of appeal.

Conclusion

[19] In all these circumstances, the application for extension of time to file and serve skeleton arguments, written chronology of events and record of appeal is granted. The applicant is permitted to file and serve its skeleton arguments, written chronology of events and record of appeal within 14 days from the date hereof, that is on or before 2 November 2017. Costs to the respondent to be taxed if not agreed.