[2018] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 16/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**IVOR WALKER**	**APPELLANT**
AND	**RAMSAY HANSON**	**RESPONDENT**

Written submissions filed by Judith M Clarke & Co for the appellant

Written submissions filed by Malcolm Gordon for the respondent

20 April and 13 July 2018

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read in draft Phillips JA's reasons for the decision of the court handed down on 20 April 2018. On that date, the court dismissed this appeal, with costs to the respondent to be agreed or taxed. I agree with everything that Phillips JA has said and there is nothing that I can usefully add.

PHILLIPS JA

[2] This is an appeal against orders made by Shelly-Williams J on 23 February 2017, setting aside orders for costs and an unless order made by G Fraser J against the respondent. On 20 April 2013, this court dismissed the appeal and granted costs to the respondent to be taxed if not agreed. What follows are the reasons for so doing.

Background

[3] The appellant brought a claim against the respondent seeking declarations and orders with respect to property. The trial of the claim was fixed for 25 and 26 January 2017, but on that date, both the respondent and his counsel failed to attend. G Fraser J made, *inter alia*, the following orders which are the subject of this appeal:

> "2. [The Respondent] to pay [Appellant's] costs of the adjourned hearing for the 25th and 26th of January 2017 and costs includes [sic] travelling and accommodation expenses of US$1,100.00.
>
> 3. Costs to be agreed or taxed but [Appellant's] costs and expenses of US$1,100.00 is [sic] to be paid by the 27th of February 2017 failing which [Respondent's] Statement of Case shall stand struck out."

[4] The respondent sought and obtained an order from Shelly-Williams J setting aside orders no 2 and 3 (as stated above) of G Fraser J's order. Leave to appeal was sought from Shelly-Williams J, but was refused. Leave to appeal was however granted by the Court of Appeal on 29 January 2018. The notice of appeal was filed on 9 February 2018, and the order sought was as follows:

"Orders no. 2 and 3 of Ms. Justice Fraser dated January 25, 2017 are set aside."

[5] There were four grounds of appeal which are set out below:

"1. The Learned Judge failed to apply properly the relevant rules applicable to the application made by [the Respondent], namely Rule 11.18 of the Civil Procedure Rules in that –

(i) the learned Judge found that 11.18(3)(a) had been satisfied by there being good reason for the absence [of] the Respondent's Attorney-at-Law, Ms. Lisa Mae Gordon.

(ii) No finding was made as to whether or not Rule 11.8(3)(b)[sic] was satisfied.

2. The learned judge erred in finding as a fact that the parties had agreed that the Appellant was to give his evidence by way of video link and so the Appellant was not expected to attend the trial in person and using this finding of fact as a basis for granting the Respondent's application.

3. The learned trial judge erred in setting aside the costs order in circumstances where the Appellant would be entitled to costs.

4. The learned Judge failed to properly direct herself as to the applicable legal principles."

[6] It is necessary to set out some of the litigation history in this claim to understand how these respective orders came to be made; in order for this court to deliberate on the same; and make its considered determination in relation thereto.

[7] The notice of application which was before Shelly-Williams J sought to set aside the order of G Fraser J made on 25 January 2017, in its entirety, or for the order to be varied. The affidavit in support of the application was sworn to by Miss Lisamae Gordon, counsel for the respondent, on 6 February 2017. The respondent relied on rule 11.18(1) of the Civil Procedure Rules (CPR), which permits a party who was not present when an order was made to apply to set aside the order. The respondent also acknowledged that the application must be supported by affidavit evidence, pursuant to the rule, indicating that a good reason must be given for failing to attend the hearing, and must also demonstrate that it was likely that had the respondent attended, some other order might have been made.

[8] In her affidavit, Miss Gordon indicated that G Fraser J had granted an adjournment in the matter from 25 January 2017, until 27 and 28 March 2017, but had then made the said impugned orders.

[9] She referred to the fact that the matter had first been placed before Sykes J (as he then was) on 29 February 2016, when he had made several case management orders. Miss Gordon deponed that at the time of the hearing before Sykes J, representations had been made on behalf of the appellant that he would be unable to return to Jamaica for the trial, and so, an order was made permitting the appellant to give evidence by video link. Miss Gordon therefore deposed that the appellant was not expected to attend the trial in person to give evidence.

[10] Miss Gordon stated that on 18 January 2017, she had received an urgent call from her doctor indicating that she ought to undergo surgery that afternoon. She indicated that she made every effort to inform the court and counsel for the appellant of this development. Indeed, she had sent a letter of even date to the court and opposing counsel to that effect, and also indicated that she would not be in attendance at the trial of the matter, but would endeavour to be in attendance at the earliest date rescheduled for the trial. A medical certificate was sent to the court by email. She had been informed by the court administrator by way of an email, that the information would be placed on the court file.

[11] Miss Gordon stated further that on 19 January 2017, her office received an email with a letter scanned by counsel for the appellant. This letter indicated that the appellant was himself suffering from serious illness and had made great effort to attend the trial (which was only six days away). Accordingly, despite Miss Gordon's condition, the appellant's counsel was not prepared to agree to an adjournment of the trial. The letter further advised that Miss Gordon should therefore arrange for another attorney to be fully briefed to undertake the matter. In response, Miss Gordon informed the appellant's counsel that she would not be able to do so. In fact, she deponed in her affidavit that it would have been impossible for her to instruct and brief counsel at the time, as her condition was such that she was unable to even speak.

[12] Miss Gordon stated that this correspondence surprised her, as, at the time, counsel for the appellant was not prepared for trial. Miss Gordon arrived at this conclusion, as, on 11 January 2017, she had received requests from counsel for the

appellant for copies of documents which were on the list of documents. Also, on 24 January 2017 (the day before the trial), counsel for the appellant had supplied her with a further list of documents. It was clear, she stated, that she would not have been able to request inspection of those documents at that time due to her medical condition.

[13] Miss Gordon stated that counsel for the appellant had not complied with rule 39.1 of the CPR as the bundles for the trial had not yet been prepared. Indeed, there was a letter which had been received at her offices on 31 January 2017 (after the trial date), requesting information as to which documents she wished to have included in the court bundle.

[14] Counsel for the appellant responded by way of an affidavit sworn to on 21 February 2017. She confirmed the exchange of correspondence relating to Miss Gordon's surgery, and the fact that she had indicated that she would not be agreeing to an adjournment of the matter as a result of that situation. She stated that her client (the appellant) resided overseas and he had made arrangements to attend court for the trial on 25 and 26 January 2017. She also confirmed that on the trial date before G Fraser J, neither Miss Gordon nor her client was in attendance. She stated that though there was a letter headed "to whom it may concern" on the court file indicating that Miss Gordon was about to undergo surgery, nonetheless that there was "no data [before the court] justifying the absence of both the respondent and counsel on his behalf". Counsel stated that in spite of that, the matter had been adjourned to 27 and 28 March 2017, but the consequential orders in relation to costs as set out aforesaid

were made. Counsel pointed out that it was in those circumstances that the unless order was made by G Fraser J.

[15] Counsel also complained that apart from failing to attend the trial, the respondent had not complied with other case management orders, namely, the filing and serving of skeleton arguments and a list of authorities. Additionally, the respondent had not indicated which documents should be included in the court's bundle of documents. She said that it was only on 20 February 2017, that the respondent had responded to the request for inspection of documents. Counsel also reminded the court that the adjournment of the matter on 25 January 2017, was the second adjournment of the trial of this matter.

[16] She informed the court that the appellant had recently completed a course of treatment for a "serious ailment" and was therefore anxious to have the matter finalized. Counsel therefore had made every effort to obtain new dates for an early trial, namely, 27 and 28 March 2017, which were secured to replace the dates which had been vacated. Counsel indicated that the appellant had already made arrangements for his travel on the upcoming trial dates.

[17] On 23 February 2017, Shelly-Williams J heard the notice of application for court orders with the affidavits as set out above, and made her orders setting aside orders no 2 and 3 of G Fraser J's order. She confirmed the trial dates for 27 and 28 March 2018, and made other ancillary orders relating to the conduct of the trial, for example, allowing the respondent access certain property for purpose of conducting a valuation.

[18] From the submissions of counsel, we understand that the trial of this matter did commence on the days in March reserved for it, and continued to completion. Additionally, at the time of the filing of the notice of appeal on 9 February 2017, the only matters outstanding were the submissions of counsel and thereafter the judgment of the court.

The appeal

Submissions

Ground 1- failure to comply with rule 11.18 of the CPR

[19] Counsel for the appellant submitted that the application before Shelly-Williams J ought to have been made pursuant to rule 39.6 of the CPR as opposed to rule 11.18 referred to by counsel for the respondent, as the application made before G Fraser J was made at a trial. Counsel referred to what she considered to be the relevant rule, and submitted that all the conditions stated therein must be satisfied as they were cumulative in application. For instance, counsel argued that the affidavit in support of the application must contain evidence setting out a good reason for the applicant's absence. Counsel maintained that the evidence in the affidavit of Miss Gordon only referred to a reason for her own absence; it said nothing about the absence of her client, the respondent. Additionally, the reason proffered by her did not explain the reason for the failure of other counsel from the firm to have attended to "hold" brief on her behalf. So, counsel submitted that the learned judge erred in finding that the conditions had been satisfied, as failing to explain the absence of the applicant meant

one of the conditions had not been met; and there was no "residual discretion" to set aside the order previously made by G Fraser J.

[20] The appellant's counsel also pointed out that the learned judge had made no finding as to whether the second condition had been satisfied, that is, whether had the applicant attended, it was likely that some other order might have been given or made. In fact, counsel posited that the affidavit of Miss Gordon had not addressed that issue at all.

[21] Counsel for the respondent posited that the rules in this jurisdiction regarding the court's approach when orders are made in the absence of a party are different from those that obtain in the United Kingdom (UK). In the UK, counsel submitted, the rule stipulates that orders and judgments made in the absence of a party may be set aside "only if" the party acted promptly; had a good reason for non-attendance; and had a reasonable prospect of success. Accordingly, in the UK all the requirements must be satisfied, and the court had no discretion if they had not been. However, that is not so in this jurisdiction, counsel argued, where the wording is somewhat different. Counsel stated that rules 11.18 and 39.6 of the CPR mirrored each other.

[22] The respondent's counsel relied on the authorities of **Kenneth Hyman v Audley Matthews and Another** [Consolidated Appeals] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal Nos 64 and 73/2003, judgment delivered 8 November 2006; **Rouse v Friedman** (2002) Times, 8 January 2002; and **Lloyd Pommells and Another v Donald Kerr and Another** [2015] JMCC Comm 26 to

support her submissions that had the respondent's counsel been present, a different order would have been made, particularly since counsel for the appellant had not been ready for trial at the time.

Ground 2- video linked evidence

[23] Counsel for the appellant submitted that when Sykes J made the order permitting the appellant to give evidence by video link, the learned judge also made order no 17 which read as follows:

> "17. If [the appellant] wishes to give evidence by video link the [appellant] to inform the [respondent] and the Registrar of the Supreme Court in writing not later than **January 5, 2017**."

[24] The appellant's counsel further contended that there were two orders relating to the issue of whether the appellant would give evidence by video link, which, when taken together clearly meant, that although he was permitted to do so, it did not mean that the appellant would give his evidence by way of video link. Additionally, the letter sent to Miss Gordon from the appellant's counsel would have indicated that the appellant intended to attend the trial and give evidence in person. The learned judge therefore erred in finding as a fact that the appellant was to have given his evidence by video link and was not intending to attend the trial. Additionally, even if the court was of that view, that could not, counsel submitted, be a basis to set aside the orders no 2 and 3 made by G Fraser J.

[25] Miss Gordon for the respondent submitted that the order made by Sykes J permitting the appellant to give evidence by way of video link, was made at a case management conference. Counsel asserted that if the appellant chose to take the more expensive option of attending the trial in person, in circumstances where he had been informed that counsel was ill and experiencing a medical emergency, costs ought not to be awarded in those circumstances, as the costs could have been avoided. The appellant should have taken heed of the overriding objective to proceed in a manner which would save expenses. The learned judge made no error in that regard, counsel posited.

Ground 3 – appellant's entitlement to costs

[26] The appellant's counsel contended that even if Miss Gordon had been present, once the adjournment had been granted, costs would have been payable by the respondent. Counsel submitted further, that it was a "settled principle" that if a party was ready to proceed to trial, and the other party was requesting an adjournment, then the former party would be entitled to costs. Counsel also contended that it was well within the discretion of the learned judge to make an unless order.

[27] Counsel for the respondent argued that there was no specific mention of the entitlement to costs on the occasion of an adjournment in relation to rule 39.6. As a consequence, it is entirely a matter relating to the exercise of the discretion of the judge. She had not erred in this regard either.

[28] In further written submissions, the respondent's counsel posited that as the appeal was in essence only an appeal in respect of costs, such an appeal was not permitted pursuant to section 11(1)(e) of the Judicature (Appellate Jurisdiction) Act (JAJA). As the appellant was not asking for a variation of the order but a restoration of the same, the appeal was misconceived, as at the time of the appeal, payment of the said costs and expense had passed, and the claim had been tried, so the claim could no longer be struck out pursuant to that order, that is in respect of the non-payment of costs. The appeal would thus be in beach of section 11(1)(e) of JAJA as stated above.

[29] Additionally, the learned judge had jurisdiction under the CPR (rule 26.1) to vary or revoke a previous order. So, that power was additional to those contained in rule 39.6, to apply to the court in circumstances where an order had been made in the absence of the respondent. Counsel also submitted that the appellant had not provided any evidence to permit G Fraser J to make a summary assessment of costs. Also, the evidence of the fact that the appellant's list of documents and bundles not having been completed and submitted, and the inspection of documents not having been done, made the order extremely irregular in the circumstances of her unchallenged ill-health.

Ground 4- judge failed to properly direct herself

[30] Counsel for the appellant submitted that this ground of appeal merely reiterated what had been set out previously. Counsel concluded that the court should therefore set aside the orders of Shelly-Williams J which set aside orders no 2 and 3 of G Fraser J. However, counsel thought it prudent to mention that as the date for payment of the costs, 27 February 2017, had already passed, and the trial had proceeded, it was

understandable that the current state of affairs "may render the appeal against the setting aside of the unless order moot, [however], the leave to appeal against the setting aside of the costs orders remains live".

Discussion and analysis

[31] This appeal relates to the exercise of the discretion of Shelly-Williams J. The law is clear on how this court should approach the review of the exercise of the judge's discretion. Morrison JA (as he then was) has summarised and distilled the principles gleaned from Lord Diplock's dictum in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraph [20] where he said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[32] So, the issue really is, was the decision of Shelly-Williams J so aberrant that no judge properly informed would have arrived at it. In reviewing what had taken place in this matter, the following occurred. Miss Gordon fell ill. She was expecting to undergo emergency surgery imminently, and was unable to conduct the impending trial. Neither she nor her client attended the hearing. She had informed the court and opposing counsel of her difficulties. In spite of this, G Fraser J made a harsh costs order which

included the payment of airfare and accommodation, in respect of the appellant's travel to Jamaica to attend his trial, and also made an unless order, that if costs were not paid the claim would be struck out.

[33] The relevant rule in respect of this application is rule 39.6 of the CPR, as the orders made by G Fraser J were made at the trial of the matter. The rule reads as follows:

> "(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -
>
> (a) a good reason for failing to attend the hearing; and
>
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[34] The application to set aside or to vary the orders of G Fraser J was made promptly on 7 February 2017, and there was affidavit evidence in support of this application. Rule 39.6 speaks to two matters that must be shown by affidavit in support of the application. In my view these are cumulative. The applicant (respondent) must show a good reason for failing to attend the hearing and that it is likely that had the applicant attended some other judgment or order might have been given or made.

[35] Counsel for the appellant took issue with the fact that although there had been an explanation with regard to the absence of Miss Gordon, there was nothing said about the reason for the absence of the respondent. The explanation in the instant matter was the ill-health and the impending surgery of Miss Gordon which made her unable to conduct the up-coming trial. She made every effort to inform the court, and did inform opposing counsel of her current predicament. Opposing counsel received the e-mail communicating this information, and a note with regard thereto was placed on the court's file.

[36] I do not think that counsel's submission that the fact that there was no evidence why the applicant himself was absent as against his attorney-at-law, was fatal to the application, as the rule refers to "a party" not being present at the trial. The sub-rule therefore would of necessity also be referring to "a party", and rule 2.4 of the CPR (the definition section) provides that "'party' includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only". This rule does not do so. In those circumstances, in my view, there was a good reason for the respondent's failure to attend the hearing.

[37] In my view, it is likely that had the applicant (respondent) attended, some other judgment or order might have been given or made. Had Miss Gordon been present, she would have indicated to the court that she had to be rushed into surgery. Miss Gordon would also have placed heavy importance on the fact that the documentation and

bundles for the trial had not been settled. The parties were therefore, it would have seemed, not ready for trial.

[38] Counsel for the appellant had submitted that the appellant would still be entitled to costs had the respondent been present. Counsel for the respondent contended that since the matter had been tried, the only issue that remained was an appeal as to costs and section 11(1)(e) of JAJA prevents an appeal being made against costs only. Section 11(1)(e) of JAJA provides that no appeal shall lie "**without the leave of the Judge making the order or of the Court of Appeal** from an order made with the consent of the parties or as to costs only where such costs by law are left to the discretion of the court" (emphasis supplied). Leave to appeal was refused by Shelly-Williams J on 23 February 2017, and the application for permission to appeal was filed 12 April 2017. Leave to appeal Shelly-Williams J's order, which included setting aside the costs order and the unless order, was granted by this court on 29 January 2018. The appeal was filed on 9 February 2018. Accordingly, in my view, in this matter, the appeal as filed was not an appeal against costs only.

[39] Even if it can be said that the issue relating to the unless order was non-existent since the trial had already been conducted, there nevertheless seems to be compliance with section 11(1)(e) of JAJA, since this court granted leave to appeal an order which included setting aside costs. As a consequence, the appeal against setting aside the costs order is therefore properly before this court.

[40] The costs order would be at the court's discretion. Accordingly, if the respondent was present, the question whether US$1,100.00 represented the entire airfare and accommodation, and should have been reimbursed, would have been an issue. The circumstances were such that the appellant, who was ailing, had indicated that he may not be present in Jamaica for the trial and so he had been permitted, by the order of Sykes J, to give his evidence by video link. It is true that notice of that intent ought to have been given. There is no indication whether it had been given, and the date to do so (5 January 2017) had passed. Counsel could not therefore say categorically that the appellant was not coming to attend the trial.

[41] However, there was no canvassing, as might have occurred, if counsel had been present, with regard to the date that the ticket had been purchased. If the ticket had not been purchased (although that is unlikely), then that expense could have been avoided. A changed ticket may have cost less. The costs to change the date of travel, may not have necessitated expenses for accommodation, once information was received of the severity of counsel's illness, that is, requiring emergency surgery six days before the trial, and therefore not being in a position to attend court. Additionally, since there was no evidence before the court to support the amount of the airline ticket and or the accommodation, the sum ordered by the court may not have been made or may have been significantly less had counsel for the respondent been present. In my view, those circumstances would preclude the court from considering whether to make an unless order, and it would be unlikely that an unless order would have been imposed, had the respondent’s counsel been present.

[42] It is well known that costs of an adjournment are entirely within the discretion of the judge. But in this case the party was absent. There was a good reason for the party's absence. The judge dealing with the application to set aside those costs orders was also exercising her discretion and it is that order which is under appeal. On that occasion both parties were present, and so the competing contentions were properly placed before her. There is no entitlement to costs. The order for costs always remains within the complete unfettered discretion of the court, although of course the discretion must be exercised judicially. There are so many factors that are open to the consideration of the court when the order of costs is being contemplated. They are set out in detail in parts 64 and 65 of the CPR and they always include a consideration of the conduct of the parties.

[43] In keeping with the overriding objective to save expenses and to deal with cases justly and expeditiously, since Shelly-Williams J was dealing with the matter on 23 February 2017, approximately a month away from the trial date set by G Fraser J, it seemed more than reasonable for her to set aside those orders, and make ancillary orders for the matter to proceed to trial forthwith, which is what occurred. This seems to support the fact that her decision in all the circumstances was the correct one.

[44] In the circumstances, I could not find, that in the exercise of her discretion, Shelly-Williams J was plainly wrong, and so I agreed with the decision of this court to dismiss the appeal, and grant costs to the respondent to be taxed if not agreed.

PUSEY JA (AG)

[45] I have read in draft the reasons of my learned sister Phillips JA. I agree with her reasoning and conclusion and there is nothing more that I can usefully add.