[2019] JMCA App 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2014

APPLICATION NUMBER 207/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**YP SEATON**	**1ST APPLICANT**
AND	**EARTHCRANE HAULAGE LIMITED**	**2ND APPLICANT**
AND	**YP SEATON & ASSOCIATES LIMITED**	**3RD APPLICANT**
AND	**SAGICOR BANK JAMAICA LIMITED**	**RESPONDENT**

Written submissions filed by Hylton Powell for the appellant

Written submissions filed by Rattray Patterson Rattray for the respondent

18 January 2019

(Considered on paper with the consent of the parties)

MCDONALD-BISHOP JA

[1] The decision of the court is as reflected in the judgment of my brother F Williams JA.

SINCLAIR-HAYNES JA

[2] I agree.

F WILLIAMS JA

Background

[3] By an application filed on 20 September 2018, the applicants herein (who are the respondents in the substantive appeal) seek to have the court amend the written judgment in the appeal. That judgment is cited as [2018] JMCA Civ 23. It dealt with two judgments of a judge of the Supreme Court: one delivered on 17 March 2014 and reported at [2014] JMSC Civ 34, and the other delivered on 24 September 2014 and reported at [2014] JMSC Civ 139. In this application, the applicants seek to have several paragraphs and an order of the judgment deleted. Those portions of the judgment are concerned with the manner in which an accounting of the operation of several accounts held by the 1st applicant, Mr Y P Seaton ("Mr Seaton"), with the respondent, Sagicor Bank Jamaica Limited (the appellant in the appeal: "the bank") is to be conducted.

The relevant order below

[4] In the judgment reported at [2014] JMSC Civ 34, the judge had ordered, *inter alia*, as follows:

> "(3) It is also ordered in respect of Claim No CL 1993/S252:
>
> (a) The sum of JA$15,254,583.69 to be repaid to the claimant with interest from October 16, 1992 to date of

repayment. Further submissions are to be made on whether the interest should be simple interest or compound interest;

(b) In respect of the accounts numbered

102900024

101900579

102900172

101900561

301900809 (certificate of deposit)

it is hereby ordered that:

(i) a mutual account of all dealings between the claimant and the defendant be taken by the Registrar in respect of each account starting with the balances as stated in 3 (b) (ii) (which were the sums pleaded) in order to determine:

a. whether interest was paid on each account and what that interest was and how the interest was arrived at and for what period of time;

b. whether the claimant received all the interest to which he was entitled between the time the account was frozen and the time he had access to it;

c. whether the claimant removed any of the monies standing in those accounts and if it did, when it did this and whether interest was paid on those accounts from which it removed the money from the time they were frozen up to the time the monies were removed.

(ii) the balances in respect of each account as of May 7, 1992 are:

102900024	US$39,608.24
101900579	US$2,831.17
102900172	US$24,550.59
101900561	US$361,892.23

301900809 (CD) US$65,880.22

(iii) the claimant and the defendant are to produce before the Registrar all books, record of accounts, papers and writings in their custody or under their control including those books, records of accounts, papers and writings regarding the accounts listed at 3(b) and 3(b) (ii);

(iv) in respect of paragraph 3(b) (ii) the books, record of accounts, papers and writings referred to there may be in any form including but not limited to electronic form;

(v) in conducting this account the Registrar has the discretion to order the parties to produce any book, record of accounts, papers and writings as she sees fit in order to enable her to arrive at an accurate account;

(vi) the Registrar also has the discretion to order the parties to produce any other material that she in her discretion thinks may be of assistance in carrying out the taking of accounts;

(vii) the Registrar has the authority to make requests in writing to third parties who may have relevant books, records of accounts, papers and writings regarding the accounts listed at 3 (b) and 3(b)(ii);

(viii) the claimant and the defendant are at liberty to agree any sum for any purpose of this account including the final due to Mr. Seaton and where the parties agree any sum for any purpose their agreement is final and conclusive and the Registrar cannot enquire into the accuracy of the figure agreed;

(ix) any sum arrived at by the Registrar whether as a result of agreement under 3(b)(viii) or otherwise, shall be paid without any further order from the court.

(4) In respect of paragraph 3(a) the parties, if not agreed, are to make further submissions on the rate of interest and whether interest should be simple or compounded."

The relevant order of this court

[5] The order that was made by this court, addressing that order, reads as follows:

> "3) With the consent of the parties, paragraph 3(ix) of the order made on Mr Seaton's claim (claim no CL S252 of 1993) is set aside and substituted therefor is the following order:
>
> > The accounting exercise is to be conducted by an expert agreed by the parties within 60 days of the date of the order of this court. If the parties cannot agree such an expert, then the Registrar of the Supreme Court is empowered to appoint such a person from an agreed list submitted by the parties; or, in the absence of such agreement, from a person listed on one of the individual lists submitted by the parties. Within 30 days of completion of the accounting exercise, the expert shall submit to the Registrar of the Supreme Court a report giving the results of the exercise, copies of which shall be forwarded by the Registrar to the attorneys-at-law for the parties within seven days of its receipt. After the expiration of ten days of the service of the report on the parties' attorneys-at-law, the Registrar shall order that the sum found to be outstanding shall be paid by the bank to Mr Seaton, without need for further orders UNLESS either party's attorneys-at-law raise an objection in writing within seven days of service of the report upon them, in which case the Registrar shall refer the matter to the learned judge who may invite or permit further submissions from the parties and make further orders to finalize the matter as he shall deem necessary." (Emphasis added)

[6] This court's rationale for adjusting the order for the accounting exercise stipulated by the court below can be seen at paragraphs [107] to [112] of the judgment on appeal. In a nutshell, those paragraphs disclose that the making of the order by this court was informed by the view discussed at the hearing by all the parties and the court that the process of accounting might more easily and competently have been conducted by a chartered accountant or someone with a similar specialist background, rather than the Registrar of the Supreme Court. More germane to this application, however, and as

expressed in the underlined portion of this court's order quoted above, is that it was thought that the order was being made "[w]ith the consent of the parties…"

[7] It is important to observe that there was no appeal in respect of the order for accounting that had been made below. The concern arose during the course of argument.

The present challenge

The position of the applicants

[8] Counsel for the applicants have objected to the making of this court's order with the inclusion of the words: "with the consent of the parties", on the basis, they say, that there was in fact no consent. In support of this contention, they have drawn our attention to a letter dated 15 November 2016 signed by the attorneys-at-law representing both sets of parties to the appeal.

[9] It is their view that this court's order was erroneously made and that the slip rule (rule 42.10 of the Civil Procedure Rules – "the CPR") applies, pursuant to which that error should be corrected. These are the orders that they seek in their notice of application:

> "1. The judgment delivered by this court on 31 July 2018 be amended to delete paragraphs [107] to [112], [129] (3) and order 3).
>
> 2. Costs of this application to be costs in the appeal.
>
> 3. Such further order as this court sees fit."

[10] Filed in support of their application to have this court delete the particular paragraphs and the order which flows therefrom are two affidavits of Mr Seaton: (i) one sworn on 20 August 2018; and (ii) the other sworn on 20 September 2018. To these affidavits are exhibited several e-mail messages, which, it is contended, show agreement between counsel on both sides as to how the matter of the accounting ought to be dealt with. Mr Seaton's affidavits also indicate that, not only has the accounting process started in the court below; but also suggest that the process is considerably advanced.

[11] The view of the applicants' counsel is that the slip rule and rule 1.7(7) of the Court of Appeal Rules ("CAR") apply and that these rules can be used to address the issue. They rely on the case of **In the matter of L and B (Children)** [2013] UKSC 8, cited by the bank.

The bank's position

[12] The bank's position might shortly be stated to be that, whilst, admittedly, the particular order was not made by consent, the slip rule does not apply; and, on this application, the court is free to make any order that it wishes to make in respect of the matter. In support of the latter submission, the bank relied on the case of **In the matter of L and B (Children)**, quoting, in particular, Lady Hale who is reported at paragraph 19 of the judgment as saying:

> "[T]here is jurisdiction to change one's mind up until the order is drawn up and perfected."

[13] The bank's main submissions in relation to the matter (apart from those already stated) might be seen in paragraphs 15 and 17 of its written submissions as follows:

> "15 We submit that the court's decision on whether to amend its written judgment should depend on whether it believes that the lack of consent from the parties would have affected its view of the necessity correctness and appropriateness of [the] Accounting order.
>
> …
>
> [17] Alternatively, if the court is minded to accede to the application it should be limited to deleting the words "with the consent of the parties" as they appear at paragraph 129 (3) and order number 3."

Discussion

[14] We consider it important to say at the outset of the discussion that no member of the panel can recall having seen that letter of 15 November 2016, referred to by counsel.

[15] Without doubt, if we had, we would not have stated the order to be "with the consent of the parties", that is, if we would have considered altering the order at all.

[16] In considering the matter and in making the particular order, we were guided by the submissions made before us when we raised our concerns, given the complexity of the matter, about the appropriateness or otherwise of the order made below for the Registrar to conduct the accounting and to enter final judgment without any opportunity for further reference to the court. Our notes indicate that we had invited both Queen's Counsel's comments on the matter. We were referred then by Queen's

Counsel to rule 2.15 of the CAR as to our powers to make such order as we saw fit, even though there was no ground of appeal in respect of the taking of the account. We were guided by the comments of Queen's Counsel against the background of rules 1.16(3) and 2.15 of the CAR.

[17] Both Queen's Counsel have been recorded in the judges' notes and the notes of the judicial clerks as having accepted that position. It was our view at the end of the hearing that both sides had agreed for the court to vary the order, if we should have thought it appropriate, which we did. The substance of the approach taken in court is confirmed in paragraphs 5 and 6 of Mr Seaton's affidavit filed on 20 September 2018, in which he states (so far as is relevant):

> "5. ...I am informed by the respondents' attorneys-at-law and do verily believe that during the course of the hearing of the appeal in October 2016, Queen's Counsel for the respective parties and the court took the view that the accounting exercise was one that appeared to be outside of the competence of the Registrar given the complexity of the exercise.
>
> 6. I am also informed that it was recognized by the court and the parties that, while the accounting was not before the court, with the agreement of the parties this issue could be addressed and there are rules of court which could permit the variation of the order for the Registrar to conduct the accounting. The court then asked the parties to discuss an alternative to the order by Sykes J (as he then was) that the Registrar carry out the accounting exercise."

[18] However, that position has been overtaken by the joint letter earlier mentioned. As indicated at paragraph [14] of this judgment, we have no recollection of having seen the letter of 15 November 2016, that came after the hearing of the appeal. In our view,

however, that letter undoubtedly changes the "complexion" of what occurred during the hearing. The other important consideration is that we now know that the process has already started and at least one aspect of it has gone a considerable way, based on the parties' agreement.

[19] Against that factual background we may briefly examine the court's powers in dealing with this application.

[20] We are not of the view that the slip rule applies. Rule 42.10 of the CPR, pursuant to which applications are made in the Supreme Court for the correction of errors in judgments or orders, reads as follows:

> "42.10 (1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
>
> (2) A party may apply for a correction without notice."

[21] However, part 42 of the CPR is not among those parts of the CPR that have been incorporated into the procedural rules of the Court of Appeal by rule 1.1(10) of the CAR. That rule, therefore, as stated in the CPR, in our view, cannot and does not apply. Perhaps more importantly, however, is the fact that there has not been, in our view, an accidental slip or omission in this case, which would bring the rule into play.

[22] In our considered opinion, this court's power to consider and make orders relevant to the subject matter of this application is derived from three sources: one is

the provisions of rule 1.7(7) of the CAR, dealing with the court's general powers of management. It reads as follows:

> "1.7(7) The power of the court to make an order includes a power to vary or revoke that order."

[23] The second source is the common law, in particular that principle to be found in the words of Lady Hale in **In the matter of L and B (Children)**, cited by the bank and adopted as well by counsel for Mr Seaton, with a different emphasis. Those words indicate in essence that a judgment of the court may be amended or varied so long as the order is not yet perfected. This is what she stated at paragraph [16] of the judgment:

> "16. It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected."

[24] It is clear, therefore, that, had the order been perfected, by the issuing of the certificate of result of appeal, we would have been rendered *functus officio*. However, the order has not been perfected in this case. We are therefore free to amend or alter the judgment or otherwise deal with it as we see fit and as circumstances dictate.

[25] The third source is this court's inherent jurisdiction. In at least two decisions of this court, it has been said that this court may, by virtue of its inherent jurisdiction to control its own process: "correct a clerical error, or an error arising from an accidental slip or omission…in its judgment or order" (per Harris JA in **Brown v Chambers** [2011] JMCA Civ 16, at paragraph [11]. This was accepted and reaffirmed by Morrison

JA (as he then was) in **American Jewellery Company Ltd et al v Commercial Corporation Jamaica Ltd** [2014] JMCA App 16, at paragraph [2].

[26] We have considered the fact that, in making the particular order, we had used such words as "appropriate" and "necessary". However, that perspective and our decision to make the order pursuant to rule 2.15 of the CAR, were undergirded by our belief that both sides were consenting to our doing so. We now know that there was no such consent and that the parties have in fact agreed to approach the matter along certain lines discussed and arrived at by them. We are of the view that it would be best to give pre-eminence to that agreed position. In light of these important considerations, although we are aware of our powers pursuant to rules 2.15 and 1.16(3) of the CAR, and although we are still of the view that the process could much more easily and less onerously be conducted by a specialist in the field, we would be most loath to, in effect, undo what has already been done by and with the consent of the parties.

[27] In the result, the application will be granted, the relevant paragraphs and order that gave rise to this application will be deleted from the judgment and a final judgment issued. Additionally, as the need to make this application has arisen from the fact that the letter of 15 November 2018, was not taken into consideration by the court, it is appropriate that there should be no order as to costs.

[28] These, therefore, are the proposed orders:

i. The application to amend the judgment dated 31 July 2018 is granted by deleting paragraphs [107] to [112], [129] (3) and order 3).

ii. No order as to costs.

MCDONALD-BISHOP JA

ORDER

i. The application to amend the judgment dated 31 July 2018 is granted by deleting paragraphs [107] to [112], [129] (3) and order 3).

ii. No order as to costs.