[2024] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00102

APPLICATION NO COA 2023APP00084

BETWEEN	**ALCOVIA DEVELOPMENT COMPANY LIMITED**	**APPLICANT**
AND	**KEMTEK DEVELOPMENT & CONSTRUCTION LIMITED**	**RESPONDENT**

Joseph D Willis instructed by Daly Thwaites & Co for the applicant

Seyon Hanson instructed by Beecher Bravo Hanson & Associates for the respondent

24 October 2023 and 24 May 2024

Civil Procedure - Appeal - Application to amend notice of appeal - Court of Appeal Rules - Whether permission should be granted - Relevant principles

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of my sister Dunbar Green JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[2] I, too, have read the draft reasons for judgment of my sister, Dunbar Green JA. I agree with her reasoning and conclusion.

DUNBAR GREEN JA

[3] This is an application by Alcovia Development Company Limited ('the applicant') to amend its notice of appeal filed against a decision handed down by Mott Tulloch-Reid J ('the learned judge'), on 21 September 2022, granting an application by Kemtek Development & Construction Ltd ('the respondent'), to amend its defence after summary judgment but before assessment of damages.

[4] The application, which was filed on 24 April 2023, sought permission to include another ground of appeal (designated 'ground 3' in the amended notice of appeal filed on 17 April 2023) which the applicant contended emerged from the written reasons of the learned judge which were supplied after the notice and record of appeal had been filed. The applicant also sought permission for the amended notice of appeal, amended written submissions, index to the supplemental record of appeal and index to the appellant's list of authorities, filed on 17 April 2023, to stand. It also requested that the date of 24 April 2023, set for the consideration of the procedural appeal, be vacated.

[5] The application was made pursuant to rules 1.12(2), 1.10 and 1.16 of the Court of Appeal Rules ('CAR'), and was supported by an affidavit sworn by Ronald Thwaites, managing partner in the law firm of Daly Thwaites & Co, attorneys-at-law for the applicant. The affidavit states, among other reasons, that the law firm received the written reasons from the learned judge, on 15 March 2023, and based on those reasons, it decided that a supplemental record of appeal and an amended notice of appeal were required.

[6] On 24 October 2023, in refusing the applicant's application to amend its notice of appeal, we made the following orders:

1. The application is refused.
2. Costs of the application are awarded to the respondents to be taxed if not agreed.

We promised then that the written reasons for our decision would follow. This judgment is a fulfilment of that promise.

Background

[7] On 9 July 2019, the applicant (the claimant in the court below) commenced proceedings in the Supreme Court seeking, among other things, a declaration that it had lawfully rescinded an agreement for the sale of land between itself and the respondent the defendant in the court below), recovery of specified sums of money, and damages for breach of contract.

[8] On 23 October 2020, Hutchinson J entered summary judgment in favour of the applicant against the respondent. She then set the matter for case management and assessment of damages on 28 April 2021 and 28 February 2022, respectively.

[9] Approximately 20 months after the summary judgment and before the assessment of damages, on 7 June 2022, the respondent applied to amend its defence in anticipation of certain issues being raised at the assessment of damages. The learned judge granted most of the proposed amendments on 21 September 2022.

[10] Aggrieved by the learned judge's decision to grant the amendments, the applicant filed a notice of appeal (procedural appeal) on 4 October 2022, challenging the decision.

[11] By this application, the applicant sought to amend that notice of appeal.

Summary of submissions

For the applicant

[12] Mr Willis submitted that, pursuant to rule 1.12 (2) of the CAR, this court may permit an applicant to amend its notice of appeal. He referred to **Dalton Wilson v Raymond Reid** (unreported), Court of Appeal, Jamaica, Application No 16/2006, judgment delivered 7 April 2006, ('**Dalton Wilson**') as a case which appears to limit consideration to whether the amendment sought was relevant to the issues on appeal,

and whether the issue surrounding the amendment was raised in the court below. However, he contended that, by rule 1.16 of the CAR, this court may entertain issues even if they were not raised below. In support of that position, counsel referred us to **Gordon Stewart, Andrew Reid and Bay Roc Limited v Merrick (Herman) Samuels** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 2/2005, judgment delivered 18 November 2005.

[13] Counsel's explanation for the delay, in pursuing an amendment to the notice of appeal which in turn caused a postponement of the date for considering the appeal, was that the written reasons of the learned judge were only received by the applicant, on 15 March 2023, five days before the appeal was initially scheduled to be considered on paper. Counsel argued that this did not allow sufficient time for the applicant's current attorney to revise or amend the notice of appeal to reflect the applicant's new position, and still keep the scheduled date for consideration of the appeal.

[14] As to the basis for the proposed new ground of appeal, counsel submitted that the issues affecting liability, such as failure to complete the sale, had already been decided by Hutchinson J when she ruled that the applicant had lawfully terminated the agreement for sale. Further, the amendments granted by the learned judge did not only diminish the value of the summary judgment, but permitted the issues that were already determined to resurface. This, he argued, was contrary to the doctrine of *res judicata*.

[15] In oral argument, counsel pointed to paras. [8] and [13] of Hutchinson J's written judgment for summary judgment to support the submission that account had been taken of the defect in title in her ruling on the summary judgment application.

For the respondent

[16] Mr Hanson submitted that, although rule 1.12 (2) of the CAR gives the court a general power to amend a notice of appeal, in a procedural appeal (as in the instant appeal) the court's permission must first be sought in order to file an amended notice of appeal. This was not done prior to the applicant filing its amended notice of appeal, on

17 April 2023. Consequently, the amended notice of appeal was not properly before the court and could not be considered by it. Neither was the respondent obliged to respond to the filing.

[17] Counsel posited that when such applications are brought properly before the court, the factors for consideration are: (a) the nature of the amendment; (b) reasons for the amendment; (c) the length of the delay in filing the application to amend; (d) explanation for the delay; (e) merits of the appeal; (f) number of times the appeal had been rescheduled; (g) general conduct of the applicant; (h) degree of likely prejudice to either party if the amendment is granted or refused; and (i) the overriding objective. He relied on **Commissioner of Lands v Homeway Food Limited and Stephanie Muir** [2016] JMCA Civ 21, and **Peter Haddad v Donald Silvera** (unreported), Court of Appeal, Jamaica, Motion No 1/2007, judgment delivered 31 July 2007.

[18] Turning to the proposed amendment, counsel argued that the amended notice of appeal was filed seven months after the notice of appeal and only days before the appeal was set to be considered. Also, there was no supporting affidavit from the applicant itself, nor was any explanation given for the applicant's delay in responding to communication from the court as to the scheduling of the appeal. Further, the amended notice of appeal, having been filed more than a month after the learned judge's written reasons were made available to the parties, should not be allowed to stand without good reasons. Counsel also urged the court to consider the applicant's dilatory conduct in adhering to timelines. His concluding argument was that the proposed amendment was ill-conceived, had no bearing on the appeal, and should be refused.

Discussion

[19] As this application concerns a procedural appeal, rule 1.12(1) of the CAR is inapplicable since the provisions therein expressly exclude procedural appeals. Therefore, the applicant required the court's permission to amend the notice of appeal under the provisions of rule 1.12(2), which give the court a general power to grant such applications. The amended documents were filed, on 17 April 2023, that is prior to the

notice seeking permission. Mr Hanson is, therefore, correct that the amended notice of appeal filed was of no effect (see **The Attorney General v Barrington Irwin** [2017] JMCA App 40, para. [17], where this court found that a notice of appeal which was filed without the court's permission, where such permission was required as a matter of law, was a nullity and of no effect).

[20] In any event, the application to amend would have failed for lack of merit as will be seen later in this discussion.

[21] I do not accept Mr Willis' submission that rule 1.16 of CAR would apply, as that rule explicitly addresses the "hearing of appeals". The applicable questions outlined in **Dalton Wilson** are whether the amendment is relevant to the issues on appeal, whether it was raised in the court below, whether it is fair to the parties, and whether it is in the interests of justice and in accordance with the governing rules of practice. These considerations were expanded in **The Commissioner of Lands Appellant v Homeway Foods Limited and Stephanie Muir** and **Beep Beep Tyres, Batteries and Lubes Ltd v DTR Automotive Corporation** [2022] JMCA App 18.

[22] In refusing to grant the amendment to the notice of appeal, it was considered that the application was filed on 24 April 2023, approximately seven months after the notice of appeal was filed. This was also some five weeks after the written judgment of the learned judge became available, on or about 15 March 2023. I am not persuaded by the argument that the applicant's new attorney-at-law needed to exhaust that time to determine whether the written reasons disclosed cause for an amendment to the notice of appeal, particularly if, as Mr Hanson suggested, the written reasons mirrored the oral ones which the learned judge gave.

[23] This type of application should be made within a period comparable to the 14-day period within which an interlocutory appeal is permitted to be brought after the decision being appealed against is made. To bring an application to amend in excess of one month after receipt of written reasons for an oral judgment is inordinate delay. The applicant's

position was made worse by the fact that it made the application on the same day when the appeal was scheduled for consideration on paper. This meant that neither the respondent nor the court had sufficient time to consider the application ahead of the scheduled appeal.

[24] Two additional considerations militated against granting the application to amend the notice of appeal. Firstly, Mr Hanson is on good ground in pointing out that the evidence to support the application did not come from an officer of the applicant but from one of its attorneys-at-law. Any explanation as to fact ought to come from the litigant itself (see **Crown Motors Limited and Others v First Trade International Bank & Trust Limited (in liquidation)** [2016] JMCA Civ 6).

[25] The second reason is that *res judicata*, on which the applicant relied for the amendment, did not arise in the case. See principles relevant to the doctrine of res judicata in **Belize Port Authority v Eurocaribe Shipping Services Limited, dba Michael Colin Gallery Duty Free Shop and Fort Street Tourism Village Limited** (unreported), Court of Appeal, Belize, Civil Appeal No 13/2011, judgment delivered 29 November 2012 which was affirmed, by this court, in **Suzette Curtello v University of the West Indies (Board for Graduate Studies and Research)** [2023] JMCA Civ 11. Morrison JA articulated the applicable principles, thus:

> "[43] …the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an absolute bar to re-litigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) **Henderson v Henderson** abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various

> interests involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in **Johnson v Gore Wood & Co (a firm)**, at page 499). There can be no doubt, in my view, that, in **Johnson v Gore Wood (a firm)**, the House of Lords was concerned to circumscribe somewhat more closely the limits of **Henderson v Henderson** abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression."

[26] The applicant relied on the third limb. However, the ruling of Hutchinson J disclosed no basis on which to find that it was made based on any defect in title. At para. [8] of her written judgment, the judge recited the contents of the applicant's second undertaking, set out some of the applicant's submissions at para. [13], and at para. [40], made it clear that the respondent did not make "defect in title" a fact in issue. She remarked further that, "while the affidavit of the [respondent's] representative (which was produced in response to the application) asserts that the property was vacant and no lawsuit had been brought by anyone seeking to assert ownership, it is still unknown whether the encroachment identified has been removed". In summary, Hutchinson J found that the respondent had delayed, unreasonably, to comply with the terms of the letter of undertaking (see paras. [46] and [47] of the judgment).

[27] Further, the amendments granted, by the learned judge, could not affect the issue of liability on which a judgment had already been obtained. Consequently, the issue of *res judicata* would not arise.

[28] It is for the abovementioned reasons that I concurred in making the orders at para. [6] above.