[2014] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 19/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**ANDREW HAMILTON CONSTRUCTION LIMITED**	**APPLICANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Ian Wilkinson QC and Mrs Shawn Wilkinson instructed by Wilkinson and Co for the applicant

Miss Alethia Whyte for the respondent

23 and 27 June 2014

ORAL JUDGMENT

MANGATAL JA (Ag)

[1] This is an application by Andrew Hamilton Construction Limited ('the applicant') by way of an amended notice of application for court orders, filed on 19 June 2014. The original application was filed on 13 February 2014. We heard submissions on 23 June 2014 and this is the judgment of the court. The application as amended seeks the following orders:

"1. That the time within which the Applicant is to apply for Leave to Appeal against the Orders or judgment of Sykes, J delivered on 31st day of July, 2013 be extended for such period as this Honourable Court deems just;

2. Further, or alternatively, that the instant application be allowed to stand;

3. Leave to Appeal to the Court of Appeal against the said Orders or judgment of Sykes, J delivered on the 31st July, 2013;

4. That a time-table be set for the filing of the relevant documents, including the Notice and Grounds of Appeal; and

5. Costs to be costs in the Appeal."

[2] The extensively stated grounds upon which the applicant is seeking these orders are set out in the amended notice of application as follows:

"1. On the 31st day of July, 2013, the Hon. Mr. Justice Sykes ('the learned judge') dismissed the Applicant's Preliminary Objections/Points *in limine* to have the Respondent's claim dismissed or struck out on the basis of absence of legal personality;

2. The learned judge refused to grant to the Applicant leave to appeal his decision or said judgment.

3. Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act provides that, in circumstances relevant to the instant matter, no appeal shall lie without the leave of a Supreme Court Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge;

4. Rule 1.8(1) of the Court of Appeal Rules provides that 'Where an appeal may be made only with the permission of the Court [sic] a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is being [sic] sought.'

5. The instant application was filed in this Honourable Court on February 13, 2014 outside of the required period;

6. Rule 1.7(2)(b) of the Court of Appeal Rules provides-: 'the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for extension of time [sic] is made after the time for compliance has passed'.

7. The Applicant has provided adequate or justifiable explanation or reasons for the delay.

8. The applicant has prepared the relevant Notice and Grounds of Appeal and these were filed [sic] exhibited to the Affidavit in support of the instant application;

9. The Applicant has a reasonable prospect of success on appeal as the relevant legislation and documents show that the Respondent clearly has no legal personality;

10. The issues to be determined on appeal involve new fundamental issues of law regarding the Respondent, not previously raised and/or determined by this Honourable Court;

11. The issues sought to be determined are of real public importance and have implications for the proper administration of justice and good governance regarding important areas of the law;

12. The learned judge erred in law in failing to take into account sufficiently, or at all, the relevant principles, particularly those pertaining to 'legal personality' vis-à-vis the provisions of the Proceeds of Crime Act and the Financial Investigations Division Act, respectively;

13. The learned judge applied incorrect principles of law, particularly in placing reliance on the 'purposive' rule of interpretation, in dismissing the Applicant's application in the Supreme Court;

14. If leave is refused the Applicant will suffer grave prejudice in not being able to pursue an appeal concerning a matter of tremendous importance to itself and to the public;

15. The Applicant delayed the filing of the instant application in reliance on the advice of its Attorneys-at-law;

16. The Respondent has suffered no, or no undue, prejudice by the Applicant's failure to file the relevant application within the time stipulated;

17. [Sic] Respondent will suffer no, or no undue, prejudice, if the relief sought by the applicant is granted;

18. The Notice of Appeal and Grounds of Appeal cannot be filed until, and unless, leave is granted;

19. A related appeal between the same parties, regarding a September 30, 2013 ruling by the learned judge, has not yet been heard. The appeal the Applicant wishes to file herein can be conveniently scheduled for hearing before, or with, the said related appeal;

20. If the Applicant is correct and its application in the Supreme Court should have succeeded, the granting of the instant application by this Honourable Court and the scheduling of the appeal the applicant wishes to file as suggested will save valuable judicial time going forward and obviate the parties incurring costs, legal and otherwise; and

21. It is in the interests of justice for the relief sought to be granted."

[3] The application is supported by the affidavit of Ms Ann Marie Cleary, filed on 13 February 2014, who swore that she is a director of the applicant. Ms Cleary stated that due to her knowledge of the claim she was the best person to sign the documents.

There are various reasons advanced by Ms Cleary as to why the application was not brought before. These may be summarized as follows:

1. The applicant was awaiting the ruling of the learned trial judge on the more substantive but related issue of striking out the claim. If the application to strike out had been granted, then there would be no point in the proposed appeal on the preliminary point.

2. Ms Cleary was plagued by illness, and was incarcerated on 17 December 17, and released on 20 December 2013. The illness and incarceration adversely affected her ability to meet with her attorneys, give sufficient instructions, and sign documents.

[4] Learned Queen's Counsel, Mr Wilkinson, who appeared for the applicant, expanded on the very detailed grounds by way of both written and oral submissions, and cited a number of authorities and statutes. The application has been vigorously and ably opposed by Miss Alethia Whyte, who appeared for the Assets Recovery Agency ('the respondent'). Miss Whyte also provided both written and oral submissions as well as authorities. Indeed, we are grateful to learned counsel on both sides, and wish to express our appreciation for the quality of the submissions and assistance provided.

[5] The relevant statutory provisions of the Judicature (Appellate Jurisdiction) Act and the rules of the Court of Appeal Rules 2002('the CAR') to be applied to the facts and circumstances of this matter are not in doubt, and are amply set out respectively in

grounds 3, 4 and 6 of the amended notice of application. We will therefore not restate those provisions and rules here. The only other rule that needs to be set out is rule 1.8(9) of the CAR which states as follows:

> "1.8…
>
> (9) 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."

[6] We will move on to provide a brief background relevant to the consideration of this application. In that regard, we are grateful to the learned trial judge for his characteristically clear summary of the relevant facts contained in his two judgments, delivered respectively on 31 July 2013 and 30 September 2013. The judgment delivered 30 September 2013, was exhibited to the affidavit of Miss Cleary and is the judgment in relation to the striking out application. We are also grateful to learned Queen's Counsel for the synopsis provided in his written submissions. In June 2013, the respondent brought a claim against the applicant and other persons seeking, restraint orders and other reliefs under the Proceeds of Crime Act ('POCA'). Sykes J granted the restraint orders on a without notice application. The applicant brought an application to have the 2013 claim dismissed and 'without notice' orders discharged on the ground, amongst others, that they amounted to an abuse of process. In a 2012 claim (alleged by the applicant to be almost identical to the 2013 claim), the respondent had sought and obtained without notice restraint orders, against the applicant and others, starting with orders obtained in November 2012, which were extended, and subsequently

varied. However, ultimately, on 27 May 2013, Marsh J declined to further extend the orders, and the applicant referred to the order of Marsh J as granting relief to it. It was on these bases that the applicant sought to have the 2013 claim struck out and the restraint orders discharged. It was when the matter was set down for inter partes hearing that the applicant sought to take the preliminary point that the Assets Recovery Agency is not a legal entity and could not be a party to the proceedings in its own right. On 31 July, the learned judge dismissed the preliminary point and on 30 September 2013, he dismissed the application to strike out and to discharge the orders. He also granted the respondent's application to extend the restraint orders initially granted by him, until judgment or until further order.

[7] The principles that guide the court in considering applications for extension of time are not in dispute; the overriding principle is that justice is to be done. The oft-quoted, clear and concise language of Panton JA (as he then was) in ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (Motion No 12/1999 delivered 6 December 1999), at page 20, continue to guide the court and counsel as to the correct approach. Some of the factors that the court will consider are:

1. the length of the delay;
2. the reason for the delay;
3. whether there is an arguable appeal; and
4. the degree of prejudice to the other parties if the time is extended.

[8] In the context of an application to extend time for applying for leave to appeal the decision of the learned trial judge, and seeking leave to appeal the decision, it would seem to us that the question of whether the appeal has a real chance of success is a particularly crucial consideration and arises for consideration as the first issue. If there is no merit to the appeal, there is no utility to extending the time for making an application for leave to appeal - see the decision of Smith JA in ***Evanscourt Estate Company Limited v National Commercial Bank Limited*** Application No 166/2007, delivered on 26 September 2008, at page 9, cited by Miss Whyte. Additionally, as stated by Lord Denning in the oft-cited case of ***Salter Rex & Co v Ghosh*** [1971] 2 All ER 865, in a case in which the English Court of Appeal considered that there was no appeal with merit, "If we extended his [its] time, it would only mean that he [it] would be throwing good money after bad".

[9] Section 3(1) and (2) of POCA, provides as follows:

> "PART I. The Assets Recovery Agency
>
> 3-(1) In this Act, the Assets Recovery Agency means-
>
> (a) The Financial Investigation Division of the Ministry of Finance and Planning; or
>
> (b) any other entity so designated by the Minister by order.
>
> (2) The Chief Technical Director of the Financial Investigation Division or, where another entity is designated as the Agency under subsection (1), the person in charge of the operations of that entity, shall be the Director of the Agency."

[10] Mr Wilkinson QC has argued that "Assets Recovery Agency" referred to in POCA is a concept and not a legal person; further, that POCA did not establish the respondent as a legal entity, as a corporation sole, or as a body corporate, capable of suing and being sued in its own name. POCA was passed in 2007. Learned Queen's Counsel has also argued that although section 3 of POCA states as one of its meanings of "Assets Recovery Agency", "the Financial Investigation Division of the Ministry of Finance and Planning", the Financial Investigation Division did not itself gain legal status until 2010 when the Financial Investigations Division Act was passed.

[11] At paragraph [20] of his written judgment of 31 July 2013, the learned trial judge stated, amongst other matters:

> "Parliament may have chosen an unusual way to go about achieving its purpose. That does not make it bad. What is important is to determine whether what has been enacted can be sensibly interpreted."

[12] In all of the circumstances, we are of the view that the proposed appeal does have a real chance of success. As is well known, a real chance or prospect of success does not mean that an appeal has a real likelihood of success. The issue in respect of which the applicant wishes to seek leave, is in essence a purely legal point. It is neither frivolous nor vexatious. Indeed, it would seem to be a point of some interest and public importance, along the lines discussed by Smith JA in ***Evanscourt***. The matter being of public interest would itself, exceptionally, be a basis upon which to give leave

to appeal, even if the case had no real prospect of success - see page 10 of ***Evanscourt***.

[13] Sykes J having refused the applicant permission to appeal, the applicant ought to have applied to the Court of Appeal within 14 days of the refusal on 31 July 2014, that is, by 15 August 2014. The legal vacation would have intervened but would not have prevented time from running. In our judgment, the delay of approximately six months is not insubstantial. As regards the matters of illness or incarceration of Ms Cleary, put forward in partial explanation for the delay, these reasons do appear to be genuine. However, in so far as the applicant is a company, the majority decision of the court in ***Alcron Development Limited v Port Authority of Jamaica*** [2014] JMCA App 4, may suggest that these reasons are not wholly acceptable ones. That case would suggest that whether Ms Cleary is or is not the best person to have signed the papers is beside the point. Since the applicant is a company, there would (without any evidence having been offered to the contrary), be other officers or persons who could also have played a role in having the application for leave to appeal made on time. In addition, whilst the explanation that the applicant was awaiting the learned judge's ruling may not be unreasonable in itself, this does not assist with the period of delay after 30 September 2013.

[14] However, the cases make it clear that, notwithstanding the absence of a good reason for the delay, the court is not bound to reject an application for extension on that basis - see ***Leymon Strachan***. In ***Dorothy Vendryes v Richard and Karene***

Keane [2010] JMCA App 12, cited by Mr Wilkinson, the court had for consideration an application to extend time for filing skeleton arguments, a chronology of events, and a record of appeal and not an application to extend time for applying for leave to file an appeal. However, the statements of McIntosh JA at sub-paragraphs [50] a and c of that judgment are also apposite in the circumstances of this case:

> "...
>
> a. Each case must be decided on its own particular facts. There are no hard and fast theoretical circumstances which will trigger the court's discretion to grant or refuse an application.
>
> ...
>
> c. Although the length of time of the delay is a factor to be considered there is no principle to be extracted from the decided cases as to any particular period of time beyond which an application may not succeed. The length of the delay is but one factor to be considered by the court in its aim of dealing fairly with the parties, avoiding prejudice, saving expenses and ensuring that the cases are dealt with expeditiously. (see for example ***Finnegan v Parkside Health Authority*** referred to above)."

[15] Another factor which the court looks at in considering whether to extend time is the question of whether there will be any prejudice or hardship occasioned to the respondent if the application for extension of time is granted. We note that no affidavit has been filed on behalf of the respondent. In addition, importantly, Miss Whyte, in response to questions posed by the Bench, candidly conceded that there is no factor that she could advance on behalf of the respondent to show that it would suffer any prejudice. That is an important factor pointing in the direction of granting

the application. Another factor is that there is extant the related appeal duly filed by the applicant, and which is proceeding apace in respect of the learned judge's ruling on the striking out application. There would seem to be little harm in allowing this point, (which appears to be a fundamental legal point that indeed, could have first been taken at any stage of the proceedings) to be argued alongside the other appeal.

[16] In conclusion, therefore, we are of the view that it is in the best interests of justice to grant the application. At paragraph 7 of her affidavit, Ms Cleary stated that the notice and grounds of appeal in relation to the preliminary point had been prepared and could be filed at the earliest opportunity. Indeed, a draft of these documents was exhibited to the affidavit. We have also been informed by counsel (and the registrar) that in the related appeal, SCCA No 80/2013, a case management conference is scheduled for 15 July 2014. Although rule 1.11(1)(b) allows the applicant to file the notice of appeal within 14 days of the date when permission is granted, the applicant has asked this court to set a time-table for the filing of the relevant documents and the hearing of the appeals. Thus, we exercise the power under rule 1.7(2)(b) of the CAR to shorten the time for filing the notice and grounds of appeal. An application can be made by the applicant at the case management conference for a consolidation of the two appeals pursuant to rule 1.7(2) (a) of the CAR.

[17] We therefore make the following orders:

1. The time within which the applicant is permitted to apply for leave to appeal the order or judgment of Sykes J delivered on 31 July 2013, is extended until 27 June 2014.

2. The applicant is granted permission to appeal the order or judgment of Sykes J delivered on 31 July 2013.

3. The applicant is to file and serve notice and grounds of appeal by 4 July 2014.

4. Costs of the application to the respondent to be taxed if not agreed.