[2018] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 93/2013

APPLICATION NO 185/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**CARICOM INVESTMENTS LIMITED**	**1ST APPELLANT**
AND	**CARICOM HOTELS LIMITED**	**2ND APPELLANT**
AND	**CARICOM PROPERTIES LIMITED**	**3RD APPELLANT**
AND	**NATIONAL COMMERCAL BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**RIO BLANCO DEVELOPMENT LIMITED (in receivership)**	**2ND RESPONDENT**
AND	**ESTATE of KARL AIRD (deceased) (former receiver of Rio Blanco Development Limited)**	**3RD RESPONDENT**

Ransford Braham QC, Neco Pagon and Ms Kalisia Miller instructed by Braham Legal for the appellants

Charles Piper QC and Ms Petal Brown instructed by Charles E Piper and Associates for the respondents

24 and 27 September 2018

BROOKS JA

[1] Caricom Investments Limited, Caricom Hotels Limited and Caricom Properties Limited (the appellants) have appealed from a judgment of the Supreme Court. Although they filed several grounds of appeal, it is only necessary and possible to address one. They contend in it, that the judgment, which is the subject of the appeal, is a nullity.

[2] The judgment of the Supreme Court was handed down on 20 September 2013. The reason that they assert that it is a nullity is that the learned judge who heard the case had retired from the bench prior to the judgment being delivered. It was delivered, on his behalf, by a sitting judge of the Supreme Court (erroneously said to be Brooks J, who was, by then, a judge of this court).

[3] The appellants rely, for support of their stance, on a judgment of this court in **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others** [2018] JMCA App 7 (**Chen-Young v Eagle**). In addition to their complaint that the judgment is a nullity, the appellants, by virtue of a notice of application for court orders, also ask that their costs, which would be costs thrown away, if they were to succeed on the ground mentioned above, be refunded to them by the Attorney-General.

[4] The respondents, National Commercial Bank Jamaica Limited (NCB), Rio Blanco Development Limited (in receivership) and the Estate of Karl Aird (deceased) (former receiver of Rio Blanco Development Limited), do not oppose this ground of appeal. Mr Piper QC, on their behalf, did, however, oppose the application for the order for costs.

[5] The decision in **Chen-Young v Eagle** supports the appellants' contention that the judgment is a nullity, but does not support them in respect of the issue of costs thrown away. These issues shall be considered separately below.

Declaring the judgment in the court below to be a nullity

[6] The Privy Council, in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** [2005] UKPC 33 provides guidance in cases where the ground of appeal is that the decision in the court below is a nullity. That decision was on an appeal from this court. Lord Millett, who delivered the judgment of the Board, quoted from his judgment in **Hip Hing Timber Company v Tang Man Kit and Foo Tak Ching** [2004] 7 HKCFAR 212; [2005] 1 HKLRD 572 to show that an appellate court may declare an impugned judgment of a lower court to be a nullity. He made the further point that the appellate court may not, in those circumstances, make any ruling on the merits of the case. At paragraph 31 of the judgment in **Leymon Strachan**, Lord Millett set out the relevant circumstances in **Hip Hing Timber Company** and, thereafter, quoted from that judgment:

> "An order of the Court of Appeal, if not properly constituted, is a nullity. It is, of course, a proper ground of appeal that the court from which the appeal is brought had no jurisdiction to make the order in question; but if that is found to be the case the court hearing the appeal has no jurisdiction to determine the appeal on its merits but is bound to confirm the position by setting aside the order below as a nullity."

[7] In **Chen-Young v Eagle**, this court decided that a decision, which it had earlier purported to have handed down in that case, was a nullity because the three judges, who had heard the appeal, had all retired from the bench by the time that their reasons

and judgment were delivered. This court, in arriving at the decision that the judgment was a nullity, also ruled that the hearing of the appeal was a nullity. It so held, because, in the absence of the possibility of a decision being validly delivered, the hearing, although conducted before a properly constituted panel of this court, could amount to nothing.

[8] In the course of their reasons for the decision in **Chen-Young v Eagle**, the panel considered a number of constitutional provisions dealing with the appointment and retirement of judges of the Court of Appeal. The court found, albeit on different reasoning by the respective members of the panel, that the judges who had heard the appeal were unable, having demitted office by way of retirement, to properly deliver a valid judgment of the court. This result was despite the fact that, as Morrison P said in part, at paragraph [60] of his judgment, "no one [could] possibly doubt that the judges [who had produced it] all acted in perfectly good faith in continuing to work on and producing the impugned judgment".

[9] This court pointed out that the judges, who had retired, had been rendered unable to deliver a valid judgment because:

a. they had each attained the mandatory retirement age;

b. none of them had been granted an extension of time by the Governor-General, as the Constitution of Jamaica allowed, to remain in office, in order to deliver outstanding judgments; and

c. none of them had in fact remained in office, and continued to perform the functions of a judge, after attaining the mandatory retirement age.

[10] Morrison P summarised his reasoning in respect of these points at paragraph [70] of his judgment in **Chen-Young v Eagle**. He said:

> "It accordingly seems to me that, as I have already suggested, the only possible basis upon which a judge of appeal can continue to perform as such after he or she has attained retirement age is by virtue of permission given for the purpose by the Governor-General under section 106(2) of the Constitution. In this case, as far as the court has been able to ascertain, none was either sought or obtained. **It therefore follows that, the judges all having retired before delivering judgment in this appeal, the impugned judgment handed down on 1 December 2017 must be regarded as a nullity**…." (Emphasis supplied)

[11] There is no material distinction between the constitutional status of judges of this court and judges of the Supreme Court in this regard. The constitutional provisions in respect of Supreme Court judges are virtually identical to those in respect of judges of this court. For completeness and convenience only, the relevant provisions of section 100 of the Constitution of Jamaica are set out below. They consider the position of the judges of the Supreme Court. Their counterpart provisions, at section 106, which deal with judges of this court, were fully examined by this court in **Chen-Young v Eagle**, in arriving at its decision. The relevant portion of section 100 states:

> "(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Supreme Court shall hold office until he attains the age of seventy years:
>
> Provided that he may at any time resign his office.

> (2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Supreme Court may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.
>
> (3) Nothing done by a Judge of the Supreme Court shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office."

Subsections (4) to (7) of section 100 are not relevant for these purposes, and need not be set out here.

[12] The uncontested evidence in this case is that the learned trial judge:

a. was a duly appointed judge of the Supreme Court when he presided over the trial of the claim in the Supreme Court;

b. attained retirement age without having delivered the judgment in the case;

c. had not been granted permission by the Governor-General to remain in office in order to be able to deliver a judgment in this matter, despite having attained retirement age;

d. demitted office and proceeded into retirement without having delivered the judgment;

e. produced his decision, and reasons therefor, after he had retired; and

f. had a sitting judge of the Supreme Court deliver the decision and reasons on his behalf.

It is also beyond question that the learned trial judge prepared his decision, and his reasons for that decision, in utmost good faith.

[13] Those circumstances are materially indistinguishable from the circumstances in **Chen-Young v Eagle**. Accordingly, the finding of this court in that case must be the finding of the court in this appeal. The judgment must be regarded as having been delivered without authority. It is therefore a nullity. It must also be held, as Morrison P explained at paragraph [70] of the judgment in **Chen-Young v Eagle**, that, "it follows further that the applicants have made good their contention for an order that the [case] should be set down for a re-hearing at the earliest convenient time".

[14] This issue was raised with Mr Braham QC, who appeared on behalf of the appellants. Learned Queen's Counsel submitted that this court should order that the case be remitted to the Supreme Court for a case management conference to be convened, in order to arrange for a retrial of the case before a judge of that court. Ms Brown, on behalf of the respondents, did not disagree with learned Queen's Counsel's stance.

[15] A retrial is the appropriate step to be taken.

The question of costs thrown away

[16] The appellants filed an affidavit in support of their application for the costs to be ordered paid by the Attorney-General. The affidavit spoke only to "wasted costs in the appeal". The bulk of the costs wasted, would, however, have been incurred in the trial in the court below.

[17] Two factors militate against the award of costs as sought by the appellants. Firstly, they seek to have those costs paid by the Attorney-General, yet, as Mr Piper QC correctly pointed out, have not sought to have the Attorney-General present in these proceedings to state her position. It would have been possible to cure that defect by adjourning the matter to allow for the Attorney-General to have been served with the necessary process, but the second factor would make that step pointless.

[18] The second factor is the decision in **Chen-Young v Eagle**. A similar, although not identical, application in respect of costs, was made in that case. The applicants in that case sought payment of costs by the Attorney-General on the basis that their constitutional rights to a fair hearing, including the delivery of a judgment, within a reasonable time, had been breached. They joined the Attorney-General to the application as an interested party.

[19] This court ruled in that case, that there was no basis for awarding costs thrown away against the Attorney-General. It made it clear, however, that this was only in respect of the costs incurred in this court. It stated that its ruling was without prejudice to any issue of costs which could arise if the Supreme Court decided that there had

been a breach of those applicants' constitutional rights. The court said at paragraph [233] of the judgment:

> "The costs thrown away are not the fault of either party. None should be called upon to pay the other in that regard. Nor should the Attorney-General, who was not a party, be called upon to shoulder the costs of either party. A payment by that official could only arise if there has been a court order that the constitutional rights of one party or the other has been breached. That is an order to be made by the Supreme Court, after due consideration of the case. There has been no court order to that effect."

[20] The present case is somewhat different from **Chen-Young v Eagle**, in this regard. As mentioned above, the majority of the costs that would have been thrown away would not have been incurred in this court, but rather in the Supreme Court. Nonetheless, the same approach, taken in **Chen-Young v Eagle**, should be taken on this appeal. There should be no order as to costs in this court.

Conclusion

[21] The circumstances of this case require that the conclusion must be the same as that in **Chen-Young v Eagle**. The learned trial judge purported, albeit in good faith, to hand down a judgment after his authority to do so had expired, by virtue of his retirement. The judgment must therefore be declared a nullity. As the learned trial judge is no longer able to deliver a valid judgment, the trial of the claim before him, must also be declared a nullity.

[22] Accordingly, the result must be that the appeal must be allowed. Although NCB had filed a counter-notice of appeal, it did not pursue it, in the light of its acceptance of the force of the decision in **Chen-Young v Eagle**.

[23] The situation is not due to any fault of either of the parties. There should therefore be no order as to costs incurred in this court. The case should be referred to the registrar of the Supreme Court for her to set the case down for retrial in that court at the earliest convenient time.

ORDER

1. The appeal is allowed.

2. The trial of the claim and judgment delivered therein in the Supreme Court on 20 September 2013 are each declared to be a nullity.

3. The case is referred to the Supreme Court for the registrar of that court to fix the matter for retrial at the earliest convenient time.

4. No order as to costs in this court.