[2012] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 26/2012

BETWEEN	**COLE'S FARM STORE LTD**	**APPLICANT**
AND	**CHINA MOTORS LTD**	**RESPONDENT**

2 May 2012

(Considered on paper pursuant to rule 2.10 of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] The applicant, Cole's Farm Store Ltd, seeks an order permitting substituted service, on the respondent, China Motors Ltd, of an application for extension of time within which to file an appeal.

[2] The applications have their genesis in a judgment of Campbell J in the Supreme Court. Campbell J had reduced his decision and reasons therefor, to writing. In that judgment, the learned trial judge made awards in favour of the applicant.

which, to the knowledge of the applicant, they previously operated. One of those locations is still the respondent's registered office.

[7] In order to overcome the difficulties of service, the applicant has filed the present application seeking orders permitting substituted service. It wishes to serve the application to extend time, by two publications of the notice of proceedings in the Daily Gleaner newspaper, seven days apart.

The time for filing the notice of appeal

[8] Although this is not the substantive application, in my view, the present application raises the question of whether the time for filing the notice and grounds of appeal has, in fact, expired. Although the applicant is of the view that the time has expired, I was not convinced that that was, in fact, so. Submissions in respect of the issue were requested of the applicant's attorneys-at-law. Their response, by way of a letter, was that rule 1.11(1)(c) of the Court of Appeal Rules 2002 (the COAR), dealing with the time for filing and serving a notice of appeal, would not assist the applicant. I found the response unhelpful.

[9] I have therefore embarked on an analysis of the question without the benefit of assistance from counsel from either side. The examination of the issue requires reference to both the COAR and the Civil Procedure Rules 2002 (the CPR).

> "Any judgment or order which requires service must be served by the party obtaining that judgment or order unless the court orders otherwise."

Rules 6.2 and 6.6 provide support for rule 6.1(1), in terms of the means of service and the deemed date of service. Other than to say that rule 6.2 speaks to the means of service of documents, besides claim forms, there is no need, for these purposes, to set out any of the terms of those rules.

[13] Rule 42.6 of the CPR specifically speaks to the service of judgments and orders. It requires the party who files a draft judgment for perfecting, in accordance with rule 42.5(2) or 42.5(3), to serve the perfected judgment on every other party to the claim. For completeness rules 42.5(2), 42.5(3) and 42.6 are set out in full below:

> "42.5 (2) Subject to paragraph (5), every judgment or order must be drawn up and filed at the registry by the party on whose claim or application the order was made, unless –
>
> (a) the court directs another party to draft and file it;
>
> (b) another party with the permission of the court agrees to draft and file it;
>
> (c) the court dispenses with the need to draw the judgment or order; or
>
> (d) it is a consent order under rule 42.7.
>
> (3) **Where a party fails to file a draft of an order within 7 days after the direction was given, any other party may draw and file the order.**"

> "42.6 (1) Unless the court otherwise directs the party filing a draft judgment or order in accordance with rule 42.5 **must serve the judgment or order on –**

[16] The CPR does not provide a penalty for failing to draw up and to file a judgment or order for perfecting. The only provision in that regard is rule 42.5(3), which allows another party to have the order perfected and served in the event that the party, bearing the primary obligation to do so, fails or refuses so to do. The judgment remains a judgment of the court despite the fact that it has not been perfected. It is effective from the date on which it is pronounced, although the court may amend it at any time before it is perfected. That point was succinctly made by Jenkins LJ in **Re Harrison's Share under a Settlement** [1955] 1 All ER 185. The headnote accurately reflects the reasoning of the learned Law Lord:

> "Although the order of a judge dates from the day of its being pronounced, it can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it and the right of withdrawal will not be prevented or prejudiced thereby."

[17] This court in **San Souci Ltd v VRL Services Ltd** SCCA No 20/2006 Application No 8/2009 (delivered 10 June 2009), accepted that latter principle, as being correct. Smith JA, at paragraph 24 of his judgment, accepted that the order is not final until it has been perfected.

[18] The enunciation of that principle is, however, a digression. The principle, which is to be recognised as critical to determining this application, is that it is service of the perfected judgment, which triggers the clock for calculating the time, within which notice and grounds of appeal may be lodged.

Conclusion

[22] Based on my interpretation of the relevant rules of the CPR and the COAR, the application for extension of time is misconceived and unnecessary. Time has not yet begun to run for the purposes of filing the notice and grounds of appeal and has therefore not expired. The present application for permission to use substituted service is, therefore, also unnecessary.

Order

[23] The application for substituted service is dismissed.