[2012] JMCA App. 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 30/2012

APPLICATION NO 42/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATES LTD**	**APPLICANT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**RESPONDENT**

Ms Carol Davis for the applicant

Lackston Robinson instructed by Director of State Proceedings for the respondent

7 June 2012

ORAL JUDGMENT

PANTON P

[1] This is an application to strike out an appeal that has been filed by the Attorney-General of Jamaica. In this matter, the parties are Construction Developers Associates Ltd, which is the applicant, and the Attorney-General of Jamaica representing the Ministry of Education.

[2] The Ministry and Construction Developers entered into a contractual relationship in respect of the building of a school at Annotto Bay in the parish of St Mary. Problems arose during the execution of that contract and there are provisions in the contract whereby reference of disputes may be made to an adjudicator, and this was done as long ago as 2001. The contract incidentally was executed on 16 December 1998.

[3] The adjudicator in this case was the Hon Dr Lloyd Barnett, an eminent attorney-at-law. He made three decisions which were all in favour of Construction Developers. The contract provides also that the decision of the adjudicator may be referred to an arbitrator within 28 days of the adjudicator's written decision, and if neither party referred a dispute to the arbitrator within the said 28 days, then the adjudicator's decision would be final and binding.

[4] The Ministry of Education wrote two letters, the first on 6 July 2001 addressed to Construction Developers, where Construction Developers' interpretation is that, that letter purported to refer the decision of the adjudicator to arbitration, and the second letter written on 20 December 2001 whereby reference was made to arbitration. There is a dispute as to the meaning of those letters and following thereon there being no further action taken by the Ministry, after it had written those letters, Construction Developers filed a fixed date claim form on 23 December 2009. In that fixed date claim form Construction Developers sought the determination of the court as to the following questions of law:

> "1. Whether without more, the letter from the Ministry of Education Youth and Culture dated 6th July,

2001 addressed to the Claimant constituted referring the decision of the Adjudicator to an Arbitrator pursuant to clause 25.2 of the Conditions of Contract.

2. Whether without more, the letter from the Ministry of Education Youth and Culture dated 20th December, 2001 addressed to the Claimant constituted referring the decision of the Adjudicator to an Arbitrator pursuant to Clause 25.2 of the Conditions of Contract.

3. A declaration that pursuant to the Contract between the Claimant and the Ministry of Education Youth and Culture with respect to the construction of a school at Annotto Bay, the decision of the Adjudicator with respect to Adjudication 1 dated 15th June 2001, Adjudication 3 dated 27th November 2001, and Adjudication 5 dated 27 November, 2001 is final and binding on the parties."

[5] The fixed date claim form came before Mrs Justice McDonald-Bishop on 5 May 2010. At that time, the Attorney-General representing the Ministry of Education was absent. However, the learned judge made contact with Mr Nigel Gayle, an attorney-at-law instructed by the Director of State Proceedings for the Attorney-General, and after hearing both Ms Carol Davis, who appeared for the applicant, and Mr Gayle for the Attorney-General, she ordered that the hearing was to be adjourned to 3 November 2010 at 3:30 pm for half-an-hour. She ordered secondly, that unless the defendant filed a defence or affidavit in response to the fixed date claim form and affidavit by 25 June 2010 she would grant the order sought pursuant to paragraph 3 of the fixed date claim form which was read earlier. She also ordered that the claimant, that is Construction Developers, was permitted to file a response to the Attorney-General's

affidavit within 28 days of receipt thereof. After that, on 26 October 2011 the matter came before Miss Justice Paulette Williams who made an order which reads as follows:

> "Pursuant to Order made by Mrs. Justice McDonald Bishop on 5th May 2010, the defendant having failed to file Defence or Affidavit in Response to Claimant's Fixed Date Claim Form and Affidavit by 25th June 2010 the Court declares that pursuant to the contract between the Claimant and the Ministry of Education Youth and Culture with respect to the construction of a school at Annotto Bay the decision of the adjudicator with respect to Adjudication (1) dated 15th June 2001, Adjudication (3) dated 27th November 2001 and Adjudication 5 dated 27th November, 2001 is final and binding on the parties."

[6] The Attorney-General seemed to have finally sprung to life and thereafter filed an application to set aside the order of Mrs Justice McDonald-Bishop, and that application came before Mr Justice Glen Brown on 24 February 2012.

[7] The order sought by the Attorney-General was as follows:

> "An Order setting aside the order made by Justice McDonald-Bishop on the 5th day of May 2010 that, unless the Defendant file a Defence or Affidavit in response to the claimant's Fixed Date Claim Form and affidavit filed on 23rd November 2009 by 25th June 2010 order granted pursuant to paragraph 3 of the Fixed Date Claim Form."

[8] Mr Justice Brown, having heard the parties, refused the application. However, he granted leave to the Attorney-General to appeal. The Attorney-General duly filed notice of appeal on 2 March 2012. The ground of appeal which has been filed is to the effect that having regard to the provision of rule 12.2(a) of the Civil Procedure Rules 2002 the learned judge erred in law in refusing the application.

[9] Before us this morning, Ms Davis submitted that since no appeal had been against the order of Mrs Justice McDonald-Bishop or that made by Miss Justice Williams, there really is no basis for the appeal filed against the order of Mr Justice Brown to proceed. She submitted that, that appeal has no prospect of success and that the order made by Mrs Justice McDonald-Bishop was a reasonable order in the context of a case management and that there is no basis for it to be set aside.

[10] Mr Robinson for the Attorney-General has submitted that by virtue of the provisions of part 12 of the Civil Procedure Rules there is no room for a default judgment to be entered in respect of the fixed date claim form. He pointed to the fact that it is a default judgment in the circumstances and that in any event the two questions which were posed prior to the third which Mrs Justice McDonald-Bishop answered, related to the effect of the letters written by the Ministry and that there was no determination in respect of that. He submitted that the order is interlocutory and he made reference to the well-known case of ***Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes*** SCCA No 54/1977 delivered on 18 December 1998, which was followed by ***Ronham & Associates Ltd v Christopher Gayle and Mark Wright*** [2010] JMCA App 17. He submitted further that the order of Miss Justice Williams was superfluous as the declaration had already been made and that the way was really clear for the Attorney-General to apply to set aside the order of Mrs Justice McDonald-Bishop and that is what it had done.

[11] Ms Davis' response to that was that Mrs Justice McDonald-Bishop made a final determination which is possible at the first hearing and that the judge was entitled to make an unless order at such a hearing.

[12] We have considered the submissions and the relevant rules to which we have been referred and we are not satisfied that the situation is such that we would be at liberty to strike out the appeal that has been filed. It seems to us that there is much room for argument in respect of what has transpired in this matter and we see no basis on which we could strike out this appeal. We make no comment on the eventual outcome, of course. All we are saying is that there is no basis to strike it out.

[13] In the circumstances, we refuse the application with costs to the respondent, the Attorney-General, to be agreed or taxed.