JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 109/07

APPLICATION NO: 166/07

BETWEEN	**EVANSCOURT ESTATE COMPANY LIMITED (by Original action)**	**PLAINTIFF/APPLICANT**
A N D	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED (by Original action)**	**DEFENDANT/RESPONDENT**
A N D		
BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**PLAINTIFF/RESPONDENT**
A N D	**EVANSCOURT ESTATE COMPANY LIMITED**	**1ST DEFENDANT/APPELLANT**
A N D	**DESIGN MATRIX LTD. (by way of Counterclaim and Set Off)**	**2ND DEFENDANT/RESPONDENT**

Mr. Paul Beswick, instructed by Messrs. Ballentyne Beswick & Company for the Applicant.

Mrs. Sandra Minott-Phillips instructed by **Myers Fletcher & Gordon** for the 1st Respondent.

Mr. Charles Piper for the 2nd Respondent

IN CHAMBERS

September 26, 2008

SMITH, J.A.:

This is an application for an enlargement of time within which to appeal an order of Jones, J made on the 25th September 2007, whereby

the learned judge imposed cost sanctions against the applicant/appellant for the applicant's failure to comply with pre-trial orders. The relevant pre-trial orders were (i) the claimant's attorney to file core bundle of documents by September 7, 2007 and (ii) claimant's attorney to file agreed bundle of documents by August 31, 2007.

Background

At case management conference the trial was set for five (5) days commencing September 24, 2007. On September 24, Mr. Beswick, counsel for the claimant/applicant, informed the Court (Jones J) that he was having difficulties in the preparation of the bundles and requested that the matter be adjourned to the following day.

On September 25, 2007 Mr. Ballentyne appeared in place of Mr. Beswick. The matter could not proceed as the bundles were still incomplete. Mr. Ballentyne could not proceed. Mr. Ballentyne told the Court that in light of the claimant's failure to comply with the order he could not resist an order for costs. Instead of striking out the claimant's statement of case pursuant to rule 26.3 (1) (a) of the Civil Procedure Rules (CPR) Jones, J. decided to make an order for costs. Consequently he invited the parties to make representations in respect to a summary assessment of costs under Part 65.9 of the CPR. Mr. Ballentyne declined the invitation to make submissions. Following the submissions of counsel for the respondents Jones J. made the following order:

"(i) On the Claimant's application the trial is adjourned to May 18, 2009 for five (5) days;

(ii) Costs to National Commercial Bank Jamaica Limited in the sum of $180,000.00 (being $60,000.00 per day for three (3) days with certificate for two (2) counsel);

(iii) Costs to Design Matrix Limited in the sum of $120,000.00 (being $40,000.00 per day for three (3) days.

(iv) The said costs to be paid by the Claimant by the 25th October, 2007 failing which the claimant's statement of case is struck out.

(v) National Commercial Bank Jamaica Limited's Attorney-at-law to file and serve this Order."

Application for Leave to Appeal

It is against this order that the applicant wishes to appeal. To initiate the appeal the applicant must first obtain leave either of the judge making the order or of the Court of Appeal – See section 11 (e) of the Judicature (Appellate Jurisdiction) Act. Rule 1.8 (1) of the Court of Appeal Rules (CAR) stipulates that permission to appeal must be made within fourteen (14) days of the order against which permission to appeal is sought. By virtue of Rule 1.8 (2) of the CAR the application for leave, in such a case, must first be made to the court below.

It seems that an application for leave to appeal was not made orally on September 25, 2007 when Jones, J. made the order for costs (referred to hereafter as the costs sanction order) as contemplated by Rule 1.8 (3). However on October 2, 2007 the applicant filed, in the Supreme Court a Notice of Application for Court Order requesting leave to appeal against items (ii) (iii) & (iv) of the Order. The application for leave was heard by Jones, J. on October 26, 2007. The learned judge on November 1, 2007 dismissed the application and subsequently gave written reasons for so doing. Jones, J. was of the view that an appeal would have no real chance of success.

Having failed in its application for leave in the court below, the applicant has taken the application to this court. An application to this court must be made in writing and must set out the grounds of the proposed appeal. However, before the application for leave was heard in the court below, the applicant on October 9, 2007 filed in the Court of Appeal a Notice of Appeal against the said order for costs made by Jones, J. on September 25, 2007. Interestingly, at para. (i) of the Grounds of Appeal the applicant stated:

> "(i) That Counsel appearing for the claimant did not make an application for leave to appeal at the time the order was made because he was stunned by the magnitude of the order and was unable to collect his thoughts sufficiently to make the application".

This Notice of Appeal, is of course, to no effect since leave was not first obtained. On October 16, 2007 the applicant filed an Amended Notice of Appeal. This too was invalid for the same reason. A further Amended Notice of Appeal was filed on October 19, 2007. By this time the fourteen (14) day period within which the Notice of Application for Leave should be filed in this court had expired. The applicant would be in deep water if the court below should refuse permission. Although the application for leave to appeal was not determined, the applicant none-the-less was pursuing the 'appeal'. And on October 23, 2007 the applicant obtained an extension of time for preparing and filing skeleton arguments.

On October 25, 2007 the applicant filed, in the Supreme Court an Amended Notice of Application for Court Orders. In addition to what was sought in the Notice of October 2, 2007 the applicant sought that the Order of the 25th September, 2007 be withdrawn and refiled in an amended form.

On the 25th October 2007, Mrs. Minott-Phillips, Counsel for the 1st respondent filed, in the Court of Appeal, a Notice that the respondent would be taking a preliminary point that the appeal was not valid as leave to appeal was not obtained pursuant to section 11 (1) (e) of the Judicature (Appellate Jurisdiction) Act.

Mr. Beswick's response to this is that "the original order was made on the 25th of September, 2007 and the application for leave was first made in the Supreme Court on 2nd October, 2007 some seven (7) calendar days later, well within the fourteen (14) days period set out in rule I. 11 (1) (b) of the Court of Appeal Rules 2002".

This submission is clearly untenable. In the first place, Rule 1. 11 (1) (b) concerns the filing and serving of a Notice of Appeal.

The instant application is about permission to appeal. The relevant rule is 1.8 (1) of the CAR which states:

> "Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within (14) days of the order against which permission to appeal is sought".

Secondly, it seems clear to me that the application to this court for permission must be made in writing and within fourteen (14) days of the order appealed. The fact that the application to the court below was made within the prescribed time does not remove the time limitation in respect of an application to this court. If Mr. Beswick was right, it would mean that an application could be made to this court at anytime after refusal in the court below. There can be no doubt that at the time of the hearing of the application by Jones, J. the time within which the application to this court should be made had long expired.

Thirdly, there is no written application for permission before this court in compliance with Rule 1.8 (3).

Fourthly, even if a valid application for permission to appeal to this court had been made, that application was not yet determined and therefore the applicant had no leave to appeal when the Notice of Appeal was filed. Hence such a Notice is of no effect. Mrs. Minott-Phillips' preliminary point was well taken.

On November 1, 2007, the same day Jones, J. dismissed the application for leave, the applicant filed a Notice of Application for Court Orders in the Court of Appeal seeking an extension of time within which to apply to the court for leave to appeal. On November 28, 2007 Cooke, J.A. directed that there be an inter parte hearing in Chambers. When the application for extension of time finally came before me on June 3, 2008 the applicant, with the consent of the respondents, was permitted to amend the November 1 Notice of Application for Court orders to read:

> "The Applicant, Evanscourt Estate Company Ltd., c/o Ballantyne, Beswick & Company, 66 and 68 Barry Street, in the parish of Kingston, seeks the following orders:
>
> (1) That the time for making application in the Court of Appeal for leave to appeal against the order of Justice R. Jones made on the 25th day of September, 2007, the subject of the appeal herein, be extended.

(2) That the claimant be granted leave to appeal against those portions of the order made by His Lordship Mr. Justice Jones on the 25th September, 2007 set out hereunder:

(3) Costs to the National Commercial Bank Ltd. in the sum of $180,000.00 being $60,000.00 per day for three (3) days with certificate for two (2) counsel.

(4) Costs to Design Matrix Ltd. in the sum of $120,000.00 (being $40,000.00 per day for three (3) days).

(5) The said costs to be paid by the claimant by the 25th of October, 2007 failing which the claimant's statement of case is struck out".

The grounds remain the same.

The reason given for the failure of the applicant's counsel to make the application for leave to appeal orally at the time the order was made is that counsel "was stunned by the magnitude of the order and was unable to collect his thoughts sufficiently to make the application".

The failure of counsel to make the application orally placed the applicant in a difficult situation. The time within which to make the application for leave in the Court of Appeal was running out and he did not know whether or not the court below would grant leave. It seems to me that in such a situation counsel for the applicant should have also timeously filed an application for leave in the Court of Appeal **ex abudante cautela**. According to Mr. Beswick, Counsel for the applicant,

a Notice of Appeal was filed "as a precautionary measure". But, of course the filing of a Notice of Appeal without leave where leave is first required is completely ineffective – See ***Strachan v The Gleaner Co. Ltd.*** SCCA 54/97 delivered December 18, 1998 at p. 11.

The parties are at one that if permission to appeal ought not properly to be given, it would be futile to enlarge the time within which to apply for leave. I would add that, in the circumstances of this case where there was obviously confusion on the part of Counsel for the applicant as to the effect of the early filing of a written application for leave in the court below, if there is a real chance of an appeal succeeding the court should give permission.

I will therefore first turn to the question of whether or not leave should be granted. Rule 1.8 (9) of CAR 2002 reads:

> "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".

The use of the word "general" to describe "rule" suggests that this rule applies barring special exceptions. Thus leave may also be granted in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. See Lord Woolf MR Practice Note (Court of Appeal: procedure 1998) (1998) 1 All E R 186. It has been said

that the phrase "real chance of success" means a "realistic" as opposed to a "fanciful" prospect of success - See ***Swain v Hillman* (2001)** 1 All E R 91 which was applied by this court in ***Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the* Cayman Islands *in the Province of the West Indies*** SCCA No. 103/2004 delivered May 25, 2005.

The following principles may be extracted from the authorities:

(1) Generally, leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is not sufficient.

(2) Leave may also be given in exceptional circumstances, even though the case has no real prospect of success, if there is an issue which, in the public interest, should be examined by the Court of Appeal.

The applicant's proposed grounds of appeal seek to challenge the costs sanction aspects of the order of Jones, J. The following issues are raised:

1. Whether the costs assessed and the time within which such costs should be paid and the consequence of failure to comply were fair and reasonable.

2. The jurisdiction of the trial judge to make an award of costs outside of the CPR 2002 scale.

Issue No. 1

The September 25, 2007 order has three (3) elements –

(i) the cumulative costs of $300,000.00

(ii) payment to be made by October 25, 2007

(iii) failure to comply to result in striking out of statement of case.

The learned trial judge at para. 18 of his judgment said:

> "The sting in the tail, in this case, was the condition added to the cost sanction which provided that the cost was to be paid by Oct. 25, 2007, with the consequence of failure to comply being the striking out of the Claimant's Statement of Case: see CPR 2002 Part 26.1 (3) (a) and (b)".

I cannot accept the contention of Mrs. Minott-Phillips that as a prerequisite to appealing the applicant should have applied for relief from sanction under rule 26.8 of the CPR 2002. Indeed in ***Marcan Shipping (London) Ltd. v. Kejalas and Another*** (2007) 3 All ER 365, on which Mrs. Minott-Phillips relied, an appeal against an "unless" order was heard although no application for relief from sanction was made. It seems to me that although, pursuant to the costs sanction order, the claimant's case was automatically struck out on his failure to comply therewith, if eventually the claimant should succeed in having Jones, J's order set aside, then his case would be restored.

In my judgment the important question is whether it was "just and proportionate" for the claimant's case to be struck out for failure to comply with the costs sanction order. It will be recalled that the costs sanction order was made because the applicant's Attorneys-at-law had

failed to file the Agreed Bundle of documents. Was this breach so serious as to warrant the imposition of punitive costs with a sting in the tail? Would a peremptory order that the Agreed Bundle be filed within five (5) days, failing which the claimant's case stands struck out with five (5) days costs to the defendants in any event, be more appropriate in the circumstances? – See Rule 26.4 (5).

What should be the approach of the trial judge in the exercise of his discretion to make a costs sanction order with the consequence of failure to comply being the striking out of the case? Should such order be confined to a contumelious breach?

In ***Barbados Rediffusion Service Ltd. v Asha Mirchandani and Others*** (No. 2) (2006) 69 WIR 52 the Caribbean Court of Justice (CCJ) on an appeal from the Barbadian Court of Appeal concerning a judge's exercise of discretion to make a striking-out order for breach of an "unless order" said:

> "...even though a court (or a judge) in its discretion might make a striking-out order in appropriate circumstances in response to (and, in a sense, as a punishment for) a contumelious or defiant breach of a peremptory order of the court, the approach of the court must be holistic and a balancing exercise was necessary to ensure that proportionality was maintained and that the punishment fitted the crime; accordingly even though there had been an element of fault in the appellant's failure to preserve the master tapes, in the circumstances the order of the trial judge (upheld by the Court of Appeal) striking out the defence of the appellant had been

> wholly disproportionate and could not be justified as a matter of fairness to the respondents or to other litigants, nor as an appropriate response to the defiance of an order of the court".

There can be no doubt that the default must not go unmarked. The court must act appropriately to make it clear that delays will not be tolerated, but proportionality must be maintained.

In my view, in the light of the affidavits of the Acting Registrar of the Supreme Court concerning the quantification of costs and those of Messrs. Terrence Ballentyne and Paul Beswick as to the reason for non-compliance with the pre-trial order, it is in the public interest that this court should examine the question of proportionality in the making of a costs sanction order with condition.

Issue No. 2 – Jurisdiction of the Court

The applicant wishes to contend on appeal that the court's power to award costs is "subject to the terms of the rules, i.e., the scale laid down by the rule".

Section 47 (1) of the Judicature (Supreme Court) Act reads in part:

> "(1) In the absence of an express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court...
>
> No costs shall be recoverable until they have been taxed by the Registrar or his deputy."

Section 28E – of the aforesaid Act reads:

> "(1) Subject to the provisions of this or any other enactment and to rules of Court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the Court.
>
> (2) Without prejudice to any general power to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing -
>
> (a) Scales of costs to be paid -
>
> (i) as between party and party;
>
> (ii) the circumstances in which a person may be ordered to pay the costs of any other person; and
>
> (b) the manner in which the amount of any costs payable to the person or any attorney shall be determined.
>
> (3) subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid."

The learned trial judge invited the parties to make representations in respect to a summary assessment of costs under Rule 65.9 of the CPR 2002. Rule 65.9 relates to the summary assessment of costs in respect of procedural applications referred to in Rule 65.8 . The latter rule reads:

> "65.8 (1) On determining any application except at a case management conference, pre-trial review or the trial, the court must decide which

> party, if any, should pay the costs of that application and may:
>
> (a) summarily assess the amount of such costs in accordance with rule 65.9; and
>
> (b) direct when such costs are to be paid.

The September 25, 2007 order, i.e. the costs sanction order states that the adjournment was granted on the application of the claimant/ applicant.

It seems to me that from their language Rules 65.8 and 65.9 do not contemplate an application for adjournment. In any event subsection (1) of rule 65.8 excepts an application at the trial from its purview.

Item 1 of table 2 of rule 65 speaks to the quantum of costs for appearance in court where the trial is adjourned without a hearing. This is the situation in the instant case. Is the court's power to award costs in the circumstances subject to Rule 65, Appendix B, table 2, item 1 by virtue of the provisions of section 28E of the Judicature (Supreme Court) Act?

In my opinion an appeal will have a real chance of success.

Accordingly, leave is granted to apply out of time for permission to appeal and leave to appeal is granted.

No order as to costs.

SMITH, J.A.

ORDER:

Leave is granted to apply out of time for permission to appeal. Leave to appeal is hereby granted. No order as to costs.