[2024] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

APPLICATION NO COA2022APP00220

BETWEEN	**DELROY FOSTER**	**APPLICANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION INC**	**RESPONDENT**

Dr Delroy Beckford instructed by Samuel Beckford Attorneys-at-law for the applicant

Maurice Manning KC, Miss Tavia Dunn and Miss Dionne Samuels instructed Nunes, Scholefield, Deleon and Co for the respondent

25, 26 January and 8 March 2024

Application for permission to appeal – Order striking out claim following refusal of injunction – Whether permission required to appeal order striking out claim made together with order refusing an injunction – Whether applicant has a real chance of success in challenging order striking out claim

MCDONALD-BISHOP JA

[1] Mr Delroy Foster, the applicant, has applied to this court seeking permission to appeal the decision of Hutchinson J (now Hutchinson Shelly J) ('the learned judge') made in the Supreme Court on 14 October 2022 in favour of the respondent, the Jamaican Redevelopment Foundation Inc ('JRF').

[2] The learned judge had refused Mr Foster's application for an interim injunction, struck out his claim and awarded costs to JRF to be agreed or taxed. She also refused Mr Foster's oral application for permission to appeal made when the decision was delivered. Therefore, the application for permission to appeal is properly before this court.

[3] On 26 January 2024, after considering the oral and written arguments advanced by counsel for the parties, we granted Mr Foster's application for permission to appeal, and issued directions for the progression of his intended appeal, in the following terms:

1. The court notes that no permission is needed to appeal the refusal of the application for the injunction and the court will grant the extension of time.
2. In light of paragraph one, permission is granted to the applicant to appeal the decision of Hutchinson J (as she then was) dated 14 October 2022 relative to the decision striking out the claim.
3. The applicant is to file and serve his notice and grounds of appeal in relation to both the injunction and the striking out orders, on or before 9 February 2024.
4. The respondent is at liberty to file and serve a counter-notice of appeal, if it so desires, upon service of the notice and grounds of appeal in accordance with the Court of Appeal Rules.
5. Costs of the application shall be costs in the appeal.
6. Upon the filing of the notice and grounds of appeal, the hearing shall be fixed for the week commencing 17 June 2024.
7. The judge's bundle filed in the application for permission to appeal on 28 April 2023 is permitted to stand as the record of appeal.
8. Counsel for the applicant is to file a supplemental record of appeal comprised of the notice and grounds of appeal and the counter-notice of appeal, if any, on or before 22 March 2024.
9. After the filing of the supplemental record of appeal, a case management conference is to be scheduled before McDonald-Bishop JA for further directions.
10. The applicant's attorney-at-law is to prepare, file and serve this order.

[4] We verbally declared the reasons for our decision in open court but promised to detail them in writing at a later date. These are the written reasons, as promised.

[5] By way of a brief background, Mr Foster filed a claim in the Supreme Court against JRF seeking a declaration that he has acquired possessory title to a parcel of registered land situated in the parish of Manchester ('the property') through his open, exclusive and undisturbed occupation of the property since 2001 and that JRF is not entitled to bring an action or suit to recover the land from him.

[6] The property was registered in the names of Mr Foster's parents, who both died before the filing of the claim. The original mortgagor was Mr Foster's father, and the original mortgagee was the National Commercial Bank. However, by a series of assignments of the debt, JRF became the successor mortgagee. In 2004, by a debt restructuring agreement between JRF, on the one hand, and Mr Foster and his mother, on the other, Mr Foster and his mother undertook to pay and started to pay the outstanding mortgage to secure the property from the exercise of JRF's power as mortgagee. Mr Foster and his mother defaulted on the mortgage repayment, with the last payment made in 2011 by Mr Foster. In 2020, after two failed attempts at selling the property through public auctions, as well as court action instituted by Mr Foster's mother to restrain JRF from exercising its power of sale, JRF foreclosed on the property. Consequently, the certificate of title in the name of Mr Foster's parents was cancelled, and a new certificate of title was issued in the name of JRF. After he was notified of the foreclosure, Mr Foster filed a claim for a declaration that he was the legal owner of the property and for the cancellation of JRF's title.

[7] After filing the claim, Mr Foster applied for an interim injunction to restrain JRF from entering upon, taking possession of, selling or otherwise interfering or dealing with the property. Up to then, JRF had not filed its defence in the matter. However, it opposed the application for the injunction with supporting evidence. JRF also filed a notice of application for the claim to be struck out but, up to the time of the hearing of the application for the injunction, its application was not scheduled for hearing. JRF,

nevertheless, made an oral application during the hearing of Mr Foster's application for the claim to be struck out as showing no reasonable grounds for bringing the claim or, alternatively, that the claim was an abuse of process pursuant to rule 26.3(1)(b) and (c) of the Civil Procedure Rules, 2002. JRF relied on the evidence it had filed in opposing the application for the injunction.

[8] The learned judge determined both applications. On the injunction application, she concluded that there was no serious issue to be tried and that the balance of convenience favoured JRF.

[9] On the application to strike out the claim, the learned judge concluded that based on her finding on the application for the injunction that there was no serious issue to be tried, Mr Foster had "no real/reasonable prospect of success" on the claim. She opined that there was a "dearth of evidence" presented to prove that he had acquired a possessory title.

[10] Aggrieved by the learned judge's approach, reasoning and findings, Mr Foster seeks to challenge the decision on 10 grounds of appeal. Seven of the proposed grounds collectively challenge the learned judge's refusal of the injunction. Two grounds relate to the striking out order.

[11] Having considered each party's case and the submissions advanced on their behalf in this court, we concluded that the application for permission to appeal should be granted for three primary reasons which will now be outlined.

[12] Firstly, regarding the appeal against the refusal of the injunction, Mr Foster did not require permission to appeal. The parties have accepted that the law does not require the leave of the court to appeal against the refusal of the injunction (see section 11(1)(f)(ii) of the Judicature (Appellate) Jurisdiction Act ('JAJA')). Accordingly, Mr Foster is entitled to appeal the injunction as of right.

[13] Secondly, we considered the more problematic question of whether leave should be granted to appeal the striking-out order and concluded that it should be granted because of its connection to the order refusing the injunction. In the ordinary course of things, leave is required to appeal an interlocutory striking-out order by the Supreme Court, as it does not fall within the categories of interlocutory orders for which leave to appeal is not required under section 11(1)(f) of the JAJA.

[14] In considering the question of whether leave is required to appeal the striking-out order, which accompanies a related order refusing an injunction in the same proceeding, regard was had to **Emmerson International Corporation v Renova Holding Limited** [2019] UKPC 24, a decision of the Privy Council on an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands). As the Privy Council recognised, the solitary issue in that case was whether leave was required to appeal to the Court of Appeal of the Eastern Caribbean Supreme Court in respect of a variation of a disclosure order made in conjunction with, and as part of, a freezing order. The Privy Council noted that the issue on appeal was "a short point of statutory construction" of section 30(4) of the Eastern Caribbean Supreme Court (Virgin Islands) Act, which is identical to section 11(1)(f) of the JAJA. The Court of Appeal had concluded that leave to appeal was required for the aspect of the order that did not fall within any of the exceptions under section 30(4) of the Act. The appeal was dismissed.

[15] Having assessed the case and the order of the court, the Privy Council found that the provisions of the freezing order as varied "were an inherent part of the disclosure provisions and could not be separated out from those provisions" (para. 14). Essentially, their Lordships concluded that section 30(4) (like our section 11(1)(f)) must be given a practical interpretation which would militate strongly against a construction that "would require a party to go through an exercise of parsing a single order with interlocking parts… to break it down into separate paragraphs or subparagraphs, and then asking of each paragraph or subparagraph whether it should be characterised as 'an injunction' or not" (para. 15). According to their Lordships, this exercise would not only be "unduly complicated but also likely to give rise to considerable uncertainty as to how different

parts of a single, unified order were properly to be characterised" (para. 15). This, they said, would undermine the object of the procedural provision, which is to give clarity to litigants as to how to bring their case before an appropriate tribunal. Their Lordships accepted that the appeal was properly brought before the Eastern Caribbean Court of Appeal, without prior leave of the court.

[16] Having benefitted from the learning derived from this authority, we found that the application to strike out flowed from and was closely intertwined with the application for the injunction. The evidence relative to the injunction application was treated by the learned judge as inherently a part of the striking-out application. Correspondingly, the learned judge's reasons for striking out the claim resulted from her refusal to grant the injunction. Therefore, the matters being appealed against regarding the striking-out order (for which leave is required) are tightly interlocked with those arising from the injunction (for which leave is not required).

[17] Given the inextricable link between the two applications and the decision on both, there would be no reasonable basis to sever the order of the learned judge to make one component of the order appealable as of right and the other, only with the court's permission. In the premises, the entitlement to appeal the order refusing the injunction carries with it the entitlement to appeal the striking-out order as a matter of logic and practicality. For this reason, we considered that permission to appeal should be granted without any regard to the merit of the application or to any other matter that would be needed to fulfil the requirements of rule 1.8 of the Court of Appeal Rules ('CAR'), which prescribes the general rule for the grant of permission to appeal.

[18] However, though the court has arrived at the above conclusion, it also found a third and discrete basis for granting permission to appeal. We found that the two proposed grounds challenging the learned judge's order striking-out the claim require the investigation of this court and cannot be said to be devoid of merit. Essentially, Mr Foster's complaints, as encapsulated in these proposed grounds, are that the learned judge wrongly ventured into a mini-trial on the evidence, including determining issues of

credibility, and thereby wrongly applied the test applicable to summary judgment applications to JRF's striking-out application.

[19] The proposed grounds of appeal regarding the approach taken by the learned judge, and her ultimate finding that the claim has no "real/reasonable prospect of success", raise an arguable issue with a real chance of success on appeal. Given the approach taken by the learned judge in treating with the striking out application, and the test she evidently applied, the resolution of that issue may be necessary for the proper administration of justice in light of this court's pronouncements on the differences in the approach required when treating with summary judgment and striking out applications. See **S & T Distributors Limited and Another v CIBC Jamaica Limited and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007, **Sebol Limited and another v Pan Caribbean Financial Services Limited (Formerly Trafalgar Development Bank Limited)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2007, judgment delivered 12 December 2008, and **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009.

[20] Finally, but relatedly, JRF had made its striking-out application on the basis that the pleadings disclosed no reasonable ground for bringing the claim or, alternatively, that the claim was an abuse of process. Before this court, counsel for JRF maintained that where the challenge to the claim is on the ground of abuse of process, the judge is entitled to consider affidavit evidence, not just the pleadings. The court notes, however, that the learned judge did not base her decision on either ground raised by JRF. Instead, she based her decision on her conclusion that the claim had no real or reasonable prospect of success. This, indeed, raises a live issue of whether she had applied the correct test. For the decision to be upheld on any ground not relied on by the learned judge in striking out the claim, a counter-notice of appeal must be filed. JRF is not yet at that stage. Therefore, the court cannot refuse permission to appeal because the learned judge may have been right to strike out the claim on another basis not explicitly

considered by her. Only on the substantive appeal will this court be in a position to affirm the learned judge's decision on other grounds not considered by her. An appeal would, therefore, be warranted.

[21] For all the foregoing reasons, we found it proper to grant Mr Foster's application for permission to appeal with some necessary consequential directions for the progression of the appeal, if one is filed pursuant to the permission granted.

SIMMONS JA

[22] I have read the reasons for the court's decision in the draft judgment of McDonald-Bishop JA. They accord with my reasons for concurring in the decision of the court, and there is nothing I can usefully add.

SHELLY-WILLIAMS JA (AG)

[23] I, too, have read the reasons for the decision of the court in the draft judgment of McDonald-Bishop JA. They reflect my reasons for agreeing with the court's decision, and I have nothing useful to add.