[2015] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 114/2012

MOTION NO 14/2014

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	HENLIN GIBSON HENLIN (A FIRM)	1st APPLICANT
AND	CALVIN GREEN	2nd APPLICANT
AND	LILIETH TURNQUEST	RESPONDENT

Paul Beswick and Ms Georgia Buckley instructed by Henlin Gibson Henlin for the applicants

Ms Jacqueline Cummings instructed by Turnquest Wilson and Franklin for the respondent

25 and 26 February 2015

ORAL JUDGMENT

MORRISON JA

[1] I have had the privilege of reading, in draft, the judgment prepared by my brother Brooks JA for delivery in this matter. I entirely agree with the reasons given by him for refusing this application for leave to appeal to Her Majesty in Council and there is nothing that I can usefully add.

DUKHARAN JA

[2] I too have read the draft judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[3] The applicants Henlin Gibson Henlin, a firm of attorneys-at-law, and Mr Calvin Green have sought leave to appeal to Her Majesty in Council from a decision of this court that was handed down on 24 October 2014. They are referred to collectively in this judgment as the applicants.

[4] In analysing the application the issues to be decided are whether the applicants are entitled as of right to obtain leave to appeal and, if not, whether the matters involved in the litigation are of such great general or public importance that they ought to be granted leave. It is first necessary, however, to give a background to the present application.

The background to the application

[5] The genesis of the claim from which the appeal arose is a sale transaction involving real property. Mr Green had entered into an agreement to sell the property to Wynlee Trading Company Limited. Henlin Gibson Henlin had carriage of the sale. Attorney-at-law, Ms Lilieth Turnquest, acted for Wynlee.

[6] The parties had a dispute in respect of the transaction. That dispute ended in litigation. Wynlee was the victor and had orders of costs in its favour. It was represented by other attorneys-at-law in that litigation. The total costs involved was

$2,471,648.44 and that sum attracted interest. Apparently, Mr Green did not satisfy the demand for the payment of the costs and the sum remained unpaid.

[7] The litigation being concluded, except for the payment of the costs, the sale transaction was continued and brought to the stage where Ms Turnquest gave an undertaking to pay $6,386,640.00 in exchange for certain documents certifying Wynlee's ownership of the property. That exchange would have brought the sale to completion. Such documents were sent to Ms Turnquest but she did not pay over the full sum representing her undertaking. Her reason for not paying the sums involved was that she had been ordered by the Supreme Court, by way of garnishee proceedings, to pay the sum of $2,471,648.44 to Wynlee. She sent a cheque for the balance, $3,914,991.56, to Henlin Gibson Henlin but they returned the cheque and promptly filed a fixed date claim form against her.

[8] The claim sought, through the supervisory jurisdiction of the Supreme Court over attorneys-at-law, a declaration that Ms Turnquest had breached a professional undertaking as an attorney-at-law. The claim also requested that Ms Turnquest be ordered to pay over the sum of $6,386,640.00 to the applicants.

[9] Shortly after the claim was filed garnishee proceedings were held leading to a final order for Ms Turnquest to pay over the sums representing the costs. It is not disputed that Mr Green was represented in those garnishee proceedings by Henlin Gibson Henlin. The existence of the undertaking was brought to the attention of the

learned presiding judge D O McIntosh J. He nonetheless made the garnishee order final.

[10] Six weeks after the applicants' claim was filed, Ms Turnquest filed an application for summary judgment, or in the alternative, sought an order that the claim be struck out as, among other things, being an abuse of the process of the court. She cited the garnishee proceedings in support of her application.

[11] Paulette Williams J heard and refused Ms Turnquest's application. The learned judge was of the view that Ms Turnquest had breached her professional undertaking as an attorney-at-law, and handed down a declaration to that effect. Williams J, however, refused to order that Ms Turnquest pay over to the applicants the sums that she had been ordered to pay pursuant to the garnishee order. The learned judge was of the view that to have done so would have been, "oppressive".

[12] Ms Turnquest appealed against this order and the applicants counter appealed seeking an order for the payment of the sums. The appeal was heard by Panton P, Dukharan JA and Mangatal JA (Ag). The panel ordered as follows:

> "1. Appeal allowed.
>
> 2. Judgment of Paulette Williams J set aside.
>
> 3. **The fixed date claim form is dismissed.**
>
> 4. Costs of the appeal and in the court below to the appellant, such costs to be taxed if not agreed.
>
> 5. Counter notice of appeal dismissed.
>
> 6. No order as to costs." (Emphasis supplied)

The question of whether the applicants' should have leave to appeal to apply to Her Majesty in Council, will now be assessed.

The appeal to Her Majesty in Council

[13] An application for permission to appeal to Her Majesty in Council must satisfy one of the provisions of section 110 of the Constitution. Those provisions state:

> "110.-(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **as of right** in the following cases-
>
> (a) Where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, **final decisions in any civil proceedings**;
>
> (b) final decisions in proceedings for dissolution or nullity of marriage;
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
>
> (d) such other cases as may be prescribed by Parliament.
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **with the leave of the Court of Appeal** in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of **its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council**, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament." (Emphasis supplied)

It will be observed from a reading of the section that subsection (1) deals with appeals as of right while subsection (2) deals with appeals with the permission of this court in specific circumstances. The import and application of each of these subsections will be dealt with in turn.

The appeal as of right

[14] Both Mr Beswick, for the applicants, and Ms Cummings, for Ms Turnquest, submitted that there was no appeal as of right pursuant to section 110(1). Mr Beswick conceded, with some diffidence, that as this was a decision arising from an application for summary judgment it did not meet the requirement that the sum involved was in excess of $1,000.00 and that the matter arose from a final decision in civil proceedings. Learned counsel, submitted that he was constrained to the concession by virtue of the decision of this court in **John Ledgister and Others v Bank of Nova Scotia Jamaica Limited** [2014] JMCA App 1. Mr Beswick, having made that concession, Ms Cummings did not go into any detail in her submissions in respect of the appeal as of right.

[15] The major principle in **Ledgister** for these purposes is that to qualify under section 110(1), "the value of the property in dispute is to be considered cumulatively with the decision being a final decision in civil proceedings. In other words...the property value requirement had to be satisfied **and** the decision had to be a final decision in civil proceedings" (paragraph [15] of **Ledgister**).

[16] It was also reiterated in **Ledgister** that the authorities stipulate that a ruling on an application for summary judgment did not qualify as a "final decision in civil proceedings". This is because the question of whether a matter was interlocutory or final, depended on the application that was placed before the court at first instance. An application for summary judgment was therefore considered an interlocutory application, despite the fact that it had the potential of bringing a claim to an end.

[17] Applying those principles to the present case, it does seem on the surface that, although the value requirement has been met, the requirement of the matter to be a "final decision in civil proceedings" had not been met. This is because Ms Turnquest's application was for summary judgment and therefore was deemed, from the established authorities, an interlocutory application. There is, however, some cause for pause, as to whether this was a decision based on an application for summary judgment.

[18] As has been mentioned above, Ms Turnquest applied for summary judgment or that the claim be struck out. Although Williams J implicitly refused those applications, she went further. After hearing the parties, she ruled that Ms Turnquest had breached her undertaking "from before she was served with the [garnishee] orders" (paragraph 77 of the judgment). She then went on to make a declaration along the lines of the relief sought by the applicants in the fixed date claim form.

[19] It would seem, therefore, that Williams J did not just rule on the application for summary judgment but ruled on the fixed date claim. It must be noted that this was

not the applicants' application for summary judgment; it was Ms Turnquest's. Williams J's ruling went beyond the ambit of the application. It completely dealt with the claim in dispute and brought the claim to an end. Based on that ruling, this would have been "a final decision in civil proceedings". If the ruling were to stand, the value requirement having been already met, this would be a case that satisfies the requirement of section 110(1).

[20] The ruling in this court did, however, restore the predominance of Ms Turnquest's application. The order included the following term "[t]he fixed date claim form is dismissed". This was the result that Ms Turnquest had sought. The order of this court was, therefore, an order in interlocutory proceedings. The requirements of section 110(1) would not have been satisfied. The applicants have no appeal as of right to Her Majesty in Council.

The appeal by way of permission

[21] The second issue to be assessed is whether the issues raised by the claim are of such public and general importance that they qualify for permission under section 110(2). In this vein, Mr Beswick submitted that the matter of undertakings of attorneys-at-law was critical to conveyancing transactions in this country. He said that the question that arose is whether a court should make an order which contradicts or undermines an undertaking by an attorney-at-law. He pointed to evidence that the decision of this court in this case had been circulated to over 350 attorneys-at-law. He submitted that its impact would redound negatively in the profession. He argued that

it would limit transactions that would otherwise have taken place. Accordingly, he argued, the matter is of great general or public importance.

[22] Ms Cummings, for her part, submitted that the claim had nothing to do with undertakings in conveyancing matters. Learned counsel argued that the issue arising from the ruling of this court is whether the summary judgment was properly given. She submitted that this court would not grant leave to appeal to Her Majesty in Council, just to test the waters to see if the Privy Council would agree with it.

[23] Learned counsel pointed to the fact that there was no injury to either Henlin Gibson Henlin or to Mr Green by Ms Turnquest making the payment under the garnishee order. All that had occurred, she submitted, was that Mr Green had had taken from him money that he should have already paid to Wynlee. She argued that Williams J had recognised this in her judgment when the learned judge refused the application for Ms Turnquest to pay the sum of $2,471,648.44 to the applicants. Learned counsel summarised the result as one of, "no harm, no foul".

[24] Ms Cummings submitted that the issue was not of public or general importance and, therefore, did not qualify under section 110(2) of the Constitution. She urged the court to refuse the motion. Learned counsel relied on the cases of **Georgette Scott v The General Legal Council (Ex Parte Errol Cunningham)** SCCA No 118/2008 Motion No 15/2009 (delivered 18 December 2009), **Stewart v Sloley and Others** [2013] JMCA App 4 and **Michael Levy v Attorney General and Another** [2013] JMCA App 11, in support of her submissions.

[25] Where there is no entitlement to an appeal as of right, an applicant must satisfy this court that it qualifies under section 110(2). Guidance as to the standard set by this section may be found in the judgment of Morrison JA in **Michael Levy** at paragraphs [27] through [35].

[26] In **Michael Levy**, Morrison JA approved the principle that the phrase, "'general or public importance', must perforce connote importance through the eyes of the law" (paragraph [34]). The learned judge of appeal pointed out that whereas an issue may have "critical importance and concern to [an applicant] personally", and may be even of importance to others, it may not even come "close to satisfying the criterion of general or public importance from a legal standpoint" (see paragraph [35]).

[27] In **Georgette Scott**, Phillips JA adopted the principle that for a question to satisfy the requirements of section 110(2), it should be "one the decision of which would guide and bind others in their commercial and domestic relations" (pages 9-10 of the judgment).

[28] The facts in this case do not raise the issues that Mr Beswick addresses. The panel that heard Ms Turnquest's appeal analysed whether:

a. performance of the undertaking had been properly called upon; and,

b. the applicants' fixed date claim was an abuse of the process of the court.

The question of the impact of court orders on undertakings did not arise before Williams J or before this court on the appeal from the learned judge's order. It is true that, at paragraph [23] of his judgment, Panton P stated that the service of the provisional orders on Ms Turnquest prevented the honouring of her undertaking. The learned President said in this regard:

> "These orders commanded [Ms Turnquest] not to dispose of monies in her hands, lest she be held liable in damages. It would have been most unwise for her to have disobeyed that judicial injunction. Consequently, obligations connected to the undertaking had to be regarded as having been suspended until the court made a determination as to the fate of the provisional attachment of debt orders."

That statement is, however, not a new proposition of law. Every attorney-at-law is aware of the principle that orders of the court must be obeyed until they are set aside.

[29] Despite Mr Beswick's attractive arguments on the point, it is Ms Cummings' submissions which are to be preferred. She is correct in saying that the issue concerning the effect of orders on undertakings does not arise from the decision of Williams J but rather from the decision of D O McIntosh J finalising the garnishee order. It is understood that that order has also been appealed and is due to be heard shortly by this court.

[30] In the circumstances, it must be said that this claim does not involve an issue which extends beyond the parties in this case. It is not one of great general or public importance or importance through the eyes of the law. Section 110(2), having not been satisfied, the application for permission to appeal must be refused.

Conclusion

[31] Based on all the above, it must be found that the applicants have failed to satisfy the court that the issues raised by the instant case qualify under either subsection of section 110 of the Constitution. As was properly conceded by Mr Beswick, the application does not satisfy the requirements of being an appeal from a final decision in civil proceedings. It must also be said that it does not involve any issue of great general or public importance. It, therefore, does not warrant a reference to Her Majesty in Council. The application for permission to appeal to Her Majesty in Council must, therefore, fail.

MORRISON JA

ORDER:

(1) The application for leave to appeal to Her Majesty in Council is refused;

(2) Costs to the respondent to be taxed if not agreed.