[2010] JMCA App 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 25/2010

APPLICATION NO. 116/2010

BEFORE: THE HON MR JUSTICE HARRISON JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPLICANT**
AND	**ROSE MARIE SAMUELS**	**RESPONDENT**

Patrick Foster QC and Miss Tavia Dunn instructed by Nunes Scholefield Deleon & Co. for the applicant

Sean Kinghorn and Ms Danielle Archer instructed by Kinghorn & Kinghorn for the respondent

1 July and 26 November 2010

HARRISON JA

[1] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and the conclusion arrived at. I have nothing further to add.

HARRIS JA

[2] I too have read in draft the judgment of Morrison JA. I agree with his reasoning and conclusion. There is nothing useful which I can add.

MORRISON JA

The application

[3] By notice of application for court orders dated 25 June 2010, the applicant seeks the following orders:

> "1. (a) The Notice of Appeal herein filed on March 4, 2010 be permitted to stand.
>
> **OR ALTERNATIVELY**
>
> (b) That the time for filing the appeal be extended to March 4, 2010 and that the Notice of Appeal filed on March 4, 2010 be permitted to stand.
>
> 2. That the time for filing of the Skeleton Submissions and Record of Appeal be extended to fourteen (14) days from the date hereof."

[4] The application is supported by an affidavit sworn to by Miss Tavia Dunn, an attorney-at law and a member of the firm of Nunes, Scholefield, Deleon & Co, the attorneys-at-law on the record for the applicant.

The background

[5] This application arises out of a suit filed in the Supreme Court by the respondent against the applicant to recover damages for trespass, as a result of the presence on the respondent's property of electric poles and wires belonging to the applicant. The poles were erected by the applicant pursuant to an agreement entered into between it and the respondent's predecessor in title.

The applicant and the respondent each filed an application for summary judgment against the other, pursuant to rule 15.2 of the Civil Procedure Rules 2002 ("the CPR") and the applications were heard together by Williams J (Ag) on 15 May 2009, when judgment was reserved. On 20 January 2010, in a written judgment dated 19 January 2010, the judge dismissed the applicant's application, but granted the respondent's. Summary judgment was accordingly entered in respect of liability in favour of the respondent against the applicant, on the ground that the applicant had no reasonable prospect of successfully defending the respondent's claim. The judge also made orders granting permission to the respondent to proceed to assessment of damages and to the applicant to appeal against his decision.

[6] In due course, on 4 March 2010, the applicant filed notice of appeal challenging the judge's decision, on factual as well as legal grounds. On 20 April 2010, the respondent filed an application in this court for an order that the appeal be struck out on the ground that it was filed out of time. Notice of this application was served on the applicant on 5 May 2010 and it is clear that it is this application which led the applicant to file the application for an extension of time which is now before the court.

[7] Mr Foster QC for the applicant, put the argument in support of the application in two ways. Firstly, it was contended that an order for summary judgment in proceedings in which the defendant appears and offers a defence is

a final judgment on the merits. This is so, it was submitted, even if the order was made on an interlocutory application, or directs further enquiries. In the instant case, what took place before Williams J (Ag) was the first part of a final hearing, which would be completed in due course by an assessment of damages on a subsequent occasion. On this basis, it was submitted that the applicant had an unfettered right of appeal from Williams J (Ag)'s order, which is what it exercised when it filed notice of appeal within the time limited by rule 1.11(1)(c) of the Court of Appeal Rules ("the CAR"), that is to say, 42 days of the date on which the judgment of the court below was served.

[8] But in the event that this submission does not find favour with the court and it is thought that it is in fact an appeal from an interlocutory order, which ought to have been filed within 14 days of the decision appealed against, then this is, Mr Foster submitted in the alternative, a fit case for the exercise by the court of the discretion to extend time given to it by rule 1.7 of the CAR. In this regard, Mr Foster referred us to a number of authorities, to some of which I will also refer briefly in due course.

[9] In its very helpful written submissions, the respondent opposed the application on three grounds, viz: (i) that it was not properly before the court; (ii) that it was short–served; and (iii) that it did not satisfy the principles for the granting of an extension of time within which to file an appeal and the record of appeal. The first two of these three grounds have to do with the process by

which the applicant's application came to be listed for hearing at the same time as the respondent's application to strike out the appeal. Although these grounds were argued with some vigour in the respondent's written submissions, they were to a large extent overtaken by events at the hearing of the application and I think it is fair to say that in his oral submissions before us, Mr Kinghorn concentrated his efforts on the third ground.

[10] Mr Kinghorn submitted that the length of time that the applicant had taken to file its application was inordinate and that no or no satisfactory reasons had been advanced for that delay. It was also submitted that the judge's order was clearly an interlocutory one, but that on whatever basis time was calculated in this instance, the appeal was clearly out of time. Finally, Mr Kinghorn contended strongly that, in any event, the appeal had no reasonable prospect of success on the merits, relying, as had Mr Foster, on a number of authorities, to some of which I will also come in due course.

The rules

[11] Rule 1.11 of the CAR sets out the times for appealing to this court from various orders made in the Supreme Court, as follows:

> "1.11 (1) The notice of appeal must be filed at the registry and served in accordance with rule 1.15 –
>
> (a) in the case of a procedural appeal, within 7 days of the date the decision appealed against was made;

(b) where permission is required, within 14 days of the date when such permission was granted; or

(c) in the case of any other appeal within 42 days of the date when the order or judgment appealed against was served on the appellant.

(2) The court below may extend the times set out in paragraph (1)."

Was the judge's order interlocutory or final?

[12] It is common ground that if the order granting summary judgment to the respondent was interlocutory, then the appeal was required by the rules to be filed within 14 days of the date of the order giving permission to appeal (CAR, rule 1.11 (1)(b)). If, on the other hand, it was a final order, the time for appealing would be within 42 days of the date when the order was served on the applicant (CAR, rule 1.1 (1)(c)).

[13] The test of whether an order or judgment is interlocutory or final was for a long time not fully settled. The two schools of thought around which the debate revolved, the "application" test and the "order" test, are best explained by Lord Denning MR in ***Salter Rex & Co v Ghosh*** [1971] 2 All ER 865:

> "There is a note in the Supreme Court Practice 1970 under RSC Ord 59,r4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In ***Standard Discount Co v La Grange*** and ***Salaman v Warner,*** Lord Esher MR said that the test was the nature of the application to the court and not the

> nature of the order which the court eventually made. But in ***Bozson v Altrincham Urban District Council***, the court said that the test was the nature of the order as made. Lord Alverstone CJ said that the test is: Does the judgment or order, as made, finally dispose of the rights of the parties? Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action or dismissing it for want of prosecution – every such order is regarded as interlocutory: see ***Hunt v Allied Bakeries Ltd***. So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory. It was so held in an unreported case, ***Anglo-Auto Finance (Commercial) Ltd v Robert Dick,*** and we should follow it today."

[14] In that case, the court therefore applied the "application" test and treated the appeal against a refusal to grant a new trial as interlocutory. The basis for this was that, had the application for a new trial been granted, the order would clearly have been interlocutory, so where it was refused, it was equally to be regarded as interlocutory.

[15] In the later case of ***White v Brunton*** [1984] 2 All ER 606, 608, Sir John Donaldson MR, after a review of some of the earlier authorities such as ***Salter Rex & Co v Ghosh,*** observed that the court "is now clearly committed to the

application approach as a general rule...". However, the learned Master of the Rolls did go on to distinguish cases in which there was a "split trial" as for instance where there was an order that all questions of liability should be tried before and separately from any issue as to damages. It was held that in such cases, an appeal without leave could be taken by either party against an order made at the end of one part, provided that "he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing" (per Sir John Donaldson MR at page 808). The basis of this distinction is that in such cases, what has in effect taken place is in reality, a single hearing split into two parts.

[16] In ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (SCCA No. 54/1997, judgment delivered 18 December 1998), this court (by a majority) endorsed the application approach. And again, in ***Dalton Yap v RBTT Bank Jamaica Ltd*** (SCCA No. 58/1998, judgment delivered 31 January 2002), this court endorsed and applied the application approach. However, Downer, JA in a judgment with which the other two members of the court (Walker JA and Smith JA (Ag)) agreed, following ***White v Brunton*** in this regard, also distinguished cases in which there was a split hearing, with the comment (at page 14) that "The 'order approach'...has been revived in relation to split hearings" (see also ***Olasemo v Barnett Ltd*** (1995) 51 WIR 191, 197, where Downer JA adopted the 'split' hearing concept in the context of a discussion whether a decision was final or interlocutory for the purposes of determining

whether an appeal from that decision to the Privy Council was available as of right).

[17] Encouraged by these authorities, Mr Foster submitted that what had happened in the instant case was that the hearing before Williams J (Ag) had been the first part of a final hearing split into two parts, viz: the summary determination of liability and the subsequent assessment of damages as ordered by the judge. As a result the applicant had, in the same way that it would have had if there was a single trial on both liability and damages, an unfettered right of appeal.

[18] Mr Foster was even further encouraged by the following statement made by Lord Walker in the course of delivering the judgment of the Board in ***Vehicles & Supplies Ltd & Vehicles and Supplies (Industrial Division) Ltd v Financial Institutions Services Ltd*** [2005] UKPC 24, para. 22:

> "No estoppel *per rem judicatam* arises from an interlocutory order, or an order dismissing an action for want of jurisdiction. A judgment in default of appearance, or in default of defence, is also lacking in finality so long as it is liable to be set aside. But summary judgment in proceedings in which a defendant appears and offers a defence, but the defence is held to be wholly defective, is a final judgment on the merits. These principles are fully explained and documented in chapters 2, 4, *5* and 6 of the third (1996) edition of Spencer Bower Turner and Handley, Res Judicata."

[19] Following on from this, Mr Foster also drew to our attention a decision of Rawlins JA (as he then was) in ***JN Marie & Sons Ltd and Another v Jamie St. Louis*** (Civil Appeal No 14 of 2006, Eastern Caribbean Court of Appeal (St Lucia), judgment delivered 20 February 2007). In that case the learned judge distinguished ***Vehicles & Supplies*** on the ground that in the case before him, unlike in ***Vehicles & Supplies,*** summary judgment had been entered as a result of a party's non-compliance with case management orders and the order was therefore not a final order and Lord Walker's statement in ***Vehicles & Supplies*** was, as a result, not applicable to the case before him.

[20] But it is also of interest to note that in ***JN Marie & Sons Ltd,*** Rawlins JA went on to make the following observations (para. 21):

> "I venture to state, further, that even if the order of 3 May 2006 came after a substantive hearing on the application for summary judgment, it would not have been a final order under the application test. This is because had the appellants prevailed on that application, instead of the respondent, and the application was dismissed, the case would not have been determined since the court would not have entered judgment for the appellants. The case would have continued to trial. It follows that the order of 3 May 2006 would not have been a final order, whether it was made because of non-compliance with case management orders or because summary judgment was entered after a hearing on the merits of the application."

[21] By this, I understand Rawlins JA to be suggesting that, to the extent that the application test had previously been accepted in that jurisdiction as the true test of whether an order was final or interlocutory for the purposes of determining whether a right to appeal was unfettered or was subject to leave to appeal, that remained the case, irrespective of what was said in ***Vehicles & Supplies.*** If I have interpreted the learned judge's observations correctly, then I entirely agree with him. Lord Walker's statement in ***Vehicles & Supplies*** was made, it seems to me, solely in the context of deciding what was a final order for the purpose of the applicability of the principle of *estoppel per rem judicatam,* which was the issue under consideration in ***Vehicles & Supplies.*** I accordingly cannot take Lord Walker's statement to have a broader reach than is indicated by that context thereby laying down that for all purposes, including the determination whether leave to appeal is required, an order for summary judgment made after a hearing in which the defendant appears and offers a defence is to be treated as a final judgment. Indeed, if that is the proper construction of Lord Walker's statement, it would then have, purely by a side-wind, so to speak, brought about a significant qualification of long established principles.

[22] Thus in ***Salter Rex & Co v Ghosh*** (at page 866) Lord Denning MR had observed that an appeal from a judgment under RSC Ord 14, which was the old summary judgment provision, "has always been regarded as interlocutory". To similar effect is the statement to be found in Halsbury's Laws of England, 3rd

edn, Vol. 26, para. 504 that, "In general, orders in the nature of summary judgment where there has been no trial of the issues are interlocutory."

[23] Summary judgment in fact seems to me to provide a classic example of the operation of the application principle, since if it is refused, the judge's order would clearly be interlocutory and so, equally, where it is granted, the judge's order remains interlocutory. Further, I do not think that the analogy to a split hearing, for which Mr Foster contends, can apply to modify the usual result in the instant case, for the reason that a summary judgment application is a discrete procedure invoked at the option of the parties, by virtue of the special procedure laid down in the rules, while a split hearing or trial takes place where pursuant to an order of the court, the trial of the action is divided, for convenience or for some other reason, into two separate phases, liability and damages, which together comprise the trial itself.

[24] In the light of the foregoing, I have therefore come to the view that the order made by Williams J (Ag) granting summary judgment to the respondent in this case was clearly interlocutory. For what it is worth, it is also clear that, as Mr Kinghorn pointed out, this was also the view of the judge and counsel when the order for summary judgment was made, as the judge at that point then proceeded to grant leave to appeal, with the result that the appeal itself should have been filed within 14 days of that date. It follows from this that the appeal filed on 4 March 2010 was out of time by two months and it is therefore

necessary to consider whether the applicant has made good its alternative application for an extension of time.

Extension of time

[25] The applicant's reasons for failing to file the appeal in time are set out in Miss Dunn's affidavit, in which, after referring to the judgment granting summary judgment against the applicant, she states the following:

> "6. That we advised the Appellant/Defendant on the legal implications of the judgment and were instructed to file an appeal. Accordingly, a Notice of Appeal was filed within six (6) weeks of his Lordship's Order on the 4 March 2010. That I exhibit hereto marked **"TD2"** for identification a copy of the Notice of Appeal.
>
> 7. That I verily believe that the judgment of Justice Williams (Ag.) was a final one, as his Lordship heard full submissions by the attorneys for both parties on the various legal and factual issues raised in both Notices of Application and he made his Order that the Respondent/Claimant was entitled to summary judgment on liability and therefore the Respondent/Claimant could proceed to an assessment of damages.
>
> 8. That consistent with this belief [that] his Lordship's judgment was final on liability, the Notice of Appeal was filed within six (6) weeks from the date of the Order, which would have been within the prescribed time for the filing of an appeal against a final order.
>
> 9. That on being served with the Respondent/Claimant's Notice of Application for Court Orders filed on April 20, 2010 and after conducting further legal research, it would appear that a summary judgment is treated as a final or interlocutory Order and depending on how it is treated, that would determine whether an

appeal should be filed within fourteen (14) days, if it is regarded as an interlocutory order or within six (6) weeks, if it is a final order.

10. That the Skeleton Submissions and Record of Appeal should have been filed with the Notice of Appeal as is required by the Court of Appeal Rules, irrespective of whether it is an appeal from an interlocutory or final order and through inadvertance [sic] and oversight by counsel, it was not done.

11. I respectfully request that this Honourable Court grant an extension of time to do so, if necessary, as I verily believe that the delay herein is not inordinate and/or inexcusable and has not raised any prejudice to the Respondent/ Claimant."

[26] Although, hardly surprisingly in the circumstances, the actual content of Miss Dunn's affidavit was not challenged by the respondent, Mr Kinghorn was highly critical of it, as can be seen from the following paragraph in the written submissions filed on behalf of the respondent:

> ***"The reason for the delay***
>
> It is submitted that the reason given by the Appellant's Counsel for the delay is unfortunate, regrettable and ought not to be encouraged by this Court. In fact, the reason given by the Appellant betrays a shocking boldness that is truly unprecedented. For it seems to us that it cannot be sufficient, or proper, for any Counsel to simply advance before the Court incompetence, ignorance and inadvertence in complying with the Rules, to move the Court to exercise its discretion in its favour. A perusal of the Affidavit of Tavia Dunn in this regard is instructive."

[27] Rule 1.7(2) of the CAR empowers the court to "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court

even if the application for an extension is made after the time for compliance has passed", and on this point Mr Foster referred again to ***Salter Rex & Co v Ghosh***, where the applicant's lawyers admitted that they had made precisely the same error confessed to by Miss Dunn in her affidavit, which is that they thought that the order in that case was a final order and that they had six weeks in which to appeal. This is how Lord Denning MR, with whom the other judges agreed, disposed of the application to extend time (at page 866):

> "So [the applicant] is out of time. His counsel admitted that it was his, counsel's mistake, and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. **We never like a litigant to suffer by the mistake of his lawyers.** I can see no merit in [the applicant's] case. If we extended his time it would only mean that he was throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application." (emphasis supplied)

[28] Mr Kinghorn also referred us to a number of cases on the subject of extension of time within which to file notice of appeal, but I think that it is only necessary to refer to ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (Motion No. 12/1999, judgment delivered 6 December 1999) in which all the modern authorities are conveniently gathered. This is how Panton JA (as he then was) stated the legal position:

> "The legal position may therefore be summarised thus:

(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.

(2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.

(3) In exercising its discretion, the Court will consider –

(i) the length of the delay;

(ii) the reasons for the delay;

(iii) whether there is an arguable case for an appeal and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[29] It seems to me to be clear from this, if I may say so with respect, perfectly accurate statement of the legal position that, among other things, the question of the merits of the proposed appeal is an important one. From a reading of the judgment of Williams J (Ag) and the material placed before us in the written and oral submissions of both the applicant and the respondent, I am quite unable to say that there is no merit in the proposed appeal in this matter. While this is obviously not a conclusive factor, it would certainly appear from the fact that the judge granted leave to appeal his judgment that he did not find the arguments to the contrary to be unarguable.

[30] As far as the other factors that should inform the court's exercise of its discretion in this matter are concerned, the length of the delay in this case (one month) cannot be said by any measure to be inordinate and, as regards the reasons given for the delay, I find it difficult to see why, notwithstanding Mr Kinghorn's stinging criticism of the reasons set out in Miss Dunn's affidavit, Lord Denning's comment in ***Salter Rex & Co v Ghosh*** ("We never like a litigant to suffer by the mistake of his lawyers") should not be applied in this case, particularly as absolutely no prejudice has been shown or even alleged by the respondent to have resulted from the delay.

Disposal of the application

[31] I would accordingly grant the applicant's application on the alternative basis, by extending the time for the filing of the appeal to 4 March 2010 and order that the notice of appeal filed on that date should stand. I would also extend the time for the filing of the record of appeal to a date 14 days from the date of this judgment. Finally on the question of costs, I would order that the costs of this application should be costs in the cause.

HARRISON JA

ORDER

[32] It is hereby ordered that:

(1) the time for filing the appeal is extended to 4 March 2010 and that the notice of appeal filed on that date is to stand.

(2) the time for filing of the skeleton submissions and record of appeal be extended to fourteen (14) days from the date hereof.