JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 18 of 1992

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

| | | |
|---|---|---|
| BETWEEN | S. IAN JONES | |
| AND | ELEANOR JONES | DEFENDANTS/APPELLANTS |
| AND | CENTURY NATIONAL MERCHANT BANK & TRUST CO. LTD. | PLAINTIFF / RESPONDENT |

D. Muirhead, Q.C. and L. Smith for appellants

D. Goffe, Q.C. and M. Palmer for respondents

November 17, 1992 and February 8, 1993

WRIGHT, J.A.:

On November 17, 1992, we dismissed, with costs to the respondents to be agreed or taxed, the Appellants' Summons dated October 22, 1992, seeking leave to extend the time within which to file the Record and for an Order that the appellants have leave to file the Record within twenty-one days from the date of the grant of such leave. We thereupon granted, in terms, with costs to be agreed or taxed, the Respondent's Notice of Motion dated October 14, 1992, for an Order:

> "That the Appellants' appeal be dismissed for want of prosecution and that the appellants do pay the costs of this application and costs of the appeal to be taxed, if not agreed."

The reasons for our decisions are set out hereunder.

The judgment against which the appeal was brought was delivered by Reckord, J. on January 31, 1992, whereby it was ordered that:

"1. Leave is hereby granted for the plaintiff to enter final judgment against the defendants for such an amount as should be found due on the taking of an account by the Registrar together with the interest thereon up to the date of judgment.

2. Costs to the plaintiff to be agreed or taxed."

Purely as a matter of interest the grounds of appeal which were served and filed on February 14, 1992, are set out as follows:

"1. The Learned Trial Judge erred in law in not granting leave to the Defendants/Appellants to defend the action in that his finding that there is no basis for the Defendants' claim that the note for the larger sum was negotiated on behalf of one of the Defendants' companies could only have been arrived at by a determination of the very issue which was triable.

2. The Learned Judge erred in law and in fact in finding that the Plaintiff/Respondent had filled in the material particulars strictly in accordance with the authority given, in that for the Learned Judge so to find required the determination of a triable issue, and further, in that the said determination is wholly against the weight of the evidence presented before him.

3. The Learned Judge erred in law in holding that the Defendants/Appellants were estopped from denying liability upon the promissory notes.

4. The Learned Judge erred in fact in not having found that there was any triable issue and in finding that there was no defence to the Plaintiff/Respondent's action, in that that finding is wholly against the weight of the evidence."

The plaintiff's claim as endorsed on the Writ is as follows:

"1. The defendants made two (2) joint and several promissory notes dated March 7, 1989, both payable to the order of the plaintiff on demand.

"2. One of the promissory notes was for Six Million Four Hundred and Fifty Seven Thousand Dollars ($6,457,000.00) with interest at the rate of 19 percent per annum as well after as before maturity.

3. The other promissory note was for Four Million Six Hundred and Thirty Thousand Dollars ($4,630,000.00) with interest at the rate of 19 percent per annum as well after as before maturity.

4. On November 13, 1990, at the Plaintiff's place of business at 14-20 Port Royal Street, Kingston, the plaintiff presented the said notes to the defendant for payment but they were dishonoured.

5. The plaintiff claims against the defendants jointly and against each of them severally the principal sum of Eleven Million and Eighty Seven Thousand Dollars ($11,087,000.00), together with interest thereon at a rate of 19 percent per annum from March 7, 1989 until payment or judgment. As at November 15, 1990, such interest amounted to $3,572,447.10."

The affidavit of Yvette Sibble, Legal Officer for the respondent, dated September 30, 1992, in support of the application to dismiss the appeal states:

"1. My true place of abode and postal address are at 5 Lipscombe Avenue, Kingston 9 in the parish of Saint Andrew and I am an Attorney-at-law and Legal Officer for the Respondent Company. I am duly authorised to swear this Affidavit on its behalf.

2. I am advised by my Attorneys-at-Law and verily believe that the Appellants filed their Notice and Grounds of Appeal on the 14th February, 1992 and that the Record was settled on the 23rd April, 1992. The Record of Appeal should have been filed by the 1st April, 1992, but to date it has not been filed and no steps have been taken to obtain an extension of time for filing it.

3. I am further advised by my Attorneys-at-law and verily believe that the Appellants have failed to comply with the requirements of paragraph (1) Rule 30 of the Rules

> "of the Court of Appeal and that under Rule 32(1) of the said rules the Court may dismiss the Appeal. In the circumstances, I humbly pray that this Honourable Court will see fit to grant an Order in terms of the Summons filed herein."

It is, therefore, beyond a peradventure that but for this application to dismiss which was returnable on October 26 the appeal might still have lain dormant. Spurred into action the appellants' application returnable on November 10, 1992, was filed supported only by an affidavit by Lowell Smith, the appellants' attorney-at-law, the inadequacy of which is obvious on the merest reading thereof. It states:

> "2. That on the 31st day of January, 1992, on the hearing of the Summons for Summary Judgment taken out by the Plaintiff/Respondent herein, leave was given to the Plaintiff to enter judgment against the Defendants, from which decision an appeal was filed on the 14th day of February, 1992.
>
> 3. That the Appellants' Attorneys-at-law were summoned by the Registrar of this Honourable Court to settle the Record on a date after the time limited for filing the same, viz. the 23rd day of April, 1992.
>
> 4. That up to the 30th day of June, the Defendants/Appellants were represented by Messrs. Stephenson, Smith, Hemming & Green, Attorneys-at-law, but the said firm was dissolved on that date.
>
> 5. That since the latter part of 1991, the First-named Appellant (who had personal knowledge of the matters with which this litigation is concerned as well as direct conduct of the litigation on behalf of both Appellants) has been away from the Island on business, and subsequent to the time of the filing of the appeal and up to recently, he had not been in communication with his Attorneys-at-law, by reason of which it was not certain whether or not he still wished to proceed with the appeal.
>
> 6. That as a result of efforts on the part of the second-named Appellant, I have already been put in a

"position to proceed with the matter on their behalf.

7. That I do verily believe that the Record can and will be ready for filing within 21 days if leave is given to file the same out of time.

8. That I further believe that the Appellants have a good appeal on the merits.

9. That in the premises, I hereby ask that this Honourable Court grant the application prayed in the Summons for leave and extension of time herein."

On the disclosure made in paragraph 5 only charity would prevent Mr. Smith from being labelled an intermoddler seeing he had no clear indication of the appellants' intention.

The application to dismiss the appeal for want of prosecution came before the Court on November 2 when the Court was advised of the application which had been made and which was returnable on November 10. On Mr. Smith's application, an adjournment was granted with costs for fourteen days and on November 10 Wolfe, J. adjourned that application to be heard along with the application to dismiss. In the meantime an affidavit by Ian Jones dated November 6, 1992, was filed and inasmuch as the burden is on him to justify the delay and show merit in the appeal it is important to set out the relevant portions of the affidavit:

"2. That I have been informed by my Attorney-at-Law and do verily believe that the appeal herein was filed on my behalf on the 14th day of February, 1992; that the Record was settled on the 23rd day of April, 1992; and that the time for filing the Record has expired.

3. That I left Jamaica in August, 1991 for the United States of America where I have been establishing a financial consultancy company, and I have not since then had the opportunity to return home.

4. That between September, 1991 and February, 1992 I maintained regular contact with my Attorneys-at-Law, who at the time were Messrs. Stephenson, Smith, Homming & Green, and I kept abreast of the proceedings in regard to the Plaintiff/Respondent's application for summary judgment.

5. That on the very day of the decision of the learned judge in chambers granting leave to the Plaintiff to enter final judgment, I discussed with the Attorney-at-Law having conduct of the matter the merits of an appeal and gave him verbal instructions, which I shortly afterwards confirmed in writing, to proceed with the filing of Notice of Appeal.

6. That, regrettably, I was not able thereafter to maintain my contact with my Attorneys-at-Law by reason of the intense personal attention which was required of me at critical stages of my clients' business.

7. That I was then involved in negotiations concerning various international government loans to countries in Africa and the Middle East, as well as private sector loans in the oil industry involving companies in Canada, Germany, the Bahamas and the United States of America.

8. That these negotiations demanded a great deal of time in attendance at numerous meetings, for preparation and design of programs and for frequent travel throughout North America.

9. That during the time after February, 1992, I experienced delays and setbacks in these negotiations, which necessitated giving all my attention to efforts to bring about the success of the negotiations, and engaged me in work seven days per week, often in excess of 16 hours per day.

10. That my failure to communicate with my Attorneys-at-Law was not due in any way to a lack of intention to prosecute the appeal but to the constant pressure of work.

11. That by October, 1992, having completed some of the matters to which I had been attending, the pressure of work eased somewhat, and I have once again been able to give proper attention to my personal affairs.

12. That realizing then the delay in proceeding with this appeal, I issued the necessary instructions and made the necessary arrangements for the matter to be continued by my present Attorney-at-Law consequent upon the dissolution of the firm, Stephenson, Smith, Hemming & Green.

13. That I have been assured by my Attorney-at-Law and do verily believe that the Record can and will be ready for filing within 21 days if leave is given to file the same out of time.

"14. That I have been advised and do verily believe further that the Appellants have a good appeal on the merits and that this Honourable Court would find that there are triable issues sufficient to entitle the Appellants to have the action proceed to trial.

15. That among the issues which my Attorney-at-Law has advised me and which I believe need to be tried are the following:

(i) the question of whether or not one of the promissory notes on which the Plaintiff/Respondent brought its action was the note of National Limestone and Quarries Limited and not the personal note of the Defendants/Appellants.

(ii) whether or not the Plaintiff/Respondent filled in the material particulars in the said promissory notes strictly in accordance with the authority given to the Plaintiff/Respondent.

(iii) whether or not the Defendants/Appellants are estopped from denying liability upon the said promissory notes.

(iv) one of the said promissory notes being the note of the above-mentioned Company, whether or not the remaining liability of the Defendants/Appellants was extinguished by the payments made by the Appellants.

(v) whether or not the Plaintiff/Respondent applied the correct rates of interest in arriving at the balances claimed.

(vi) whether or not the Plaintiff/Respondent gave credit for the payments made by the Defendants/Appellants at the times when credit should have been given or at all.

16. That in the premises, I hereby ask that this Honourable Court grant the application on behalf of the

> "Appellants for leave to apply to extend the time for filing the Record herein and deny the Respondent's motion to dismiss the appeal for want of prosecution."

Once an appeal has been filed the obligations on an appellant which are set out in Rule 30(1) of the Court of Appeal Rules, 1962, if ignored, will attract the sanctions of Rule 32(1). Rule 30(1) states:

> "30.(1) The appellant shall within six weeks from the date when the appeal is brought or within such extended time as may be granted by the Court or by a Judge thereof, file -
>
> (a) the Record, together with four copies thereof for the use of the Judges and the Registrar; and
>
> (b) an affidavit of service of the notice of appeal in Form 5 in Appendix A, upon all parties upon whom service is required by paragraph (4) of rule 12, or, where service has been effected upon the solicitor for any such party, an acknowledgment of such service."

Rule 32(1) states:

> "32.(1) If the appellant has failed to comply with the requirements of paragraphs (1) of rule 30 or any part thereof, the respondent may apply to the Court to dismiss the appeal for want of prosecution, and the Court, if satisfied that the appellant has so failed may dismiss the appeal or make such other order as the justice of the case may require."

In advancing his application for leave for extension of time and at the same time meeting the application to dismiss the appeal, Mr. Smith submitted that in order to exercise its discretion to extend time the Court must have material evidencing a serious continuing intention to prosecute the appeal as well as show merit in the appeal. In craving the Court's indulgence he submitted that the Court now leans away from rigid application of rules of procedure and instead favours allowing matters to proceed to hearing of the substantive issues. See Gordon v. Vickers S.C.C.A. No. 59/88 (unreported) and Eldemire v. Eldemire

P.C. Nos. 33/89 and 13/90. Continuing, Mr. Smith submitted that the appellant must also show that he acted with all due diligence: Henriques v. Henriques (1971) 12 J.L.R. 298. It was his contention that not only have the appellants complied with these requirements but that they "have a good defence to the claim on the merits or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried or a real dispute as to the amount due which requires the taking of an account to determine or any other circumstances showing reasonable grounds of a bona fide defence."

By way of comment it may legitimately be observed that if the submission is that due diligence was observed by the appellants then diligence has indeed lost its true meaning and has assumed one consonant with convenience. How can such a submission be made when as much as eight months after the lodging of the appeal counsel was uncertain whether or not the appellants still wished to proceed with the appeal? (See paragraph 5 of Lowell Smith's affidavit) (supra). This paragraph is significant for the fact that it clearly shows that for a period beginning in the latter part of 1991 and continuing up to recently the appellant Ian Jones had been away from Jamaica and had not been in communication with his attorneys-at-law. Paragraph 6 of Ian Jones' affidavit confirms the want of communication. This fact also runs counter to the assertion that there was a continuing intention to prosecute the appeal.

In addition, as Mr. Goffe submitted, there has been no explanation as to why an extention was not sought prior to this. Further, said he, the truth on Mr. Jones' affidavit seems to be that he was too busy with other matters to attend to a debt of $11m.

There is no doubt that there has been inordinate delay which has not been satisfactorily accounted for. Nevertheless if the justice of the case required the Court could under rule 30(1) (supra) make an order other than one to dismiss the appeal

which would follow inexorably upon a refusal of the application for extension of time.

Wherein then lay the merit of the case which would save the day for the appellants? In considering the affidavits and submissions before him Reckord, J. noted that:

> "The plaintiff bases its claim on the promissory note, not on the loan. The first defendant has not denied that the notes were presented and dishonoured. ... The note did not bear the seal of the company and therefore it could not be regarded as being signed by the defendants on behalf of any company. ... There has been no assertion that money was not lent. Missing from the defendants' affidavits was a statement of what they say is owing."

His findings of fact are set out thus:

> "There is nothing on the face of these two promissory notes to suggest that they were otherwise than personal loans to the two defendants. I find that they signed the notes and authorised the plaitniff to fill in the material particulars which it did within a reasonable time and strictly in accordance with the authority given. There is therefore no basis for the defendants claim that the note for the larger sum was negotiated on behalf of one of the defendants companies. They are estopped from denying liability. This claim is therefore rejected.
>
> The defendants further complain that the true balance due by them cannot be determined without a prior reconciliation of the account by the plaintiff. It is significant that notwithstanding that the plaintiff has made a claim for the full amount due on the notes, the defendants have not indicated a sum which, in their opinion, is their indebtedness to the plaintiff. Surely they must know how much they have paid.
>
> The notes are dated March 7, 1989 - the demand was made on the 13th of November, 1990. In Miss Sibble's affidavit which is dated 13th December, 1990, and deponed that the defendants were indebted to the plaintiff in the sum of Eleven Million and Eighty Seven Thousand Dollars ($11,087,000.00) together with interest @ nineteen percent per annum from March 7, 1989 and

> "and were so indebted at the commencement of this action which was on the 15th of November, 1990.
>
> The sum claimed are being challenged by these defendants. These can be checked by ordinary accounting processes.
>
> I am satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendants."

In the face of such findings, which are well-founded on the facts, the appellants are impotent. In the first place even the merest law student should know the significant distinction between a company and its members, i.e. that the company is a separate legal entity. Salomon v. Salomon & Co. (1897) A.C. 22; and that consequently liability undertaken even by a director of a company in his private capacity cannot be construed as the company's liability even if such person is the sole beneficial owner of the assets of the company. If Mr. Jones is indeed the international business consultant which is alleged in his affidavit it would be passing strange if he did not know this elementary fact. That an attorney-at-law should make a submission for the Court's acceptance which runs counter to this principle is unforgivable.

The peculiar nature of a Bill of Exchange stands squarely across the intended path of the appellant and makes unavailable to the Court on the appellants' behalf some of the courses advanced on their behalf. It is apposite to cite section 20 of the Bills of Exchange Act in this regard:

> "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.
>
> In order that any such instrument, when completed, may be enforceable

> "against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact:
>
> Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given."

Upon the findings of Reckord, J. the transaction in the instant case falls strictly within the provisions of this section and are therefore unassailable. There is clearly, therefore, no defence to the claim and accordingly no merit in the appeal. The question of the amount due is eminently an accounting question and in making the order for the taking of accounts the trial judge, in our opinion, came to the correct conclusion. Hence our decisions as earlier mentioned.

DOWNER, J.A.:

I agree.

WOLFE, J.A. (Ag.):

I agree.