[2014] JMCA App 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2005

APPLICATION NO 7/2014

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**KEY MOTORS LIMITED**	**1ST APPLICANT**
AND	**EXECUTIVE MOTORS LIMITED**	**2ND APPLICANT**
AND	**FIRST TRADE INTERNATIONAL BANK & TRUST LIMITED (in liquidation)**	**RESPONDENT**

Ms Carol Davis instructed by Carol Davis and Co for the applicants

Keith Bishop instructed by Bishop and Partners for the respondent

3, 6 and 28 March 2014

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusions which are in accordance with our decision and the orders made in this matter. I have nothing to add.

BROOKS JA

[2] On 6 March 2014, having considered the application mentioned below, we made the following orders:

> "a. The application to strike out the appeal for want of prosecution is refused.
>
> b. The application to dispense with a procedural requirement is granted.
>
> c. Each party shall bear its own costs of the respective applications."

At that time promised to put our reasons in writing. We now fulfil that promise.

[3] This application to strike out an appeal for want of prosecution has emphasised the need for vigilance by all parties involved in an appeal, including the registry of this court. The lack of vigilance has caused the appeal in this case to languish although a transcript of the trial has been in place for four and a half years. Despite the passage of time, the respondent to the application has convinced us that it should not be punished with the striking out of its appeal, which is the punishment that the applicants sought.

The relevant chronology

[4] The appeal arose from a decision of M McIntosh J, handed down in the Supreme Court on 7 February 2005. The judgment was in favour of the applicants, Key Motors Limited (Key) and Executive Motors Limited (Executive) and was against the present appellant (the respondents to the application), First Trade International Bank and Trust

Limited (in liquidation), hereinafter referred to as "First Trade". First Trade, being dissatisfied with the decision, filed an appeal from that decision on 18 March 2005.

[5] Four and a half years later, on 4 September 2009, First Trade filed a transcript of the trial over which McIntosh J presided. The four bundles, which comprised the transcript, were all intituled "Record of Appeal" but revealed that they only contained the notes of the trial. The registry of this court acknowledged the filing but pointed out to First Trade's attorneys-at-law, by requisition dated 9 September 2009, that the transcript did not comprise a record of appeal, as was required by the Court of Appeal Rules (CAR).

[6] First Trade did not reply to the registry. It did nothing thereafter, despite the registry asking First Trade's attorneys-at-law, by letter dated 4 November 2009, whether they intended to ask this court to dispense with the usual procedural requirements. First Trade remained silent and inactive in the matter until Key and Executive filed the present application.

[7] Having been served with the application on 22 January 2014, First Trade filed an application for permission to dispense with the requirement of rule 2.5(1)(b) of the CAR. That rule requires the registry of this court to secure a certified copy of the record of the proceedings (referred to hereafter as "the certified record") from the Supreme Court. First Trade filed that application on 26 February 2014.

[8] The registry, although first requesting the certified record on 31 March 2005, has, to date, not received it.

The issue to be resolved

[9] The provisions of rule 2.5 and 2.6 of the CAR stipulate, in part, that upon the registry receiving the certified record, it should notify the parties of that receipt. It is at that point that time stipulations are imposed on the parties to the appeal. Certain time periods are given for each party to take the steps necessary to have the appeal proceed as designed by the drafters of the rules.

[10] The issue raised by this appeal is whether First Trade, although it filed the transcript of the trial, is entitled to rely on the fact that the registry did not issue a notice. Can it properly say that, because of the absence of the notice, it was not obliged to take the steps that are usually required when a notice is issued, and consequently its appeal cannot properly be struck out for want of prosecution? That issue will be assessed after an outline of the relevant rules and the submissions made to the court by counsel for each side.

The relevant rules

[11] The main rules of the CAR that guide the court in respect of this issue are rules 2.2, 2.5 and 2.6. In the event that either party has had the proceedings in the court below recorded, the relevant part of rule 2.2 applies. Paragraphs (6) and (7) of that rule require the parties to notify this court of that fact. The paragraphs state as follows:

> "(6) Where either party has had the proceedings in the court below recorded, the appellant must notify the court when filing his or her notice of appeal.

(7) If the appellant fails to notify the court in accordance with paragraph (6), the respondent must do so."

[12] Rule 2.2(6) and (7) are referred to in rule 2.5 which states:

"**Action by registry on receipt of notice of appeal**

2.5 (1) Upon the notice of appeal being filed (unless rule 2.4 or paragraph (4) applies) the registry must forthwith-

(a) if the appeal is a procedural appeal...

(b) if the appeal is from the Supreme Court –

(i) arrange for the court below to prepare a certified copy of the record of the proceedings in the court below and a transcript of the notes of evidence and of the judgment; and

(ii) **when these are prepared give notice to all parties that copies of the transcript are available from the registrar of the court below** on payment of the prescribed fee; or

(c) if the appeal is from a Resident Magistrate's Court...

(2) **Where the appellant (or failing him or her, the respondent) has given notice to the registrar under rule 2.2(2) that one or both parties have recorded the proceedings in the court below then a transcript of the evidence and judgment may be used** with –

(a) the consent of the judge of the court below; or

(b) the agreement of all parties to the appeal.

(3) **Where paragraph (2) applies the appellant must lodge a copy of the transcript with the registrar within 14 days after the consent of the judge or the agreement of the parties as the case may be**.

(4) If the appeal is from the Supreme Court and no oral evidence was taken paragraph (1)(b) shall not apply." (Emphasis supplied)

[13] It is rule 2.6 which establishes the time periods with which the parties are required to comply upon the registry issuing the notice mentioned in rule 2.5. Rule 2.6 states, in part:

"**Skeleton Arguments**

2.6(1) Within 21 days of receipt of –

(a) the notice under rule 2.5 (1)(b) or (c);

(b) **the lodging of a transcript under rule 2.5(3)**; or

(c) the filing of the notice of appeal where rule 2.5(4) applies, the appellant must file with the registry and serve on all the other parties a skeleton argument.

(2) Within 14 days of –

(a) receipt of the notice under rule 2.5(1)(b) or (c);

(b) **the lodging of a transcript under rule 2.5(3)**; or

(c) the filing of the notice of appeal where rule 2.5(4) applies,

all parties must inform the appellant of the documents they wish to have included in the record of the core bundle.

(3) Within 28 days of –

(a) receipt of the notice under rule 2.5(1)(b) or (c);

(b) **the lodging of a transcript under rule 2.5(3)**; or

(c) the filing of the notice of appeal where rule 2.5(4) applies,

the appellant must prepare and file with the registry four sets of the record for the use of the court comprising a copy of each of the following documents –

…" (Emphasis supplied)

The submissions

[14] Ms Davis, on behalf of Key and Executive, submitted that First Trade's delay in prosecuting the appeal was inexcusable and its conduct amounted to an abuse of the process of the court. Learned counsel cited a number of authorities in support of her submissions. These included **Port Services Ltd v Mobay Undersea Tours Ltd and Another** SCCA No 18/2001 (delivered 11 March 2002), **Peter Haddad v Donald Silvera** SCCA No 31/2003 (delivered 31 July 2007), **Watersports Enterprises Ltd v Jamaica Grande Ltd and Others** [2012] JMCA App 35 and **Biss v Lambeth Southwark and Lewisham Area Health Authority** [1978] 1 WLR 382.

[15] The main principle that Ms Davis sought to draw from those cases was that the rules of the court were meant to be obeyed and should be obeyed and in the absence of a good reason for disobedience, the court should strike out the appeals of parties

that disobey those rules. Ms Davis argued that, this court should be more stringent in requiring observance with the rules. This is because, she submitted, the claim has already been adjudicated upon and the victor, in the court below, is entitled to the fruits of its judgment. Learned counsel pointed out that the mere fact that the appeal has been hanging over the heads of the respondents to an appeal constitutes prejudice to those respondents.

[16] In applying that principle to the instant case, Ms Davis submitted that First Trade, having taken no step since it filed the transcript in 2009, had no excuse for failing to file its skeleton arguments and proceeding with the appeal. Learned counsel argued that in the absence of a good reason for this gross delay, First Trade's application to revitalise the appeal should be refused and the appeal should be struck out. She pointed out that 17 years had elapsed since First Trade filed it claim and nine years had passed since judgment had been handed down against it.

[17] Mr Bishop, for First Trade, submitted that the rules have not yet required First Trade to file any skeleton arguments or otherwise comply with rule 2.6 of the CAR. He pointed out that, in the absence of a notice from the registry, there was no obligation on First Trade to take any of those steps. The fact, he said, that First Trade filed the transcript of the proceedings below should not be used to punish it.

[18] Learned counsel argued that a record of appeal consists of more than just the transcript of the trial in the court below. He argued that First Trade's copies of the other documents, which would make up the record, were not in a state that would

allow them to be filed in this court. In those circumstances, learned counsel submitted, this court should allow the application to dispense with the usual procedural requirements, and set the matter for a case management conference so that the outstanding issues may be dealt with and the appeal set on the track of progress.

The analysis

[19] It should be noted that despite the use of the term "must" in paragraphs (6) and (7) of rule 2.2, neither party to this appeal complied with the requirements of those paragraphs. With neither paragraphs (6) nor (7) of rule 2.2 having been satisfied, rule 2.5(2) could not have been activated so as to allow for the use of the filed transcript for the purposes of the appeal. That effect would have the consequential effect of rules 2.5(3) and 2.6 also remaining inoperative in the instant case.

[20] Even if it could be said that the filing of the transcript was notice to the registrar, under rule 2.5(2), that one of the parties had recorded the proceedings in the court below, the registrar would not have been alerted that either subparagraphs (a) or (b) of that rule had been satisfied. The rule does not impose on the registrar the responsibility of securing the consent of the judge or the agreement of the parties. Perhaps it should. The lacuna may be filled by either an amendment to the rule or a practice direction. That is, however, for the future.

[21] Ms Davis submitted that the parties had agreed, prior to the commencement of the trial, for the proceedings to have been recorded. That agreement is, however,

different from the agreement contemplated by rule 2.5(2), which envisages consensus on the accuracy of the transcript for the purposes of the appeal.

[22] We agree with Mr Bishop in respect of these submissions. It is clear, however, that First Trade has ignored the spirit of the relevant rules of the CAR, which are aimed at securing the timely disposal of appeals. It is also clear from the chronology of the appeal and the excuse that Mr Bishop has proffered for First Trade's dilatory behaviour, that with a modicum of effort, First Trade could have complied with the requisition that the registry issued in November 2009.

[23] If First Trade did not have the other documents needed to complete the record of appeal, it could have secured them from the attorneys-at-law acting for Key and Executive or it could have asked the registry to secure those documents from the Supreme Court, minus the record of the proceedings at the trial. First Trade did none of those things. It remained dormant and, unfortunately, the registry, by its silence, allowed it to remain so. Only the threat of the appeal being struck out roused First Trade from its dormancy.

[24] The reason that the application to strike out must be refused is that the absence of a notice by the registry prevented time from beginning to run against First Trade. It, therefore, is not technically in breach of the provisions of rule 2.6. It would be wrong, in these circumstances, to strike out its appeal on the basis that it has not complied with those provisions. The cases cited by Ms Davis are distinguishable in that the

appellants were in breach of the required timelines imposed by the relevant rules in those cases.

[25] It is true that First Trade is in breach of rule 2.2(6). Similarly, Key and Executive are in breach of rule 2.2(7). There are, however, no sanctions imposed by the CAR for the breach of those rules. The framework of the rules requires the registry to drive the process of preparing appeals to be heard. Regrettably, the registry did not give sufficient regard to its recognition that a transcript had been lodged. It signified that recognition when it, very correctly, wrote to First Trade's attorneys-at-law to indicate that the transcript was not the record of appeal. What the registry should also have done is to make an attempt to secure the consent of the judge and the agreement of the respondents that the transcript could be used for the appeal. In this situation, the registry did not need to secure a record of the trial from the Supreme Court. Although it had requested that record from the Supreme Court, as part of the certified record, it could have adjusted its request in light of its receipt of the transcript. That approach could possibly have prevented First Trade's indolence.

[26] In addition, it is noted that the registrar is required by rule 2.20(2) to see that all parties comply with the CAR. The registrar is required by that rule to report compliance breaches to the court. Since the registry was aware that a transcript did exist, a timely report to the court of the breach of rule 2.2(6) could also have prevented this four-year delay by First Trade.

The application to dispense with the procedural requirement

[27] Rule 1.7(8) allows this court to dispense with compliance with any of the CAR. It states:

> "(8) In special circumstances on the application of a party the court may dispense with compliance with any of these Rules."

The circumstances of this case, especially the lengthy delay wrought upon it by First Trade, may be considered special.

[28] There is no need for the registry to continue to await a transcript of the trial from the Supreme Court. It must take all steps to secure the rest of the documents so as to have the record of appeal completed. First Trade's application in this regard should be granted.

Conclusion

[29] First Trade, although it had secured the transcript of the trial, did not take any other step in prosecuting the appeal it had filed against the decision of McIntosh J. It ignored communications from the registry in which the registry suggested a means by which the appeal could have been advanced.

[30] A more proactive approach by the registry would have secured the outstanding documents from the Supreme Court, enabling the registry to issue the notice required by rule 2.5(1)(b)(ii) of the CAR. Had that been done the requisite time limits prescribed in rule 2.6 would have been activated. Its failure to abide by those time limits would

have resulted in a different conclusion to the one to which we have come in this application.

[31] It is for those reasons that we ruled as indicated above. First Trade, although successful, was not awarded the costs of the application. The application was prompted by First Trade's dilatory approach to its obligations. A case management conference should, in the circumstances, be scheduled by the registry as a matter of urgency.

LAWRENCE-BESWICK JA (Ag)

[32] I have read, in draft, the judgment of Brooks JA and agree that his reasoning and conclusion form the basis for our decision and orders made herein.