[2013] JMCA Civ App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2013

APPLICATION NO 40/2013

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JOHN LEDGISTER**	**1ST APPLICANT**
	TREVOR LEDGISTER	**2ND APPLICANT**
	KARLENE LEDGISTER	**3RD APPLICANT**
	SELENA LEDGISTER	**4TH APPLICANT**
	HUGH LEDGISTER	**5TH APPLICANT**
	SUNNYCREST ENTERPRISES LIMITED	**6th APPLICANT**
A N D	**BANK OF NOVA SCOTIA JAMAICA LIMITED**	**RESPONDENT**

1st Applicant in person and appearing for other applicants

William Panton and Miss Cindy Lightbourne instructed by DunnCox for the respondent

3, 4, 5 June and 5 July 2013

HARRIS JA

[1] This is an application, made on 19 April 2013, in which the applicants seek an extension of time to appeal and to be granted leave to appeal orders of Pusey J delivered on 11 June 2008 and of Mangatal J delivered on 19 September 2008. On 5 June 2013, the application was refused. Costs were awarded to the respondent to be agreed or taxed. We now fulfill a promise to put our reasons in writing.

Background

[2] Between 1996 and 1997, the applicants obtained several loans from the respondent. They having defaulted on those loans, on 23 December 2005, the respondent brought an action to recover the sum of $14,172,181.77 being, the principal sum of $13,718,440.00 together with interest of $439,741.77 thereon, court fees of $2,000.00 and attorney's costs of $10,000.00. The applicants filed a defence and an ancillary claim claiming damages against the respondent for fraudulent or negligent misrepresentation.

[3] On 24 January 2007, the respondent made an application to enter summary judgment against the applicants. The matter came on for hearing before Pusey J, who, on 11 June 2008, made the following orders:

> "1. The Defendants be permitted to defend the Claim in this action **PROVIDED THAT** he [sic] pay to the Claimant the sum of $5,000,000.00 Dollars [sic] on or before the 1st September 2008, **FAILING** which the Claimant will be granted Summary Judgment against the Defendant on the Claim.

2. The sum of $5,000,000.00 Dollars [sic] to be deducted from any sum awarded to the Claimant on the claim.

3. The Claimant is permitted to file and serve a Defence to the Counterclaim on or before 11th July 2008.

4. The time to comply with all Case Management Orders is extended to the 1st September 2008.

5. Costs of this Application to the Claimant to be taxed, if not agreed by the parties.

6. Claimant's Attorney to prepare file and serve order."

[4] The applicants' failure to comply with the proviso to the order of Pusey J, resulted in an application by the respondent and Mangatal J ordering that summary judgment be entered for the respondent on the claim.

[5] A prolix, convoluted and disorganized affidavit, sworn by the 1st applicant on 19 April 2013, was filed in support of the application. The majority of its contents are irrelevant to the application. However, by paragraphs 9, 13, 14, 15 and 17, it could be said that there has been some attempt by the 1st applicant to furnish reasons for the delay.

[6] In paragraph 9, he stated that "on review of the case file, very serious questions were raised that would require an explanation/ investigation because it appeared as if I signed Court documents detrimental to my case which has tainted and prejudiced my case against me".

[7] In paragraph 13, he stated that the applicants were unaware of the summary judgment application or any other application. In paragraph 14 he averred that his

attorney-at-law had led him to believe that the summary judgment proceedings were negotiations "based on offers by the respondent/ claimant but not an Order from a judge to pay $5 Million to defend their right to a fair trial".

[8] At paragraph 15, he averred that it is apparent that his former attorney failed to inform him about the summary judgment as he was aware that he, the 1st applicant, would have challenged it. While, in paragraph 17, he stated that, "the respondent/claimant cannot use "adequate legal advice or representation" as an excuse to deny my lawful right to change what my former attorney prepared for my Defence, Counterclaim and Witness Statement because he did not follow my instructions".

[9] Also before this court was an affidavit, sworn by Mr Anthony Burgess, assistant manager of the respondent's loan recoveries department, in which he averred that the applicants obtained various loans from the respondent between April 1996 and February 1997. All have defaulted on their loans. The 1st applicant made payments on his loan from May to June 1997. Subsequently, his payments became irregular and he has made no further payment since January 1999. No payment has been made by the 2nd applicant since 27 June 1997. A payment had not been received from the 3rd applicant since January 1999. Nor has there been a payment by the 4th respondent since July 1999. A payment has not been received from the 5th applicant since October 1997. No payment has been made by the 6th respondent since January 1999.

[10] It was Mr Burgess' further averment that, following a complaint by the 1st applicant to the respondent's head office in Canada, on October 2002, the respondent discovered that it had made a mistake in the calculation of the interest on the loans, save and except that of the third applicant. By letter dated 8 April 2003, the applicants were informed that adjustments were made to reflect the correct application of the rates of interest.

Submissions

[11] After stating that he had discontinued the retainer of his attorney-at-law and has since been unrepresented, the 1st applicant submitted that he only became aware of the summary judgment some time in 2011 and therefore, he should not be penalized for the attorney's errors. He made reference to a number of matters which he stated that his attorney failed to do, namely: he did not request validation, verification or authentication of the debt; he failed to file a claim against the respondent "when they admitted misrepresentation"; he did not resort to the discovery process; he did not dismiss the claim on a preliminary issue; he allowed summary judgment to be entered; and he did not set aside the summary judgment.

[12] Mr Panton submitted that there is no basis for the application as it is clear from an admission in the defence and the particulars of claim that there was an acknowledgement of a debt of $5,200,000.00 owed by the applicants and they were afforded an opportunity to pay that amount into court. It is incorrect for the 1st applicant to assert that he first became aware of the summary judgment at the time of the termination of his attorney's retainer, counsel argued, as it was the understanding

that, upon the admission of the debt, only the counterclaim and not the defence would have proceeded. Even if the 1st applicant's statement is accepted, he submitted, he has come to the court two years after knowing about the entry of the judgment to seek an extension of time to appeal yet the time lapse remains unexplained.

[13] The 1st applicant, he argued, in the draft grounds of appeal, speaks to assumed facts but in his defence, he did not only admit that his family had received $4,500,000.00 but also admitted owing $5,200,000.00. He, however, now seeks to resile from those documents which he had signed and in particular the statement of truth to his defence and counterclaim, counsel submitted.

[14] No proper explanation has been given for the delay which has been inexcusable, he argued. It was counsel's further submission that the proposed appeal has no reasonable prospect of success. It, being devoid of arguable grounds, is unmeritorious. Clearly, he submitted, the 1st applicant is a vexatious litigant who strives to evade honouring a legitimate debt.

Analysis

[15] As sanctioned by rule 1.7(2)(b) of the Court of Appeal Rules, this court, in the exercise of its discretion, may extend time for compliance with a rule. In an application for an extension of time, the court, in employing its discretionary powers, ordinarily takes into consideration the following factors:

1. the length of the delay;
2. the reasons for the delay;
3. the merits of the appeal; and
4. the degree of prejudice caused by the delay.

[16] In cases such as ***Strachan v Gleaner Company Ltd and Stokes*** Motion No 12/1999 delivered 6 December 1999; ***Haddad v Silvera*** SCCA No 31/2003 delivered on 31 July 2007; and ***Arawak Woodworking Establishment Ltd v Jamaica Development Bank Ltd*** [2010] JMCA App 6, the above criteria have been adopted and applied by this court in applications for an extension of time to appeal.

[17] An appeal should be pursued within the time prescribed by the rules. The obedience to timelines laid down by the rules of court is a principle which the court seeks to preserve. Despite this, the court may extend the time within which to do an act. However, it does not follow that in all cases the court will be inclined to indulge a tardy applicant. The court, in the pursuit of its duty to control and regulate the progress of litigation has adopted a strict approach on an application to extend time to appeal. In ***United Arab Emirates v Abdelghafar*** (1995) 1 CR 65, Mummery J speaking to the approach said at para. 3:

> "The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the_parties and the public in certainty and finality of legal_proceedings make the court more strict about time limits on appeals."

[18] There has been a delay of over four years since the orders were made in the court below. The 1st applicant asserts that he became aware of the summary judgment in 2011. He did not give the specific date in that year when it came to his attention. Despite this, it will be accepted that he received the information some time in 2011. Although he did not speak to the date on which he learnt of Pusey J's order, it could reasonably be inferred that he also learnt of this in 2011. Consequently, it will be taken that the orders of the court came to his knowledge approximately two years ago. Having been cognizant of the fact that the orders were made, it would have been incumbent upon him to have acted promptly and put the necessary machinery in place for the relief which he now seeks. The delay of almost two years in seeking to make the application is inordinate and inexcusable and cannot be tolerated by this court.

[19] The 1st applicant has given no reason for the delay. He endeavours to create a reason by ascribing fault on the part of his attorney-at-law in failing to properly advise him and to conduct the applicants' defence, not in accordance with the law but in the manner which he desires. None of the matters which he stated that his attorney-at-law failed to do could be said to amount to reasons explaining the delay since he became aware of the orders. In ***Raman v Cumurasamy*** [1945] 1 WLR 8, Lord Guest said that where no excuse is given, no indulgence should be granted. There being no reason for the delay, the court would not be moved to extend any leniency to the applicants.

[20] The question of the merits of the appeal will now be addressed. The gravamen of the 1st applicant's complaint surrounds the validity of the debt. Paragraph 18 of the

defence shows an admission, by the 1st applicant, of a debt of $5,200,000.00. The defence and counterclaim and the certificate of truth thereto were duly executed by him. Arguably, before the preparation of the defence, he would have given instructions to his attorney about the debt, admitting such amount which, in his opinion, was due and owing. He would have read the documents before executing them. Clearly, it could be argued that he made the admission and therefore cannot now seek to dispute that a debt is due and owing to the respondent.

[21] We now turn to the issue of prejudice. Prejudice is inimical to justice. Inordinate delay, in itself, is prejudicial - see ***West Indies Sugar v Minnell*** (1993) 30 JLR 542. The grant of an extension of time would, without doubt, operate unduly prejudicial to the respondent which is entitled to recover such sums as are due and owing.

[22] The delay in making the application is excessive. No reason has been advanced for the applicants' tardiness. None of the facts upon which the applicants rely raises a good arguable appeal. All of the foregoing undoubtedly creates hardship for the respondent, it being deprived of its right to enforce its judgment. For these reasons, in refusing the application, we were satisfied that justice demands that the grant of an extension of time to file an appeal and to appeal would have been inappropriate.

[23] Before leaving this matter, we cannot say that Mr Panton was wrong in describing the 1st applicant as a vexatious litigant. The 1st applicant ought to have directed his attention to the pending counterclaim in the court below rather than

waste this court's time and resources by making this spurious and unmeritorious application.