JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 139/08

BETWEEN	MOSSAD SECURITY COMPANY LIMITED	APPELLANT
A N D	JOSE CARTELLONE CONSTRUCCIONES CIVILES S.A.	RESPONDENT

PROCEDURAL APPEAL

Mr Michael Thomas for the appellant
Mr B.E. Frankson for the respondent

14, 17 April 2009

MORRISON, J.A.

1. By Notice of Appeal filed 19 December 2008, the appellant appealed against the order of Thompson-James J made on 11 November 2008, setting aside a default judgment previously entered on 7 November 2007 and permitting the respondent to file a defence. The defence has now been filed and, pursuant to the judge's order, a case management conference is set for hearing on 23 April 2009.

2. The respondent took a preliminary objection to the hearing of the appeal on three grounds set out in its Notice of Preliminary Objection, as follows:

> "1. The Respondent was not served with a Notice of the Application for enlargement of time seeking leave to appeal to the Court of Appeal.

> 2. The Respondent was not served with a Notice of the Application for leave to Appeal to the Court of Appeal.
>
> 3. The Respondent was not a party to the proceedings when the Application was heard for the enlargement of time granting permission to appeal.
>
> 4. That the Appeal herein has been filed out of time in breach of Rule 1.8(1) of the Court of Appeal Rules, 2002."

3. When the matter first came in for hearing on 7 April 2009, Mr Frankson indicated that, in the light of Rule 1.8(4) & (5) of the Court of Appeal Rules, he would not pursue the ground relating to non-service of the notice of application for permission to appeal.

4. However, he contended strongly that non-service of the notice of application for enlargement of time rendered the order enlarging time a nullity.

5. The relevant chronology is that on 11 November 2008 Thompson-James J made the order appealed from and on 11 December 2008 Pusey J made an order without notice enlarging time for notice of appeal to be filed and granting permission to appeal. This order was served on the respondent's attorney-at-law on 19 December 2008.

6. In support of preliminary objection, Mr Frankson cited Rules 11.6 (applications to be in writing), 11.8 (notice to be given) and 11.15 (if application is granted without notice, the respondent is to be served with order) of the Civil Procedure Rules 2002. Non-service in this case was a material irregularity and the appeal should therefore be dismissed.

7. Mr Thomas in response accepted that no notice had been given, but pointed to the wording of Rules 11.8 ("the general rule") and 11.16 (respondent can apply to set aside the without notice order), which demonstrated that Pusey J's order was not to be treated as a complete nullity. Further, he said, there was no prejudice alleged or demonstrated by respondent.

8. In the light of rule 11.16, I cannot regard an order made without notice, even assuming that notice is required, as a complete nullity. Rule 11.16 in fact assumes its validity by permitting an application to set it aside. The respondent was served with a copy of the order on 19 December 2008, so it would have been well within time to apply to set it aside. This was not done. Given that the respondent does not now challenge the order granting permission to appeal, I regard the appeal as properly constituted and the preliminary objection therefore fails.

9. On the substantive appeal itself, Mr Thomas submitted that Thompson-James J exercised her discretion on wrong principles in that she failed to apply Rule 13.3. In particular, she failed to consider whether the respondent had a "real prospect of successfully defending the claim." He also pointed out that there was no dispute that the services in respect of which payment was claimed had been provided and that in the circumstances the defence filed was "a fanciful defence." Mr Thomas pointed out further that the respondent had failed to produce original invoices as it was required to do by a Notice to

Produce dated 3 November 2008. In all the circumstances, he concluded, the default judgment ought not to have been set aside.

10. Mr Frankson, on the other hand, contended that there were triable issues of fact arising from the defence, in particular whether the appellant supplied the services claimed for or not. He emphasised in particular the more than two years delay in submitting the invoices for services as giving rise to questions about the genuineness of claim. This was a matter in which the respondent should have its day in court and the judge had therefore exercised her discretion on correct principles. Nothing turned, he said, on the Notice to Produce.

11. I will say at once that I attribute no significance to the respondent's failure to comply with the Notice to Produce. Both counsel are agreed that this was a notice in the traditional sense and therefore its only significance is to allow the tendering in evidence at the trial of the action of copy documents in the event of a failure to comply with the notice by production of the originals.

12. On the substantive issue, I regard this as a borderline case, particularly in the light of the fact that there is no denial that the services in respect of which payment is claimed were rendered. But there may well be a triable issue raised by the defence as to the certification and approval of bills, etc., and I cannot in all the circumstances say that the judge exercised her discretion wrongly. In other words, I cannot say that there is no real probability of the defence succeeding.

13. Both parties have prayed in aid the overriding objective of the CPR which, by virtue of Rule 1.1(10)(a) of the Court of Appeal Rules, is applicable to appeals. Rule 1.1(2)(e) suggests that a better way of dealing with this case may be for the appellant to make an application for summary judgment at the case management conference if it wishes to do so (bearing in mind that there is a sum of $718,582.00 admittedly owed to it by the respondent). The appeal is accordingly dismissed, and there will be no order as to costs.