[2010] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 22/2009

BEFORE: THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE HARRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	NATIONAL IRRIGATION COMMISSION LTD.	APPELLANT
AND	CONRAD GRAY	1st RESPONDENT
AND	MARCIA GRAY	2nd RESPONDENT

Jermaine Spence and Miss Teri-Ann Lawson instructed by DunnCox for the Appellant.

Barrington Frankson instructed by B.E. Frankson & Company for the Respondents.

26 January & 14 May 2010

HARRISON, J.A.

[1] This is an appeal from an order made by Campbell, J. granting relief from sanctions to Mr. and Mrs. Conrad Gray (the respondents). My brothers and I decided that the appeal should be allowed and promised then to put our reasons in writing for allowing the appeal. This is a fulfillment of that promise.

The Background Facts

[2] The respondents had filed a Writ of Summons and Statement of Claim in the Supreme Court seeking damages for negligence in the sum of $2,254,630.00 from National Irrigation Commission Ltd. (the appellant) for that on or about 25 January, 2000 the water supply to the respondents' farm was unlawfully disconnected by the appellant thereby causing the respondents' crop, which consisted of callaloo and ockras, to be destroyed. The respondents also claimed exemplary damages. A defence was filed by the appellant denying liability.

[3] At a Case Management Conference held on 24 March 2004 the trial date was scheduled for hearing on 26, 27 and 28, June 2006. Those dates had to be vacated due to the fact that the respondents were out of the jurisdiction and were not in a position to travel to Jamaica at that time. A Notice of Application for Court Orders had been filed on June 21, 2006 requesting the court to make an order for the claimants to give security for costs of the action on the ground that the claimants were ordinarily resident out of the jurisdiction. However, a date was not fixed for the hearing of that application.

[4] The matter came on for trial again on 9 June 2008 before Mrs. Justice McDonald-Bishop but the claimants were not present. On the application of the claimants' attorney at law, the learned judge ordered that the matter be adjourned to 26 and 27 February 2009. The learned judge further ordered as follows:

> "2. Unless the First Claimant attends the said trial, Claimants' statement of case shall stand as struck out

and judgment entered for the Defendant without the need for further orders.

3. Costs for today shall be the Defendant's in any event.

4. Claimants to give security for costs in the sum of $200,000.00 within 42 days of the date hereof. The said sum to be paid in an interest-bearing account in the names of both Attorneys at Law at the Bank of Nova Scotia.

5. Unless the Claimants provide the said security for costs in the sum specified within 42 days as aforesaid, the claim shall stand as struck out.

....."

[5] The 42 days expired on or about 21 July 2008 but the sum ordered to be paid by the Claimants was not paid. On 11 September 2008 the defendant filed a request for final judgment to be entered.

[6] On 11 December 2009 the Claimants filed Notice of Application for Court Orders pursuant to Part 26.8 of the Civil Procedure Rules 2002 (the CPR) seeking relief from the sanction imposed on 9 June 2008, and for their claim to be restored. On 13 February 2009 Campbell, J. made the following order:

"1. The Claimants are relieved from the sanction imposed on the 9th day of June 2008 by the Honourable Mrs. Justice McDonald-Bishop and their claim has been restored.

2. Costs to the Defendant in any event.

3. Defendant granted leave to appeal."

[7] On 23 February 2009 the defendant filed and lodged a Notice of Appeal against the order of Campbell J. The defendant complained that:

> "(i) The learned judge erred in finding that there would be no prejudice to the Defendant if the claim was restored.
>
> (ii) The learned judge erred in finding that the Defendant was previous to say that the matter is now at an end.
>
> (iii) The learned judge erred in finding that the applicants had satisfied Part 26.8 of the Civil Procedure Rules, 2002.
>
> (iv) The learned judge failed to take account of the fact that no proper explanation had been given for the delay in applying for relief from sanction.
>
> (v) The learned judge improperly exercised his discretion by failing to have any regard or any proper regard to the overriding objective of the Civil Procedure Rules, 2002, in coming to his decision."

The Relevant Rule

[8] Rule 26.8 of the CPR as amended provides:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
>
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only if it is satisfied that –

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to –

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

The Preliminary Point

[9] At the very beginning of the hearing of this appeal, Mr. Frankson for the respondents, sought to raise a point in limine. He complained in a Notice filed 26 January 2010, that the appeal being a procedural appeal, was not filed within the required seven (7) days of the order appealed against and was therefore in breach of rule 1.11(1) (a) of the Court of Appeal Rules, 2002. Bearing in mind that the matter had gone through various stages and the point was not taken earlier, after some persuasion by the court, Mr. Frankson withdrew the application.

The Submissions

[10] The crucial issue for determination in this appeal was whether the claimants had acted promptly in compliance with rule 26.8(1) when they sought relief from sanction. Mr. Jermaine Spence for the appellant submitted that rule 26.8 has two stages. First, there is the jurisdiction phase and second, there is the discretion phase. He submitted that before the court can consider whether to exercise any discretion to grant relief from sanction, the court has to be satisfied that it has jurisdiction under 26.8(1). He submitted that unless the applicant for relief promptly makes the application, supported by evidence on affidavit, the court cannot embark upon any consideration as to whether to grant relief. He argued that this is so because it is made clear by the use of the word 'must' in 26.8(1) and the fact that the two conditions are mentioned separately as clear prerequisites for the application to be heard. He submitted that if the court finds that

the application for relief was not made promptly by the applicant, the result is that the application must fail.

[11] Mr. Spence further submitted that the word 'promptly' must be understood in its ordinary sense that is, done at once or without delay. He argued that the circumstances of this case reveal that the respondents/applicants, by their own admission, had failed to make the application promptly. He then set out a chronology of events at paragraph 4 of his further written submissions, which are worthy of repetition in this judgment:

> "The affidavit of the Respondents filed in the Supreme Court on December 11, 2008 (page 35 of the Record) makes the following clear. (From para. 5 et seq.) Arrangements were made from around July 7, 2008 to send the funds to satisfy the court order. They were advised on 23rd day of July, 2008, which is after the expiry of the Order, that the funds had not been sent. No application was made for relief at that time. No explanation is given as to why. They resent the funds and discovered that these funds were not credited to the relevant account until August 12, 2008. On the 12th day of August, 2008 they received notification that the funds were in the account. No application was made at that time; that is, without delay. It was not until December 11, 2008 that an application was filed which, expectedly, came up for hearing in February 2009, a matter of days before the matter would have come on for trial had the claim not been struck out...."

[12] Mr. Spence submitted that on any objective view, there was nothing prompt in the making of the application and that this ought to be sufficient to determine the appeal in favour of the appellant.

[13] Mr. Frankson did try valiantly to get across the first hurdle but was quite unable to show that the respondents had acted promptly in making their application for relief. In a nutshell, he submitted that there were good reasons for non-compliance with the order of the court and that the delay in the respondents' application could not be said to have prejudiced the appellant. The written submissions concluded as follows:

> "In disturbing the exercise of a Judge's discretion there must be evidence to establish that the judge failed to exercise his discretion or that he wrongfully failed to exercise his discretion. In the instant case no such evidence exists so as to enable the Appellate Court to disturb the discretion exercised by the Learned Judge below. In the absence of such evidence the appeal ought to be dismissed as there is no injustice to the Respondent."

The Discussion

[14] The first stage, as Mr. Spence puts it, is for the court to consider whether or not the appellant's application seeking relief from sanctions was made promptly. Promptly is an ordinary English word which we would have thought had a plain and obvious meaning, but if we need to be told a bit more about what it means, we do have the authority of **Regency Rolls Limited v Carnall** [2000] EWCA Civ. 379, where Arden, L.J. pointed out that the dictionary meaning of 'promptly' was 'with alacrity'. Simon Brown, L.J. said:

> "I would accordingly construe "promptly" here to require, not that an applicant has been guilty of no needless delay whatever, but rather that he has acted with all reasonable celerity in the circumstances."

[15] The issue here is whether the respondents did act with all reasonable celerity. The claim in this matter had been automatically struck out on 21 July 2008 yet it took the respondents some six (6) months before the application was made for relief from sanctions. In **Harrison v Hockey** [2007] All ER (D) 336 Mann, J. opined that a period of four-and-a-half months between judgment and an application under CPR 39.3 was likely to be too long in the vast majority of cases where an application under that provision was made. This is not a setting aside judgment situation but we do believe that similar principles in terms of time would be applicable to an application for relief from sanction.

[16] In our judgment, the application plainly could, and reasonably should, have been issued well before it was done. Six months was altogether too long a delay before making this application. Promptness, in our view, is the controlling factor under rule 26.8. It is plainly a very important factor, as is evident from the fact that it is singled-out in the rule as a matter to which the court must have regard. In our judgment, it is a very important factor because there is a strong public interest in the finality of litigation. Put simply, people are entitled to know where they stand.

Conclusion

[17] In our opinion, the respondents had not acted with the requisite degree of alacrity. That having been said, we regarded the respondents as having failed in that obligation.

[18] It was for the reasons set out above that we ordered that the appeal ought to be allowed with costs to the appellant to be taxed if not agreed.