[2013] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 8/2012

APPLICATION NOS 234 AND 242/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**LEROY POWELL**	
AND	**BEVERLEY HENRY**	**APPELLANTS**
AND	**DONALD BROOKS**	
AND	**DETA BROOKS**	**RESPONDENTS**

Mrs Jennifer Hobson-Hector for the appellants

Emile Leiba and Miss Gillian Pottinger instructed by DunnCox for the respondents

14, 28 November, 12 December 2012, 27 February and 26 April 2013

MORRISON JA

[1] In this matter, the court was concerned with two applications: application no 234/2012, which was the respondents' application to strike out the notice of appeal filed on behalf of the appellants on 24 March 2011, on the ground that they had not been served with it; and application no 242/2012, which was the appellants' application

for an extension of time within which to serve notice and grounds of appeal and for relief from sanctions.

[2] On 27 February 2013, the court made an order (a) granting application no 234/2012, with costs of $15,000.00 to the respondents and (b) dismissing application no 242/2012. These are the promised reasons for the court's decision on both applications.

[3] It is first necessary to state something of the background to these applications. On 1 December 2009, the respondents and the appellants entered into a lease agreement, by which the respondents agreed to rent premises situated at 26 Hobbs Avenue, Montego Bay, in the parish of St James to the appellants. The premises were used as a guest house and the term of the lease was for a period of five years, at an agreed rental of US$18,000.00 per month. The appellants as lessees covenanted to pay the rent reserved "without deductions or set off whatsoever" (clause 2(a)). The agreement also obliged the respondents to pay insurance and utility costs in respect of the leased premises.

[4] In March 2010, the respondents gave the appellants notice to quit the premises on 31 March 2010, as a result of alleged non-payment of rent and, on 21 May 2010, plaint no 861/2010 was lodged in the Resident Magistrate's Court for the parish of St James, claiming recovery of possession of premises 26 Hobbs Avenue, Montego Bay. On 29 June 2010, the respondents purported to lock the appellants out of the leased premises and on the following day, 30 June 2010, the appellants filed notice of their

counterclaim in plaint no 861/2010, claiming damages against the respondents in the sum of $250,000.00 for trespass to the leased premises. On 5 July 2010, the matter came on before a learned Resident Magistrate for the parish of St James, who granted an injunction restraining the respondents from preventing the appellants' access to the leased premises. (Plaint no 861/2010 was in due course withdrawn by the respondents on 2 October 2010, with costs of $4,500.00 to the appellants.)

[5] On 1 October 2010, the respondents served notice to quit afresh on the appellants, requiring them to quit the leased premises "on or before the 1st October 2010 or in the alternative at the end of the next completed month of your tenancy after service on you". The reason for the service of the notice was stated to be "by virtue of your previous and continuing breaches of the terms of the lease agreement, including but not limited to failure to pay rent lawfully due and owing to the Landlords in excess of thirty (30) days after becoming due".

[6] The appellants having remained in possession, on 18 November 2010 plaint no 2041/2010 for recovery of possession was lodged on behalf of the respondents in the Resident Magistrate's Court for St James, claiming recovery of possession of premises 26 Hobbs Avenue, Montego Bay. On 1 February 2011, the day fixed for trial of the claim in plaint no 2041/2010, Her Honour Mrs Natalie Hart-Hines, a Resident Magistrate for the parish of St James, made an order consolidating that claim with the outstanding counterclaim in plaint no 861/2010 and the trial duly commenced before her. The appellants' stated defence to the claim for recovery of possession was a denial that they were in arrears of rent and an allegation that the respondents owed them rental for the

penthouse, which they had "wrongly occupied". By way of defence to the counterclaim in plaint no 861/2010, the respondents denied that the appellants had suffered any damage by reason of their having been locked out of the premises over the period 29 June to 5 July 2010.

[7] The trial of the consolidated actions continued on 8, 10, 15 and 17 March 2011. The learned Resident Magistrate heard evidence from both of the appellants and the respondents, as well as Mr Trevor Reid, the first named respondent's brother. One of the major issues canvassed in the evidence was whether there had been an agreed variation of the lease agreement to allow the respondents to retain possession of a portion of the leased premises, referred to as 'the penthouse'. The respondents contended that there was such a variation and that it had been agreed before the commencement of the lease, while the appellants insisted that, although such a variation had been discussed, it was never agreed.

[8] At the conclusion of addresses from counsel on both sides on 17 March 2011, the learned Resident Magistrate gave judgment, with costs to be agreed or taxed in each case, (i) for the respondents on the claim in plaint no 2041/2010 and ordered the appellants to vacate the premises "forthwith"; and (ii) for the appellants on the counterclaim in plaint no 861/2010 and ordered that the respondents pay the sum of $150,000.00 as damages by reason of the appellants' exclusion from the premises between 29 June and 5 July 2010.

[9] In detailed reasons for judgment dated 3 May 2012, the learned Resident Magistrate made a number of important findings of law and fact, as follows:

1. There was a variation of the lease agreement as regards possession of the penthouse, as the respondents contended. With respect to this, the respondents were accepted as truthful, while the appellants' evidence was dismissed as untruthful.
2. The notice to quit dated 1 October 2010 was not vague or ambiguous and was therefore valid.
3. The date by which the appellants were required to vacate the premises was 1 November 2010.
4. It was accepted by all parties that rent for May and June 2010 was not paid and no justification had been provided by the appellants for the non-payment of rent for those months.
5. Receipt of a notice to quit does not cause the obligation of the tenant to pay rent to cease.
6. The appellants were excluded from the premises from 29 June until 5 July 2010.
7. The appellants had ceased to reside at the premises "since at least September 2010" and, in the light of the evidence, "it does not seem that [they] have any intention to return to the property".
8. The respondents were entitled to recover possession of the premises pursuant to section 25(1) of the Rent Restriction Act.

9. The appellants were entitled to recover $150,000.00 as damages by reason of their exclusion from the premises between 29 June and 5 July 2010.

[10] Dissatisfied with this outcome, on 24 March 2011 the appellants filed notice of appeal against the decision of the Resident Magistrate. The single ground of appeal was that "the Judgement of the Learned Resident Magistrate is inconsistent with the evidence adduced".

[11] The appeal was in due course set for hearing in the week of 12 November 2012. By letter dated 28 September 2012 (copied to the appellants' attorney-at-law), the respondents' attorneys-at-law, who had also acted for the respondents at the trial, advised the Registrar that neither they nor the respondents had been served with the notice of appeal in the matter. The respondents accordingly took the position that the appeal was not properly before the court.

[12] On 12 November 2012, the appellants filed an application for court orders, in which they sought an extension of time in which to file skeleton arguments and relief from sanctions under the Civil Procedure Rules 2002 ('CPR'). That application was supported by an affidavit, also sworn to on 12 November 2012, by the appellants' attorney-at-law, Mrs Jennifer Hobson-Hector. The affidavit spoke to the difficulties encountered by Mrs Hobson-Hector in obtaining, first, the reasons for judgment from the court below and, second, instructions from the appellants for the purpose of completing skeleton arguments.

[13] On 13 November 2012, the respondents formalised the objection taken in their letter of 28 September 2012 by filing application no 234/2012, by which they sought an order striking out the notice of appeal filed on 24 March 2011, with costs. In an affidavit sworn to on 13 November 2012 in support of the application, Miss Sabrina Cross, attorney-at-law, confirmed that the respondents had not been served with the notice of appeal. She stated that they only became aware of the appeal upon receipt of notice of hearing of the appeal dated 25 June 2012, giving notice that the appeal was set for hearing in the week of 12 November 2012.

[14] When both these applications came on for hearing on 14 November 2012, the court indicated that the respondents' application, although second in time to that of the appellants, should be heard first on the basis that the outcome of that application might be determinative of the proceedings. In support of that application, we were referred by Miss Pottinger for the respondents to, among other things, section 256 of the Judicature (Resident Magistrates) Act ('the Act), which, as regards appeals from decisions in civil proceedings in the Resident Magistrate's Court, provides as follows:

> "The appeal may be taken and minuted in open Court at the time of pronouncing judgment, but if not so taken then a written notice of appeal shall be lodged with the Clerk of the Courts, **and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment**;…" (Emphasis supplied)

[15] In the light of this clear provision, Mrs Hobson-Hector decided - in our view, prudently so - that it was desirable for the appellants to have before the court an

application for an extension of time within which to serve the notice of appeal on the respondents. She therefore applied for, and was granted, an adjournment of the respondents' strike out application to allow for the filing of the appropriate application. Accordingly, on 20 November 2012, the appellants filed application no 242/2012, which sought an extension of time on the following grounds:

> "1. That the appellants have a good and reasonable chance of succeeding on the appeal.
>
> 2. That it is just and fair in these circumstances for the Court to grant the order for extension of time.
>
> 3. That the delay has not been inordinate.
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> 4. That section 266 makes it clear that this court can, if satisfied that any formality required to be done is not done due to inadvertence or from ignorance or necessity, and if the justice of the case requires it 'permit the appellant to impeach the judgment with or without terms'.
>
> 5. That there is no undue prejudice to the Respondent[s] if such an extension is granted.
>
> 6. That given the circumstances it would be fair, just and reasonable for the Appellants to be allowed an extension to [sic] time to serve Notice and Grounds of Appeal given the overriding objective of the rules of the Supreme Court/Court of Appeal and given the Justice of the case."

[16] The application was supported by an affidavit sworn to by Mrs Hobson-Hector on 19 November 2012. Mrs Hobson-Hector pointed out that the notes of evidence and the Resident Magistrate's reasons for judgment were not received by her until 25 May 2012, when she collected them personally at the court's office. At that time, she stated, "it

[was] noted that they were also delivered to George Thomas & Co., Attorneys-at-Law who had earlier acted for the respondents" (para. 4). It was therefore assumed, "even though erroneous that this would have been forwarded to the Respondent[s] and or their Attorney" [sic] (para. 5). The affidavit referred to the court's power to extend time for service of the notice of appeal under section 12(2) of the Judicature (Appellate Jurisdiction) Act, as well as to section 266 of the Act, which required that the right of appeal in a civil cause should be "construed liberally in favour of such right".

[17] As regards the merits of the proposed appeal, Mrs Hobson-Hector's affidavit said this (at para. 8):

> "8. That the Justice of the case requires that the legal and factual issues inter alia namely:
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> Whether the Notice to Quit requiring the Appellants to quit on the date of the Notice was valid since the reasons given for the Notice was [sic] disputed.
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> The issue of whether the rent was in fact due bearing in mind the admission of the Respondent that he had not honoured the agreement re: the rental of the Penthouse, and the interpretation of 'the lease agreement between yourselves and the landlords having come to an end by virtue of your previous and continuing breaches of the terms of the lease agreement'. There was no identification of the previous and continuing breaches and the court failed to take into consideration the breach of the lease agreement by the Respondent who stated 'I lock them out'.
>
> The court failed to take into consideration that the action of the Respondent affected the revenue of the Appellants including the sums they admitted they had not paid and the revenue lost by the lock out."

[18] And finally, as regards the issue of prejudice to the respondents, Mrs Hobson-Hector asserted (at para. 10) that –

> "…the granting of an extension will not cause any undue prejudice or detriment to the Respondent[s] based on the circumstances of the case and particularly since they have been in possession of the premises since the time of Judgement [sic] and when a forthwith order was made depriving the Appellants of any time to protect their investment but will on the other hand afford the appellant the opportunity to have the Court of Appeal adjudicate on the issues."

[19] This affidavit drew a response from the first named respondent, Mr Donald Brooks, by way of an affidavit sworn to on 23 November 2012. In it, Mr Brooks confirmed (at para. 4) that, despite the fact that his address had not changed, neither he nor his wife had been served with the notice and grounds of appeal, the notes of evidence or the record of appeal. Their engagement of George C. Thomas & Co had ended prior to the trial, at which they were represented by their current attorneys-at-law. On the issue of prejudice, the respondents' position was set out by Mr Brooks in the following extract from his affidavit (paras 6 – 16), which we cannot avoid setting out in full:

> "6. Since being granted possession of my property in March 2011 I have made substantial strides in repairing and refurbishing the property after the Appellants left it.
>
> 7. To date my wife and I have spent approximately Five Hundred Thousand Dollars ($500,000.00) on repairs and in maintenance of the property. This includes painting, gardening, landscaping, drapes and linen, carpentry, plumbing, electrical repairs, building repairs and maintenance, etc. We also replaced furniture, fixtures and fittings,

refrigerators, stoves, televisions and air conditioners that were removed from the premises or destroyed by the Appellant [sic].

8. The property is commercial property and is used to operate a guest house and is a major source of income for my family since my wife and I have retired/returned to Jamaica. The guest house is called Relax Resort.

9. Since obtaining possession of the property in March 2011 my wife and I have entered into arrangements (as Relax Resort) to provide rooms/accommodation with the following companies: Expedia, Caribic Vacation, Booking.com Orbitz.com, Hotel Beds.com, International Vacations, Transat/Nolitours, Travelocity.com, cheaptickets.com.

10. My wife and I would experience serious difficulties if we were forced to enter another lease agreement or renew same with the Appellants in light of the ongoing arrangements mentioned above.

11. At the time of the trial there were several ongoing issues with the appellant including but not limited to the payment of rent. The landlord tenant relationship had deteriorated as I had growing concerns regarding the reputation/stigma of the premises in light of ongoing conduct/behavior being permitted by the Appellant and/or its Agents.

12. To the best of my knowledge the Appellants still reside outside Jamaica and I am uncertain of the arrangements that would be made to manage the property if the Appellants were to be granted possession. This is not clear from the Affidavit of Mrs Jennifer Hobson-Hector filed herein on the 9th and 20th of November 2012.

13. Given our past relationship with the Appellants I know we will have difficulties with another lease agreement or if we were forced to renew the existing lease agreement. I am fearful that the Appellants will again fall into arrears especially in light

of the fact that the monthly rental amount would be increased.

14. I admitted to locking the Appellants out of the premises but I still hold firm to my right to give my tenants notice to quit and deliver up possession of my premises due to the non-payment of rent which adversely affected my financial affairs and obligations to financial institutions.

15. My wife and I will therefore be severely prejudiced and will incur expenses if the Appellant is allowed to serve the Notice and Grounds of Appeal over a year and eight months after they were required to do so.

16. Furthermore, if it is we should be taken out of our home and forced to stop operating our business we will have very little to no income and nowhere to reside.

17. With a pending Appeal which we have not been served with we will not know how to proceed in relation to arrangements/contracts we have entered into in relation to extending and renewing same."

[20] In her written submissions filed on 14 November and 12 December 2012, Mrs Hobson-Hector reminded us again of the provision of section 266 of the Act and contended that the justice of the case required that the appellants be allowed to pursue their right of appeal from the decision of the learned Resident Magistrate. We were also referred to the decision of this court in ***Ralford Gordon v Angene Russell*** [2012] JMCA App 6 to make the point that section 266 "envisages a liberal construction of the Act in favour of the right of appeal which arises under section 251". It was further submitted that the Resident Magistrate had "erred in her findings of fact and the conclusions are not supported by the evidence".

[21] Counsel for the respondents referred us to the decision of this court in ***Jamaica Public Service v Rose Marie Samuels*** [2010] JMCA App 23, to make the point that the considerations relevant to an application to extend time to file and serve a notice of appeal are (i) the reasons for the delay; (ii) whether there is merit in the proposed appeal; and (iii) whether the respondents would be prejudiced by the granting of the application. In the instant case, it was submitted, the appellants had failed to satisfy any of these criteria, no good explanation had been proffered for the delay in serving the notice of appeal, there was no merit in the proposed appeal and it was clear from Mr Brooks' affidavit that the respondents would be prejudiced by the grant of the order. As regards the question of merit, the respondents pointed out that the proposed appeal was from the learned Resident Magistrate's findings of fact and that, in these circumstances, it would have to be shown on appeal that her findings were so contrary to the evidence that no reasonable judge could have found as she did. This, the appellants would be unable to do, as the findings of which they complained were fully supported by the evidence. It was submitted that it was clear from the evidence that rent was in fact outstanding for a period in excess of 30 days and that the appellants' tenancy had been validly terminated by the notice to quit dated 1 October 2010, which, as the Resident Magistrate found correctly and in accordance with authority, took effect from 1 November 2010.

[22] As regards the criteria for extension of time generally, in ***JPS v Samuels*** (at paras [28] – [29]), this court adopted the following formulation by Panton JA (as he

then was) in ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes*** (Motion No 12/1999, judgment delivered 6 December 1999, page 20):

> "The legal position may therefore be summarised thus:
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> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
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> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
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> (3) In exercising its discretion, the Court will consider -
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> (i) the length of the delay;
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> (ii) the reasons for the delay;
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> (iii) whether there is an arguable case for an appeal and;
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> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[23] There can be no doubt that this court has the power to make an order extending the time within which a notice of appeal from a decision of a Resident Magistrate in civil proceedings is to be served in a proper case (see the Judicature (Appellate Jurisdiction) Act, section 12(2)(a)). In ***Gordon v Russell***, which was a Resident Magistrate's Court appeal, Phillips JA also referred to ***JPS v Samuels***, stating [at para. [64]) that "[t]he court must consider the reason for the delay in filing the notice, the merits of the proposed appeal and any prejudice to be suffered as a result of the grant of the extension of time".

[24] In the instant case, we similarly take into account the three considerations against which the application for extension of time within which to serve the notice of appeal must be viewed, namely, the reasons for the delay, the merits of the proposed appeal and the question of any prejudice to the respondents.

[25] As regards the first, it seems to us to be clear that no reason has been given for the delay in serving the notice of appeal. Neither of Mrs Hobson-Hector's affidavits has provided any explanation of why she did not, as was her responsibility as the attorney-at-law having carriage of the appeal on behalf of the appellants, cause notice of the appeal to be served on the respondents within 14 days of the judgment, as section 256 of the Act requires that it should be. In any event, Messrs George C. Thomas & Co having ceased to be the respondents' attorneys-at-law from before the trial begun, there was absolutely no basis for her supposition that the notice of appeal "would" have been brought to the respondents' attention by reason of it having been forwarded to their former attorneys-at-law.

[26] As for the question of merit, the single ground of appeal filed on behalf of the appellants makes it clear that the proposed appeal is against the Resident Magistrate's findings of fact. In these circumstances, it is equally clear that, as the respondents have submitted (and as has been held time and time again), an appellate tribunal should only upset findings of fact by a trial judge if it is satisfied that, on evidence the reliability of which it was for her to assess, she plainly erred in reaching her conclusions

of fact (see, for instance, ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1986) 35 WIR 303, 306–7).

[27] This was an action for recovery of possession primarily on the ground that rent lawfully due to the lessors was unpaid for a period in excess of 30 days (Rent Restriction Act, section 25(1)(a)). The critical fact for the Resident Magistrate to consider was therefore whether that reason for possession had been made good on the evidence. There was no dispute between the parties that no rent had been paid for May and June 2010 and the learned Resident Magistrate, as she was plainly entitled on the evidence to do, rejected the appellants' reasons for not paying the rent. In any event, as she observed, the "no set off" clause in the lease agreement (see para. [3] above) precluded their opting to refuse to pay rent on the ground that the respondents were in breach of some other obligation to them.

[28] And finally, there is the issue of prejudice. In the light of (i) the Resident Magistrate's express finding that the appellants ceased to reside at the premises "since at least September 2010" and "it does not seem that [they] have any intention to return to the property"; and (ii) the unchallenged evidence put forward by Mr Brooks in his affidavit filed in these proceedings, it seems to us that the inescapable conclusion is that the respondents will suffer unnecessary and possibly irreparable prejudice from the grant of an extension of time to the appellants to serve their notice of appeal in this case.

[29] It is for these reasons therefore that we came to the conclusion that the application for an extension of time should be refused and the application to strike out the appeal should be granted, with costs of $15,000.00 to the respondents.