[2014] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 57/2008

APPLICATION NO 90/2008

BETWEEN	**WAYNE REID**	**1ST APPLICANT**
AND	**JENTECH CONSULTANTS LIMITED**	**2ND APPLICANT**
AND	**CURTIS REID**	**RESPONDENT**

Ransford Braham QC and Mrs Sacha Vaccianna Riley instructed by Vaccianna & Whittingham for the applicants

Captain P Alexander Beswick, Miss Carissa Bryan and Kayode Smith instructed by Ballantyne Beswick and Company for the respondent

IN CHAMBERS

22 April, 8 and 20 May 2014

MCINTOSH JA

Introduction

[1] Mr Wayne Reid and Jentech Consultants Limited (the applicants) are seeking a stay of execution of the decision of a Special Jury, handed down on 30 April 2008 after a trial in a libel action presided over by Roy Anderson J sitting with the Special Jury. That decision was not the end of the matter, however, as the learned trial judge had

thereafter to deliver his judgment and this he did on 30 September 2011. That brought the matter to its full conclusion.

[2] The applicants first made their application for a stay in 2008 and, after several adjournments for one reason or another, their amended re-listed application, filed on 14 March 2014, was set for hearing before me on 22 April 2014. However, it had to yield to a preliminary point raised by Mr Beswick for the respondent, the outcome of which was promised for 8 May 2014. An oral decision was delivered then and is now followed by the reasons upon which it was founded.

The pertinent facts

[3] On 11 June 2008, the applicants filed notice and grounds of appeal. Their application for a stay of execution was based on this appeal and the simple point now is whether that notice of appeal may properly form the basis of their application for a stay, having not been filed in accordance with the provisions of rule 1.11(i)(c) of the Court of Appeal Rules (the CAR) which require that it be filed "within 42 days of the date when the order or judgment appealed against was served on the appellant".

[4] The material before the court discloses that the judgment was perfected and served on the applicants on 30 October 2013. The formal order filed outlined both the decision of the Special Jury on 30 April 2008, which the applicants seek to challenge and the judgment of Roy Anderson J delivered on 30 September 2011, which the respondent seeks to challenge. This meant that both sides had 42 days after 30

October 2013 to file and serve their notices of appeal in compliance with rule 1.11(i)(c) of the CAR. It is not in dispute that the 42 day period ended on 11 December 2013.

[5] There is also no challenge to the assertion that apart from the notice of appeal filed and served by the applicants on 11 June 2008 no other notice or application pertaining thereto has been filed. The respondent had also filed a notice of appeal in 2008 and an amended notice on 5 February 2013. Then, on 9 December 2011, after the judgment was perfected, he filed a notice of appeal against both decisions, serving it the following day, which was one day before the expiration of the 42 day period. This did not prompt the applicants to follow suit and, instead, they now seek to rely on the notice of appeal filed in June 2008 to support their application for a stay.

Arguments

[6] It is the respondent's contention that, as the applicants have not pursued their appeal in accordance with rule 1.11(i) (c) of the CAR, there is no appeal in existence capable of supporting an application for a stay which is required by virtue of rule 2.11(i) (b) of the said rules. Therefore no application for a stay should be entertained in this matter.

[7] Mr Beswick relied on the case of ***Cole's Farm Store v China Motors Limited*** [2012] JMCA App 8 to bolster this submission and referred in particular to the following extract from the judgment of Brooks JA at paragraph [18]:

> "The principle which is to be recognized as critical to determining this application, is that it is service of the perfected judgment,

> which triggers the clock for calculating the time, within which notice and grounds of appeal may be lodged."

Counsel submitted that the principle from this case is applicable to the instant case clearly showing that the time for filing a notice of appeal did not arise until after the perfected order was filed and served.

[8] Further, Mr Beswick argued, the word "within" in rule 1.11(i) (c) clearly must be intended to place a boundary on the time frame. It cannot be interpreted to mean "before" or "after" the period. If it is before or after it cannot be within and the question of whether this defect can be cured is not now before the court, learned counsel argued.

[9] Counsel also referred to rule 42.13 of the Civil Procedure Rules 2002 (the CPR) which provides for an application for a stay to be made in the Supreme Court on certain grounds set out in the rule. He contended that it was arguable that in the circumstances of this case the previous applications for a stay made by the applicants could satisfy rule 42.13 as representing new matters since the judgment was handed down, as that is one of the grounds stated in the rule, but, the relisted application now before this court, is misguided.

[10] Mr Braham QC for the applicants argued that the respondent's reliance on the provisions of rule 1.11(i)(c) of the CAR is misconceived as that rule does not deal with the period between the delivery of the judgment and the service of the judgment. The CPR makes it clear, in rule 42.8, that the judgment takes effect from the moment of

delivery, learned Queen's Counsel argued and the successful party is immediately at liberty to execute it.

[11] He submitted that every citizen has a right to appeal to the Court of Appeal by virtue of the provisions of section 16 of the Charter of Fundamental Rights and Freedoms (the amendment to the Jamaica Constitution), the Judicature (Appellate Jurisdiction) Act (the Act) and the CPR. If there were no rules, then, access to the Court of Appeal would be without time limit, learned Queen's Counsel submitted and to interpret the CAR to mean that non-compliance with their provisions in relation to service of the perfected judgment would deprive the citizen of that right, must be misconceived.

[12] Mr Braham QC referred to section 10 of the Act which confers jurisdiction on the Court of Appeal to hear appeals subject to rules of the court. He submitted that it is against this background that the rule in the CAR dealing with the time for filing an appeal should be interpreted.

[13] Learned Queen's Counsel contended that, on its face, rule 1.11(i) (c) speaks to a situation where a judgment or order is served but the CAR does not speak to circumstances where an order/judgment is made and is not served or is not required to be served. In that event, the citizen is entitled to rely on section 10 of the Act and file his appeal. If the respondent's argument is correct, Mr Braham QC contended, it would mean that a prospective appellant upon whom no order was served or could be served would not be entitled to a stay of execution pending an appeal. He could not file an

appeal since no judgment was served on him and he would not be entitled to apply for a stay since the filing of an appeal is a condition precedent to applying for a stay. Learned Queen's Counsel recognized, however, that the CPR provides for the unsuccessful party to file and serve the order if the successful party fails to do so.

[14] Mr Braham QC submitted that it is appropriate for the court to ask itself what mischief the legislation was intended to cure. The rules, Mr Braham QC submitted and, in particular, rule 1.11(i) (c) are intended to:

> "(a) Facilitate the timely bringing of appeals;
>
> (b) Facilitate the efficient and speedy disposal of appeals; and
>
> (c) to avoid prejudice to any of the parties by undue delays."

[15] If the respondent's interpretation is applied it would result in unreasonable, impractical, unfair and absurd consequences, learned Queen's Counsel argued and this court should not be thus persuaded. The case of ***Cole's Farm Store Limited***, relied on by the respondent, is not helpful in the instant case, Mr Braham QC contended, as the application in that case was for an extension of time to file an appeal where no formal order was prepared in relation to the judgment. Consequently, the order could not be served, learned Queen's Counsel submitted and in his judgment Brooks JA made it clear that 42 days from the date of service is the outside deadline for filing an appeal. Mr Braham QC submitted that ***Cole's*** is therefore no authority that an appeal cannot be properly filed before the judgment or order is served.

[16] In conclusion learned Queen's Counsel submitted that the question for determination is whether there is a right of appeal within the period when the matter ended and when the order was served.

[17] Mr Beswick in his reply sought leave to refer to the case of ***Evanscourt Estate Company Limited (by Original action*** ***v National Commercial Bank Jamaica Limited*** (by Original action) and ***National Commercial Bank Jamaica Limited v Evanscourt Estate Company Limited and Design Matrix Ltd*** (by way of Counterclaim and Set Off) Supreme Court Civil Appeal No 109/07; Application No 166/07; a judgment of Smith JA delivered on 21 September 2008, which he said was inadvertently omitted from his earlier submissions. This case, Mr Beswick contended, is a complete answer to the question which learned Queen's Counsel posed at the conclusion of his submissions as it indicates quite clearly that the time lines must be observed in order to validate the appeal.

[18] As this reference came late in the day and was incomplete, submissions in writing were invited from both sides in relation thereto but save for a copy of the judgment nothing further was received by me.

The answer

[19] That every citizen has a right of access to the Court of Appeal is beyond dispute. The respondent offers no challenge to this. However, it is equally clear from statute and from the authorities that there are rules governing how that right is to be exercised. Rule 1.11(i)(c) is such a rule. So, within the context of that right the CAR provides the

procedure for (a) obtaining permission to exercise that right where that is required (rule 1.8); (b) how to appeal (rule 1.9); (c) the format of the notice of appeal (rule 1.10) and the time frame in which the appeal should be filed and served (rule 1.11). In rule 1.11(i)(a) the time is **within** 7 days of the date the decision was made in rule 1.11(i)(b) the time is **within** 14 days of the date permission was granted and rule 1.11(i)(c) the time is **within** 42 days of the date of service of the order or judgment on the appellant.

[20] I find merit in Mr Beswick's submission that the word "within" used in the rule provides the boundary for the period. The right is to be exercised within that period and the rule even provides for extensions of the periods by the court below (see rule 1.11(2)). Rule 1.7(2)(b) of the CAR also provides for extensions by the Court of Appeal "even if the application for an extension is made after the time for compliance has passed", giving every opportunity for the exercise of the right.

[21] The Oxford English Dictionary provides the following among other meanings, in the same vein, for the word "within":

> "Inside, to or at or on the inside, indoors, internally; So as not to pass or exceed; a time no longer than; before expiration…"

This accord with Mr Beswick's submission with which I entirely agree. The word "within" in the rule in question means a time no longer than 42 days and beginning with the date of service of the judgment. The notice of appeal filed on 11 June 2008 does not comply with the time frame and thus is incapable of supporting an application for a stay of execution in this matter.

[22] Learned Queen's Counsel contended both in his oral and written submissions that, if there were no rules dealing with the time for filing a notice of appeal, an appellant would not be limited as to the time in which to file an appeal. But, there are rules and there are limitations and the very section of the Act which he refers to speaks to this. It reads:

> **"Subject to the provisions of this Act and to rules of court,** the court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings …" (Emphasis added)

Therefore the rule applicable to the instant case prescribes 42 days for the exercise of the right and if, for whatever reason, the deadline has passed, the rules provide for an application to be made to extend the time.

[23] Learned Queen's Counsel submitted that on the basis of the respondent's argument, a prospective appellant upon whom no order was served or could be served would not be entitled to a stay of execution pending appeal. Happily this is not a case where no service is required or where the successful litigant failed to file and serve the order. Here the order was filed and served though after much delay and what these applicants should have done was to take steps to ensure that they complied with rule 1.11(i) (c) after they were served.

[24] Since the CPR provides for service by the other party if the successful party fails to file and serve the order, to my mind, it means that the act of filing and serving the successful party would suffice for the purposes of rule 1.11(i)(c) and there would be no

question of the appellant being required to serve him or herself which was one of the absurdities that the respondent's interpretation would have, according to learned Queen's Counsel. I am not persuaded that there is any absurdity, unreasonableness, unfairness or impracticality involved in complying with the rules provided for the exercise of the right to appeal. No citizen is deprived of access to the Court of Appeal because he or she is required to follow the procedure prescribed for the exercise of that right.

[25] In my judgment the cases of ***Cole's*** and ***Evanscourt*** are of assistance in determining this matter as the principles enunciated in them are of application to the instant case and I approve and rely on them. In his analysis of the rules relating to the time for filing the notice of appeal Brooks JA, in paragraph [10] of his judgment in ***Cole's***, examined the provisions of rule 1.11(i) of the CAR, pointing out that each subparagraph had its own trigger and highlighted the provision for service in rule 1.11(i)(c) which he viewed as critical to determining the issue of the time for filing a notice of appeal, applicable in that case.

[26] As Brooks JA stated in paragraph [11] of his judgment, rule 1.15 of the CAR provides that parts 5 and 6 of the CPR apply to the issue of service of notices of appeal and part 42 speaks specifically to the service of orders and judgments about which rule 11.1(i)(c) of the CAR is concerned. While pointing out that rule 6.1 (1) of the CPR provides for service of any order or judgment, requiring service to be effected by the

party obtaining the judgment, unless the court orders otherwise, he highlighted rule 42.5 (3) of the CP.R which states that:

> "Where a party fails to file a draft of an order within 7 days after the direction was given, any other party may draw and file the order."

[27] He referred to rule 42.6 of the CPR which reads:

> "Unless the court otherwise directs the party filing a draft judgment or order in accordance with rule 42.5 must serve the judgment or order on -
>
> (a) every other party to the claim in which the judgment or order is made; and
>
> (b) … "

Then, in paragraph [14] Brooks JA reasoned:

> "Based on those rules, the judgment having been made on the applicant's claim the primary obligation lay on the applicant to serve the formal order of that judgment. It is only where, in the absence of an order of the court, the applicant failed to fulfil that obligation, that rule 42.5(3) allowed the respondent to seek to have the judgment perfected and served."

[28] I am thus fortified in my view, as expressed in paragraph [24] above and I am of the further view that if, as learned Queen's Counsel submitted, there are cases where no service is required, there is nothing to preclude service being effected by the unsuccessful party in order to activate the period, though strictly speaking, none is required. Mr Braham QC also mentioned that there may be cases where service could not be effected but it is unclear to me what that could mean since service in one form

or another would have initiated the proceedings and should also be available for service of the result of the proceedings.

[29] It may well be that the position needs to be put beyond argument by an amendment to rule 1.11 (1) (c) of the CAR to make the 42 day period run from the date of the delivery of the decision appealed against as is the case in rule 1.11 (1) (a).

[30] Further, Part 42 of the CPR provides a window of opportunity to the unsuccessful party to avoid the consequences of immediate effect of the judgment (see rules 42.8 and 42.9) so that the unsuccessful party is not necessarily faced with the immediate results referred to by learned Queen's Counsel.

[31] In ***Evanscourt***, though that case was concerned with an application for leave to appeal, Smith JA made it clear that rules regulate the right to appeal and they are to be followed by all prospective appellants. At pages 8-9, referring to the submission of the applicant's counsel that a notice of appeal had been filed before leave was granted "as a precautionary measure", Smith JA had this to say:

> "But, of course, the filing of a notice of appeal without leave where leave is first required is completely ineffective"

So too, it seems to me, is the filing of a notice of appeal before the trigger referred to by Brooks JA has been activated.

Conclusion

[32] Having filed only an amended application for a stay of execution without the foundation required by rule 2.11(1) (b) of the CAR, namely, a properly filed notice of appeal, in accordance with rule 1.11(i) (c) of the CAR it cannot proceed at this time. The preliminary point is therefore upheld with costs to the respondent to be agreed or taxed.