[2016] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 96/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**PAULETTE RICHARDS**	**APPLICANT**
AND	**ORVILLE APPLEBY**	**RESPONDENT**

Miss Racquel Dunbar and Miss Althea Wilkins instructed by Dunbar & Co for the applicant

Miss Debbie-Ann Samuels for the respondent

13, 15 June and 1 July 2016

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA and agree with his reasoning and conclusion. There is nothing that I could usefully add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my brother F Williams JA. I agree with his reasoning and conclusion.

F WILLIAMS JA

[3] On 13 June 2016 this court heard submissions on the applicant's notice of application filed on 13 May 2016. By that application, the applicant sought: (i) an extension of time to file notice and grounds of appeal against the decision of a parish judge for the parish of St Ann, delivered 18 March 2016; (ii) an extension of time for the payment of the costs and security for costs for the due prosecution of the appeal; and (iii) a stay of the execution of the said judgment.

[4] On 15 June 2016 we made the following orders:

> "1.) The time for the applicant to file and serve his Notice and Grounds of Appeal is extended to seven (7) days from the date hereof.
>
> 2.) The time for the applicant to pay the sum for security for the due prosecution of the appeal and for the security of any costs, and for the due and faithful performance of the judgment, is extended to seven (7) days from the date hereof, which sums must be paid at the time of lodging the notice and grounds of appeal.
>
> 3.) Costs of this application to the respondent to be agreed or taxed. "

[5] These are our reasons for making the above-stated orders.

[6] The claim in the court below, which was initiated by plaint note filed on 13 March 2015, was one for damages based on the tort of negligence as a result of a motor vehicle accident which occurred on 4 October 2009. The matter was tried on 18 March 2016 in the parish court for the parish of Saint Ann, holden at Brown's Town, at the end of which the learned parish judge ordered as follows:

> "...Judgment for the Plaintiff in the sum of **Seven Hundred and Seventy Three Thousand, Five Hundred and Forty Four Dollars ($773,544.00)** with interest thereon for [sic] **three per cent (3%) per annum** from the date of filing of the Plaint **(March 2015)** and **Special** damages assessed at **Seven Thousand Five Hundred Dollars ($7,500.00)** with interest thereon at **six per cent (6%) per annum** from the date of the loss **(October 2009)** plus Costs of **Seven Thousand Dollars ($7000.00)** for service and Attorney Costs of **Fifty Thousand Dollars (50,0000.00). Adjournment costs to be agreed if not taxed.**" (Emphasis as in original)

Submissions for the applicant

[7] Several grounds were advanced on behalf of the applicant in support of the orders sought. Counsel for the applicant submitted that there was merit in the appeal, as the award of damages made by the learned judge below had been inordinatedly high. Further, it was submitted that a part of the award made was based solely on the respondent's testimony which was not supported by the medical evidence before the court. Also, that the learned judge erred in making two separate awards in respect of general damages: (i) $663,544.00, which was based on the injuries stated in the medical report before the court; and (ii) $100,000.00 for pain and suffering in respect of the respondent's back pain and alleged inability to perform sexually (that claim being supported only by the respondent's *viva voce* evidence).

[8] In terms of the failure to file notice and grounds of appeal in time, it was submitted on behalf of the applicant that counsel with conduct of the matter below had misunderstood the stipulated time period for the filing of the notice and grounds of appeal (believing it to be 42 days instead of the 14-day period stipulated by section 256

of the Judicature (Parish Court) Act - the JPCA). However, counsel contended that that delay could not be deemed to be inordinate; neither would the respondent suffer prejudice by virtue of the delay if the application was granted, there also having been some delay on the part of the respondent (the claim not having been filed until 2015, although the incident had occurred in 2009).

[9] Counsel for the applicant further submitted that the matter was one of urgency as the respondent had filed an application for a judgment summons in the Parish Court in Brown's Town, which was set to be heard shortly (on or about 16 June 2016).

[10] It was also the submission of counsel for the applicant that, pursuant to section 12(2) of the Judicature (Appellate Jurisdiction) Act (JAJA), there existed a power for the court to grant the extension of time sought and that, further, in accordance with rule 2.15(a) of the Court of Appeal Rules (CAR) this court has the jurisdiction to stay the judgment pending the outcome of the appeal.

[11] Counsel for the applicant also submitted that the guiding principles to be followed in a matter of this nature were to be found in the well-known and oft-cited case of **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes**, Motion No 12/1999, judgment delivered 6 December 1999. In that case, Panton JA (as he then was) set out the matters to be considered in an application of this nature. It was submitted on behalf of the applicant that the applicant has satisfied the most important of those considerations, thus warranting the granting of the application.

Submissions for the respondent

[12] Counsel for the respondent submitted that there was no merit in the appeal, as the awards made by the learned trial judge were not inordinately high. With regard to the absence of medical evidence to support the respondent's claim for special damages, counsel submitted that the respondent had given *viva voce* evidence which was accepted by the court below.

[13] Counsel further submitted that prejudice would be occasioned to the respondent by the granting of the application and by the further delay that would thereby result, as there had been ongoing negotiations between the respondent and the appellant's insurance company from as early as 2013. Further, it was argued by counsel that the applicant would be indemnified by her insurance company (Advantage General Insurance Company Limited - "AGI") in respect of any damages which she had been ordered to pay and as such there was no risk personally to her regarding the enforcement of the judgment summons.

[14] Counsel sought to persuade the court to deem as unacceptable, the reason given by the applicant's counsel for the delay in filing the notice and grounds of appeal.

[15] Counsel averred that on the dicta of several authorities including **Ralford Gordon v Angene Russell** [2012] JMCA App 6, **Wilbert Christopher v Anna Grace and Rattray Patterson Rattray** [2011] JMCA App 2 and **Patterson and Nicely v Lynch** (1973) 12 JLR 1241, the application for extension of time was bound to fail, as

there was no payment of the security for costs for the due prosecution of the appeal, which is a condition precedent to the filing of any appeal.

[16] On the basis of the foregoing, counsel submitted that the application must be dismissed.

Discussion and analysis

The guiding principles

[17] The guiding principles for the court's consideration are in fact those set out in the **Leymon Strachan** case. In that case, at page 20, Panton JA gave the following guidance:

> "The legal position may therefore be summarised thus:
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
> (i) the length of the delay;
> (ii) the reasons for the delay;
> (iii) whether there is an arguable case for an appeal and;
> (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."

[18] It is against the background of these principles, therefore, that the various submissions and arguments on either side of this application must be considered and resolved.

The length of the delay

[19] The judgment in this matter having been delivered on 18 March 2016, and the JPCA permitting a prospective appellant 14 days within which to file an appeal, the applicant in this case ought to have filed her appeal on or about 1 April 2016. This application not having been filed until 13 May 2016, the period of delay amounts to some 42 days.

[20] To my mind, this period of delay might fairly be regarded as inordinate. However, that, by itself, is insufficient to warrant a dismissal of the appeal; and so it is necessary to discuss the other factors outlined in the **Leymon Strachan** case.

The reasons for the delay

[21] The main reason advanced for the delay in the filing of the notice and grounds of appeal is a misapprehension on the part of counsel who conducted the trial, of the time limited by law for the filing of an appeal from the parish judge's decision. That was coupled with a need on the part of the attorneys-at-law now on the record to acquaint themselves with the matter and to take instructions.

[22] While the court is being urged to accept this as a good reason for the delay by the applicant, counsel for the respondent urged us to reject this as a good reason, mainly on the bases that: (i) the time period for filing appeals from decisions in the

parish courts is well known; and should be taken as having been known by the particular attorney-at-law who conducted the trial, who is of some seniority; and (ii) the said attorney-at-law (based on averments in the affidavit of Debby-Ann Samuels, sworn and filed 9 June 2016) had actually contemplated the feasibility of filing an appeal the very day of the trial; but shortly thereafter resolved not to do so.

[23] There was no response to these averments in the affidavit of Debby-Ann Samuels. Perhaps, as the hearing of this application was set for 13 June 2016, time did not permit the filing of a reply. However, even if there had been an initial decision not to have appealed the judgment, it would not be uncommon or unreasonable for there to have been a change of mind or approach after the matter was given further consideration and/or further instructions were taken. This possibility assumes greater significance when, as in this case, there was a change in representation, with new attorneys-at-law assuming conduct of the matter. In any event, however, whatever the true position, I would have been loath to have decided this issue on these relatively tangential questions of fact.

[24] For my part, considering especially the change in legal representation in this case, which in my view would undoubtedly have caused some time to elapse, arising from the new attorneys-at-law's need to take instructions and review the matter, I find that the explanation for the delay is a good and acceptable one.

[25] In any event, however, even if I should eventually be found to be incorrect in this conclusion, it is to be remembered that, at the end of the day, what is required on

the basis of the principles outlined in the **Leymon Strachan** case is that the justice of the case be examined even where the explanation for the delay may not be a good one.

[26] In this regard, the question of the merits of the appeal assume considerable significance.

Is there an arguable case for an appeal?

[27] In relation to this issue, it is to be remembered that the applicant is making two main contentions: (i) that the award is inordinately high; and (ii) that there was no proper evidential basis for one aspect of the award for general damages.

[28] Counsel for the applicant, in this regard, stressed that the sole medical evidence in the matter came from the medical report of Dr Satya Parvataneni dated 9 July 2015. That report indicates that on 21 October 2009, when the doctor examined the respondent, he found the respondent to be : "...clinically normal. Left knee & back no signs of any bony injury and were functionally normal". At trial, however, the respondent testified that he continued to suffer from back pains, and that that affected his sexual performance with the result that his girlfriend left him. This, it was submitted, was in contrast to the medical report.

[29] On the other hand (and as indicated at paragraph [12] hereof), counsel for the respondent sought to persuade us to view that the respondent's *viva voce* evidence concerning the back pains and sexual performance, was evidence that the learned parish judge was entitled to have accepted.

Discussion

[30] It seems to me that the applicant must be regarded as having successfully crossed the hurdle of demonstrating that she has an arguable case on appeal. To my mind, the contrast between, on the one hand, the seemingly-definitive words of the medical report, describing the respondent as being in 2009 "clinically normal"; and, on the other hand, the respondent's testimony as to his continuing back pain and the resulting effects, must call for an exploration on appeal of, at the very least, the reason for this contrast and whether the learned trial judge was entitled to have accepted the *viva voce* evidence in relation to this issue.

[31] If the learned trial judge was wrong in his acceptance of this bit of the respondent's evidence, then his making an award based on it would have incorrectly inflated the award made for general damages. That is so whether or not the applicant is correct in her contention that such cases as **Reginald Stephens v James Bonfield & Conrad Young**, Khan Vol 4, page 212; and **Gilbert McLeod v Keith Lemard**, Khan Vol 4, page 205, by themselves demonstrate that the award was inordinately high. But, of course, that is also another aspect of the matter that might be explored on appeal, those cases appearing on their face to support the applicant's contention of an inordinately-high award.

[32] In my view, therefore, the applicant has succeeded on this aspect of the matter.

The degree of prejudice

[33] In relation to the issue of the degree of prejudice, there is no affidavit evidence as to the limit of the relevant policy of insurance and the extent to which, if at all, the applicant would be financially exposed by the respondent proceeding with the judgment debtor summons. Equally importantly is the fact that there simply is no evidential basis for the respondent's contention that the applicant will be indemnified by AGI.

[34] If, as the applicant contends, the award is inordinately high, then it would be unjust and prejudicial to the applicant to have the matter proceed to execution, without these issues that are being raised as to quantum, being explored on appeal. If the award is inordinately high and should be permitted to be recovered by the respondent, that would evidently be prejudicial either to the applicant (if she will be the one responsible for either a part or all of the judgment debt); or to AGI (if it has indemnified the applicant in full); or to both the applicant and AGI (if the award exceeds the policy limit and the responsibility for payment would have to be shared).

[35] On the other hand, there might be prejudice of some sort occasioned to the respondent by the delay in collecting the fruits of his judgment, which the granting of this application would necessarily occasion. However, if this application is granted and the applicant succeeds on appeal, that delay would eventually have evolved into a just outcome, and the respondent at the end of the day would be collecting no more or no less than a just award. If, however, the appeal should be dismissed, and the award made should be allowed to stand, then there would be some compensation to the

respondent for the delay in the form of additional interest that would have accrued on the judgment debt.

[36] In the result, I would say that these factors that I have considered on the issue of prejudice are in the applicant's favour and that this would be another basis for the granting of the application.

Security for the payment of costs

[37] The discussion around this issue centred on section 256 of the JPCA, which, so far as is relevant, reads as follows:

> "256. 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...within fourteen days after the date of the judgment; and the party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of six hundred dollars as security for the due prosecution of the appeal, and shall further within fourteen days after the taking or lodging of the appeal give security, to the extent of six thousand dollars for the payment of any costs that may be awarded against the appellant, and for the due and faithful performance of the judgment and orders of the Court of Appeal."

[38] In relation to the respondent's arguments to the effect that the application was doomed to failure as there was no payment made for the security of the due prosecution of the appeal and for the security of costs and for the due and faithful performance of the judgment, it should be noted that these arguments are based on cases along the lines of the decision of **Patterson and Nicely v Lynch.**

[39] An important distinction between that case and the others cited in which it was followed, on the one hand, and the instant case, on the other is this: the **Patterson and Nicely v Lynch** line of cases all involved situations in which the appeal had been filed without the payment of the relevant sums within the time specified. In the instant case, however, no notice and grounds of appeal have been filed and it is with a request for an extension of time to do so that this applicant has come before this court. That is the important distinction. There is undoubtedly a power in this court, pursuant to section 12(2) of the JAJA to extend time for the filing of notice and grounds of appeal.

This is how that section reads:

> "12(1) ...
>
> (2) Notwithstanding anything to the contrary the time within which –
>
> (a) notice of appeal may be given or served;
>
> (b) security for the costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given;
>
> (c) grounds of appeal may be filed or served,
>
> in relation to appeals under this section may, upon application made in such manner as may be prescribed by rules of court, be extended by the Court at any time."

[40] The most-convenient way of resolving this issue is by reference to dicta from the most comprehensive and authoritative discussion by this court of the said issue in the

case of **Ralford Gordon v Angene Russell**. In that case, Phillips JA on behalf of the court observed at paragraph [64] of that judgment:

> "[64] Had this matter related only to an application for extension of time to pay the sum for the due prosecution of the appeal, this would necessarily have resulted in a refusal of the application. However, the application before us requested an extension of time for filing the notice of appeal and the payment of the sum for due prosecution. In this case, the Resident Magistrate's Court refused to accept the notice of appeal, which was fortuitous to the applicant as there was then no appeal filed in relation to this matter. Rule 12(2) permits this court to grant an extension of time to file the notice of appeal."

[41] In those circumstances, and after analysing the factors to be considered in the exercise of the court's discretion, the application for an extension of time to file a notice and grounds of appeal was granted, which grant would have allowed the applicant in that case to have paid the relevant sums within the time frame specified in section 256 of the JRMA.

[42] I therefore find that there is no merit in the respondent's contention on this issue.

Application for a stay of execution

[43] The applicant's application for a stay of execution was made pursuant to rule 2.15(a) of the CAR. The stating of that rule will be sufficient to illustrate the difficulty faced by the applicant in succeeding on this aspect of the application. It reads as follows:

> "2.15 In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR part 26;..." (Emphasis supplied).

[44] On a proper interpretation of this rule, a pre-requisite for its use is the existence of a civil appeal. There was, at the time of the hearing of this application, no civil appeal in existence: the application being one, it should be remembered, seeking an extension of time to file such an appeal. In such circumstances, the applicant could not avail herself of this rule and successfully apply for a stay.

[45] It was these considerations that led me to agree to grant the application in this matter in the terms stated in paragraph [4].