[2014] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 79/2012

APPLICATION NOS 58/2013 AND 140/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

IN THE MATTER OF an application for Administrative Orders Pursuant to the Jamaica (Constitution) Order in Council, 1962

AND

IN THE MATTER OF sections 21 and 33 of The Independent Commission of Investigations Act 2010

BETWEEN **GERVILLE WILLIAMS**
ORRETTE WILLIAMSON
FRANCIS RENNALS
DEVON NOBLE
DAVID HUTCHINSON
PETRO GREENE
MARCEL DIXON
KENNETH DALEY **APPELLANTS**

AND **THE COMMISSIONER OF THE INDEPENDENT COMMISSION OF INVESTIGATIONS** **1ST RESPONDENT**

AND **THE ATTORNEY GENERAL OF JAMAICA** **2ND RESPONDENT**

AND **THE DIRECTOR OF PUBLIC PROSECUTIONS** **3RD RESPONDENT**

Chukwuemeka Cameron instructed by Carolyn C. Reid & Co for the appellants

Richard Small and Mrs Shawn Wilkinson instructed by Wilkinson & Co for the 1st respondent

Miss Althea Jarrett instructed by the Director of State Proceedings for the 2nd respondent

11, 12 November 2013 and 17 March 2014

MORRISON JA

Introduction

[1] The appellants were the claimants in Supreme Court Claim No HCV 06344/2011, while the 1st, 2ndand 3rd respondents were the defendants. The 3rd respondent did not appear and has taken no part in this aspect of the proceedings.

[2] By its judgment given on 25 May 2012, the full court of the Supreme Court dismissed the appellants' claim, with no order as to costs. The appellants filed notice and grounds of appeal against this judgment on 13 June 2012.

[3] By notice filed on 31 May 2013, the 1st respondent applied for an order dismissing the appeal for want of prosecution (application no 58/2013). Notice of this application was served on the appellants' attorneys-at-law on 30 September 2013. By notice filed

on 4 November 2013, the appellants applied for orders extending the time within which to serve their skeleton arguments and granting permission to file the record of appeal out of time (application no 140/2013).

[4] Both applications having been heard together on 11 and 12 November 2013, the court, by orders made on the latter date, refused the appellants' application to extend time and granted the 1st respondent's application to dismiss the appeal for want of prosecution.

Background

[5] The appellants were charged in proceedings before the Resident Magistrate's Court for the Corporate Area for the offence of failing to comply with a lawful order given by the Commissioner under the Independent Commission of Investigations Act ('the Indecom Act'). At the commencement of the trial on 21 May 2011, the appellants raised points *in limine* based on alleged breaches of their constitutional rights against self-incrimination and to silence.The learned Resident Magistrate having ruled against them, the appellants then sought and were granted an adjournment of the proceedings in that court to allow them to bring a constitutional claim in the Supreme Court. This is the claim, as has already been indicated, in which the full court gave judgment in favour of the respondents on 25 May 2012.

[6] After the filing of the appellants' notice of appeal on 13 June 2012, the registrar of this court, by notice dated 21 June 2012, advised all parties of the steps required by the Court of Appeal Rules, 2002 ('the CAR'), in order to advance the appeal. In particular,

the notice reminded (i) all parties to the appeal of the requirement that they should inform the appellants, within 14 days of the filing of the notice of appeal, of the documents which they wished to have included in the record of appeal (rule 2.7(2)(c)); and (ii) the appellants, of the requirement that they should file their skeleton arguments and the record of appeal within 21 and 28 days respectively of the date of the filing of the notice of appeal (rules 2.6(1)(c) and 2.7(3)(c)).

[7] Following on from this notice, the 1st respondent's attorneys-at-law wrote to the appellants' attorneys-at-law on 13 July 2012, advising them of the documents which they wished to have included in the record of appeal.

[8] On 8 April 2013, the registrar wrote to the appellants' attorneys-at-law to advise as follows:

> "Reference is made to the captioned appeal and the attached copy of a Registrar's Notice faxed to your office and confirmed received on June 21, 2012.
>
> Please be reminded that the Skeleton Arguments and Record of Appeal should have been filed within 21 and 28 days respectively of the filing of the Notice of Appeal in this Registry.
>
> The Notice of Appeal was filed on June 13, 2012 and the Skeleton Arguments and Record of Appeal should have been filed by July 4 and 11 2012 respectively (see rules 2.6(1)(c) &2.7(3)(c) of the Court of Appeal (Amendment) Rules 2006).
>
> The Skeleton Arguments were in fact filed on July 6, 2012 and Record of Appeal has not been filed to date.
>
> Kindly take the necessary steps to regularize the appeal."

[9] The following day, 9 April 2013, the attorneys-at-law for the 1st respondent wrote to the appellants' attorneys-at-law, pointing out that, although the notice of appeal had been filed on 13 June 2012, they had yet to be served with a copy of the appellants' skeleton arguments. The letter ended with an enquiry: "Kindly be good enough to indicate whether you intend to pursue the captioned appeal and if so, serve us with a copy of the relevant documents so that the matter can proceed."

[10] As at 31 May 2013, the date on which the 1st respondent's application to dismiss the appeal for want of prosecution was filed, there had been no response from the appellants' attorneys-at-law to either of the letters referred to in paragraphs [8] and [9] above. Nor had the 1st respondent's attorneys-at-law been served with a copy of the appellants' skeleton arguments (although, as it turned out, they were in fact filed on 6 July 2012).

[11] In the meantime, the constitutional claim having failed in the Supreme Court, the appellants' trial in the Corporate Area Resident Magistrate's Court at Half-Way-Tree had resumed on 28 August 2012. Thereafter, the trial continued over the course of several days, spread over a period in excess of a year, with the appellants' full participation. At the time of the hearing of these applications, we were informed by counsel that the trial was set for continuation on 23 December 2013.

The hearing of the applications

[12] This was how matters stood when the 1st respondent's application to dismiss the appeal first came on for hearing before this court on 4 November 2013. When, through no fault of any of the parties, it turned out that it was not possible for the application to be heard on that date, it was set for hearing on 11 November 2013. On that date, Mr Richard Small for the 1st respondent commenced moving the application, taking the court through the history rehearsed above. On the basis of the material before the court, Mr Small submitted, it was obvious that the appellants had no interest in pursuing the appeal and he accordingly asked for an order dismissing the appeal.

[13] At this point, Mr Chukwuemeka Cameron for the appellants referred the court to the application for extension of time within which to comply with the rules, which had in fact been filed on the appellants' behalf on 4 November 2013. Because neither this application, nor the affidavit filed in support of it, was then before the court, the matter was stood down to the following day so that this omission could be cured.

[14] The affidavit in support of the application to extend time was sworn to by Mrs Carolyn Reid-Cameron, attorney-at-law, whose firm has acted for the appellants throughout the proceedings. Mrs Reid-Cameron attributed the appellants' failure to serve their skeleton arguments on the respondents and to file the record of appeal to "an administrative error that caused the fulsome skeleton arguments not to be filed [sic] and the record not settled". She stated that this was a constitutional matter of great public importance and interest and that the appellants remained desirous of

having it determined. She pointed out that, at the appellants' request, submissions on the issues raised by the appeal, that is, the right to silence and the right against self-incrimination, had been submitted to and relied on in Parliament. She drew the court's attention to a related decision of the full court, in ***Police Federation v The Commissioner of the Independent Commission of Investigations, et al*** [2013] JMFC Full 3, an appeal from which is pending in this court,in which the court had pronounced on the constitutionality of the Indecom Act. Mrs Reid-Cameron stated that the appellants intended to apply at case management for the consolidation of these appeals so that they can be heard together. As regards the merits of the appeal, she referred to a statement by Sykes J in the court below in the instant case that the issue of the test for constitutionality "will have to be examined afresh by the higher courts", and that "Mrs Reid Cameron 'may well be correct' in her submissions as it relates to the test for constitutionality". In these circumstances, Mrs Reid-Cameron concluded, this was a case in which the appellants had a "very strong appeal" and the 1st respondent had suffered no prejudice from the appellants' delay in complying with the rules. Finally, Mrs Reid-Cameron undertook on behalf of her firm to serve the skeleton arguments and to file and serve the record of appeal within 48 hours of the date of her affidavit.

[15] In his submissions, Mr Cameron frankly conceded that, save for Mrs Reid-Cameron's reference to "an administrative error" in the office of the appellants' attorneys-at-law, no substantial reasons had been advanced on the appellants' behalf to explain the delay in prosecuting the appeal. But he went on to submit that this was not the only consideration, pointing to the court's power under rule 1.7(2) to shorten or

extend time. The appellants filed full grounds of appeal within the time limited by the rules and any other problems could be dealt with at case management. The 1st respondent had suffered no prejudice as a result of the appellants' failure to comply with the rules, "as the constitutionality of the Indecom Act and the powers of the Commissioner still hangs [sic] in the balance and are to be determined by" this court. For these reasons, Mr Cameron urged the court to grant the application to extend time and to refuse the application to dismiss the appeal.

[16] In a wide-ranging reply, Mr Small pointed to the appellants' inordinate and inexcusable delay in prosecuting the appeal, which remained unexplained (or unsatisfactorily explained); and the fact that they had participated fully in the continuation of the Resident Magistrate's Court proceedings, even after filing the appeal. These factors demonstrated, it was submitted, that the appellants had no interest in pursuing the appeal. In reliance on the decisions of this court in ***Benjamin Patrick v Fredericka Walker*** (1969) 11 JLR 303 and ***Peter Haddad v Donald Silvera***(SCCA No 31/2003, judgment delivered 31 July 2007), Mr Small submitted that there was no material before the court upon which to ground the exercise of the court's discretion in this case. In any event, all the matters of which the appellants complained in their grounds of appeal can be resolved in the Resident Magistrate's Court proceedings and, if necessary, on appeal to this court from the decision at the trial. As regards Mrs Reid-Cameron's reference to Sykes J's comment in the court below, Mr Small directed us to paragraphs [220]-[221] of the actual judgment, in order to establish the context.

[17] But further, Mr Small submitted, this is a case in which no discretion should be exercised in the appellants' favour, because of the several abuses of process committed by them. Among others, these included (i) their failure to respond to the court's reminders for 15 months; (ii) their failure to make an application to extend time before the application to dismiss came on for hearing on 4 November 2013; (iii) ignoring the appellate process while participating in the resumed trial in the Resident Magistrate's Court; and (iv) breaching the undertaking to serve the skeleton arguments and record of appeal.

[18] Miss Althea Jarrett for the 2nd respondent, while recognising that the appellants were in breach of the rules, did not oppose their application for an extension of time. Her position was that, issues relating to the constitutionality of the Indecom Act having been raised and argued in the court below, the matter was one of great public interest; therefore, despite the fact that no good reason had been put forward for the appellants' "quite startling" delay, the 2nd respondent did not support the application to dismiss the appeal.

[19] In a brief reply to the authorities cited by Mr Small, Mr Cameron submitted that they were both distinguishable on their facts.

The power of the court to extend time

[20] This issue logically arises first, since if the application to extend time is granted, it would generally follow that the application to dismiss for want of prosecution would

have been overtaken. Under the rubric, "The court's general power to extend time", rule 1.7(2)(b) of the CAR provides as follows:

> "Except where these Rules provide otherwise, the court may –
>
> (a) …
>
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed;…"

[21] In ***Haddad v Silvera***, Smith JA, with whose judgment the other members of the court agreed, characterised the discretion conferred by this rule (at page 8) as "untrammelled". But this was, the learned judge emphasised, a discretion to be exercised judicially: "There must be some material upon which the Court can exercise its discretion." In support of this statement, Smith JA cited the pre-CPR case of ***Patrick v Walker***, in which an application for leave to appeal out of time and to extend time within which to file notice and grounds of appeal was refused on the ground that "there is no material upon which this court can be asked to exercise its discretion" (per Waddington P (Ag), at page 305).

[22] Turning specifically to "tardy" applications in ***Haddad v Silvera***, Smith JA added (at page 13) that, although the general principles regarding the extension of time in the trial court are equally applicable in this court, the approach of this court is different:

> "As the successful party is entitled to the fruits of his judgment the party aggrieved must act promptly. The Court in my view should be slow to exercise its

> discretion to extend time where no good reason is proffered for a tardy application."

[23] In the result, the courtin ***Haddad v Silvera*** held that the application for an extension of time should be refused on the grounds that (i) the reasons proffered for the delay in complying with the rules were inadequate (what was put forward was that the parties were in discussions with a view to settlement and that the attorney-at-law who had conduct of the matter had left the firm); (ii) no material was placed before the court as to the merits of the proposed appeal or the absence of prejudice to the respondent; and (iii) the application to discharge the order of the single judge of appeal who had originally refused to extend time had not been made promptly.

[24] ***Haddad v Silvera*** therefore makes it clear that, although the court enjoys a wide and unfettered discretion under rule 1.7(2)(b) to extend the time for compliance with the rules, it is still necessary for the party seeking to invoke that discretion to place sufficient material before the court to enable it to make a sensible assessment of the merits of the application. In particular, as this court has repeatedly held on such applications, the court will have regard to the length of the period of delay, the explanation put forward by the applicant for the delay, the merits of the appeal and the question of prejudice to the respondent (see for instance, ***Leymon Strachan v Gleaner Company Ltd and Dudley Stokes***, Motion No 12/1999, judgment delivered 6 December 1999; and ***Jamaica Public Service Company Ltd v Rose Marie Samuels*** [2010] JMCA App 23). But, as Smith JA explained (at page 12), quoting and expressly adopting the well-known dictum of Edmund Davies LJ (as he then was) in

Revici v Prentice Hall Incorporated and Others [1969] 1 All ER 772, 774, the starting point has to be that –

> "…the rules are there to be observed; and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted: see***Ratnam v Cumarasamy*** ([1964] 3 All ER 933 at p 935; [1965] 1 WLR 8 at p 12), per Lord Guest."

Applying the principles

[25] The appellants' delay in this case was, by any measure, inordinate and Mr Cameron, realistically, did not contend otherwise. By the time the 1st respondent's application to dismiss the appeal was filed on 31 May 2013, almost a year had passed since the filing of the appeal and the appellants had been completely non-responsive to correspondence from either the Registrar or the 1st respondent. Even after notice of the application was served on them on 30 September 2013, no step was taken by them or their attorneys-at-law to make an application to extend time; and it is plain from the undisputed chronology that the filing of the application on 4 November 2013 was only prompted by the fact that the 1st respondent's application to dismiss was listed for hearing by the court on that very day.

[26] Equally realistically, Mr Cameron also accepted that no real reason had been put forward by the appellants to explain this delay. As the decision in ***Haddad v Silvera*** reminds us, a party aggrieved by the decision of the court below is under a particularly strict obligation to act promptly and an explanation for not doing so which does not

even condescend to detail of any kind, such as Mrs Reid-Cameron's laconic attribution of the delay to "administrative errors", is, in my view, completely unsatisfactory.

[27] Turning next to the question of the merits of the appeal, in support of the bare assertion that the appellants have a "very strong appeal", reliance was placed on a statement made by Sykes J in the course of his judgment in the court below that counsel "may well be correct" in a submission advanced before the court. But, as Mr Small submitted – obviously correctly – context is all important. The remark quoted in Mrs Reid-Cameron's affidavit appears in paragraph [221] of the judgment and, in order to appreciate its true import, it is necessary to pick up the thread of the learned judge's thoughts from the preceding paragraph, which is where he begins a discussion under the rubric, "The test for constitutionality":

> "[220] Mrs Reid-Cameron, for the claimants, has insisted that the test to be applied for unconstitutionality is that of proportionality. She has insisted on this even in light of the strong statements from the Judicial Committee of the Privy Council that the test for unconstitutionality in the Commonwealth Caribbean, including Jamaica, is proof beyond reasonable doubt. Not only that, the Privy Council have [sic] also said that the burden of proving unconstitutionality is a very heavy one (**Mootoo v Attorney General of Trinidad and Tobago** (1979) 30 WIR 411; **Grant v R** (2006) 58 WIR 354; **Suratt v Attorney General of Trinidad and Tobago** (2007) 71 WIR 391). The reason for this is that courts do not lightly or readily conclude that a law passed by the legislature is in breach of the constitution (**Public Service Appeal Board v Maraj** (2010) 78 WIR 410). This has been held to be the approach to bill of rights in the Commonwealth Caribbean even after the Privy Council said that the constitution must be given a

> broad and purposive interpretation (**Minister of Home Affairs v Fisher** [1979] 3 All ER 21). These claimants have not discharged the burden placed on them by this test.
>
> [221] According to Mrs. Reid-Cameron, the new Charter of Rights has new words that introduce new concepts which, without more, need another approach. She may well be correct but in light of strong authority from the higher courts, that issue will have to be examined afresh by the higher courts."

[28] It seems to me from a reading of paragraphs [220] and [221] together that, far from thinking that the argument which was being advanced by counsel was a promising one, the learned judge was inclined to the opposite view, in the light of what he described as "strong authority from the higher courts". There is therefore nothing in what Sykes J said in this case to support the contention that the appellants' case on appeal is strong, or even arguable. Nor are the grounds of appeal, taken by themselves, despite Mr Cameron's description of them as 'fulsome', particularly helpful in this regard. In my view, all that they do, in the usual manner of grounds of appeal, is to set out in summary form the arguments which the appellants intend to advance in contending that the judgment of the court below was wrong.

[29] Finally, as regards the question of prejudice, no evidence was put before us from the 1st respondent on this question. But in written submissions filed on its behalf on 28 October 2013, reference was made to ***Biss v Lambeth, Southwark and Lewisham Health Authority*** [1978] 2 All ER 125, 131, where Lord Denning MR observed that "[t]here is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial". This statement, in my

view, although made in the context of matters before the trial court, can in a proper case be equally applied in this court. On this basis, I have no difficulty in accepting the 1st respondent's submission (at paragraph 12 of the written submissions) that the fact of a pending appeal can cause "not only uncertainty in respect of the affairs of the [1st respondent], but also uncertainty in respect of the law".

[30] These are my reasons for concluding that the appellants' application for an extension of time within which to comply with the rules should be refused.

Dismissal for want of prosecution

[31] Without an order for extension of time, the appellants are back in the position in which they found themselves on 4 November 2013. I think it is fair to conclude that, as Mr Small submitted, as at that date the appellants had shown no real intention of pursuing the appeal. For, not only had they failed to take any further steps to progress their appeal for well over a year, as has been seen, but over that same period they had resumed - and sustained - active participation in the trial before the learned Resident Magistrate. It seems to me that the juxtaposition of these two factors, complete inaction in this court, as against steady activity in the other, supports a clear implication that the appellants had made an election between the two sets of proceedings.

[32] In my view, this is a clear abuse of the process of this court in the sense described by Lord Woolf in ***Grovit and Others v Doctor and Others*** [1997] 2 All ER 417, 424:

> "The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. **The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution**." [Emphasis supplied]

[33] Accordingly, on the basis of the same considerations that have informed my view that the appellants were guilty of an abuse of the process of this court, I came to the conclusion that the 1st respondent was entitled to an order dismissing the appeal for want of prosecution.

Conclusion

[34] These are my reasons for concurring in the orders made by this court on 12 November 2013 (see paragraph [4] above).

McINTOSH JA

[35] I have read the judgment of my brother Morrison JA. I concur and have nothing to add.

BROOKS JA

[36] I have had the privilege of reading, in draft, the reasoning and conclusion of my learned brother, Morrison JA. I agree with his judgment and have nothing to add.