[2016] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 35/2015

APPLICATION NO 115/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**CLIVE BANTON**	**1ST APPLICANT**
AND	**SADIE BANTON**	**2ND APPLICANT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION INC**	**RESPONDENT**

Emile Leiba instructed by DunnCox for the applicants

Mrs Sandra Minott-Phillips QC instructed by Myers Fletcher and Gordon for the respondent

18 January and 5 February 2016

PHILLIPS JA

[1] I have read, in draft, the reasons for judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing that I can usefully add.

BROOKS JA

[2] This is an application for this court to extend the time in which to file and serve a counter-notice of appeal. The applicants, Mr Clive Banton and his wife, Mrs Sadie Banton (hereinafter together referred to as the Bantons), secured a judgment in the Supreme Court on 20 March 2015, arising from the cancellation of an agreement for sale of real property, in which they were the named purchasers. The learned trial judge, Batts J, ruled that the vendor, Jamaican Redevelopment Foundation Inc (JRF), had wrongly cancelled the agreement for sale. He awarded the Bantons the sum of US$940,908.80, as damages in compensation for their loss of the bargain.

[3] JRF has appealed from the judgment. It contends that the learned judge was wrong, both in respect of liability, and in his assessment of the damages. The Bantons also wish to contest the judgment. They contend that the award of damages was too low. They assert that the learned trial judge erred in his ruling in respect of the contents of an expert report that was tendered on their behalf.

[4] In breach of the Court of Appeal Rules (CAR), the Bantons did not file the required counter-notice of appeal within the stipulated time. Their application for an extension of time within which to do so has been resisted by JRF on the bases that they have not given an explanation for the failure to obey the relevant rule; that the proposed counter-notice has no real prospect of success; and that the prejudice to JRF would render the granting of the application unjust.

[5] An outline of the relevant facts of the case would assist in assessing the merits of the application.

The background facts

[6] The necessary background may be briefly stated. JRF entered into an agreement to sell the property to the Bantons. It was, at that time exercising powers of sale contained in a mortgage. The agreement stipulated that time was of the essence for the performance of the steps to be taken by the Bantons. JRF claimed that the Bantons failed to make certain payments in time. It then allowed the mortgagor to redeem the mortgage, thus rendering a continuation of the sale to the Bantons impossible. The Bantons sued. Batts J ruled in their favour in terms of liability on 4 July 2014. He assessed the damages, as a separate exercise, in February 2015.

[7] An important aspect of the assessment of the loss, claimed to have been incurred by the Bantons, was the influence that the income-earning potential of the property, as a source for construction aggregate and sand, had on its value. During the assessment of damages, a report by chartered valuation surveyors, Allison Pitter & Co, became a source of controversy. It contained, as an attachment, a report on the quantitative and qualitative estimate of aggregate deposits on the property, and the commercial value of the deposits. That report had been prepared by Blastec Consultant Services.

[8] JRF objected to the inclusion of Blastec's report. The learned trial judge upheld the objection, and Allison Pitter's report was ruled inadmissible as originally prepared.

Later in the proceedings, however, the learned trial judge allowed an amended version of Allison Pitter's report into evidence, during evidence in chief. The amended report, admitted as exhibit 5, was substantially the same as the report that was originally produced except that Blastec's report was not attached to it. References to reliance on the experience of Blastec's principal, Mr Neufville, had also been excised.

[9] Curiously, however, although it had originally objected to Allison Pitter's original report being put into evidence, JRF's counsel cross-examined Mr Allison of Allison Pitter on the contents of the original report. Thereafter counsel applied, during cross-examination of Mr Allison, for the very report to be admitted into evidence. The report was admitted as exhibit 6. JRF has made the learned trial judge's reliance on Allison Pitter's report a ground of its appeal.

The relevant chronology

[10] JRF filed its notice of appeal in short order. It served a copy of the notice of appeal on the Bantons' then attorneys-at-law on 8 April 2015. On one view of the rules, the Bantons ought to have complied with rule 2.3(1) of the CAR and filed a counter-notice of appeal on or before 22 April 2015. As has been noted before, that was not done. Mrs Minott-Phillips QC, on behalf of JRF, initially suggested another view that could have been adopted. That view will be discussed further, below.

[11] The relevant chronology of what occurred after the service of the notice of appeal is as follows:

- On 14 April 2015, an order was made in this court staying execution of the judgment on terms. Both parties were represented by counsel.
- Up to at least 24 April 2015, correspondence continued between the attorneys-at-law representing the respective parties.
- On 5 June 2015, the Bantons retained DunnCox as their new attorneys-at-law.
- On 15 June 2015, the court documents were sent from the previous attorneys-at-law to DunnCox.
- On 16 June 2015, DunnCox filed an application for extension of time to file counter-notice of appeal. It was not served. Nor was the counter-notice that was filed on the same day.
- On 14 August 2015, the Bantons filed affidavits in support of the application for extension of time. The affidavits were not served at that time.
- On 1 September 2015, DunnCox filed an amended application for extension of time to file the counter-notice of appeal.
- On 7 September 2015, DunnCox served the amended application. Apparently, the affidavits, filed in August 2015, were also served at that time.

The application

[12] Mr Leiba, on behalf of the Bantons, argued that their application ought to be granted on the bases that:

a. the delay in making the application was not inordinately long.

b. there was a good explanation for the delay, that is, the change of legal representation.

c. the grounds of appeal, set out in the proposed counter-notice, had merit.

d. there was no prejudice to JRF as the issue of the quantum of damages had already been raised by its appeal.

e. the justice of the case favoured the granting, rather than the refusal, of the application.

The opposition

[13] Mrs Minott-Phillips, in opposing the application, countered that the Bantons had not provided any explanation for the failure to file the counter-notice within the stipulated time. She submitted that the absence of an explanation was fatal to the application. Learned Queen's Counsel argued that the change in legal representation was not an explanation for the failure to file the counter-notice because the Bantons were represented by counsel during the period within which the notice ought to have been filed. In any event, learned Queen's Counsel submitted, not only did the proposed counter-appeal have no merit, but JRF would be severely prejudiced if such a late application were granted.

The applicable principles

[14] The criteria for assessing this type of application were clearly set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999). Panton JA (as he then was) stated them at page 20 of his judgment in that case. He said:

> "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 timetable, 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."

[15] Although **Leymon Strachan v Gleaner Company Ltd** was decided prior to the promulgation of the present CAR, the criteria set out by Panton JA have been accepted

as still being of relevance in the current regime. Among the cases in which they have been cited with approval, is **Jamaica Public Service Company Ltd v Rose Marie Samuels** [2010] JMCA App 23. In **JPS v Samuels**, Morrison JA (as he then was), at paragraph [29] of his judgment, with which the other members of the panel agreed, described the above extract from **Leymon Strachan v Gleaner Company Ltd** as a "perfectly accurate statement of the legal position".

[16] This judgment will assess the Bantons' application along the lines of the guidance provided by **Leymon Strachan v Gleaner Company Ltd**.

The analysis

a. The length of the delay

[17] On Mr Leiba's calculation, the Bantons had up to 22 April 2015 in which to file the counter-notice of appeal. On his reckoning, therefore, the delay in filing the application for extension of time was 56 days (23 April – 16 June), which, in the scheme of things, he submitted, is not inordinate.

[18] Mrs Minott-Phillips initially argued that this was in the nature of a cross-appeal and not a counter-notice of appeal. Learned Queen's Counsel argued that a counter-notice of appeal is designed for a party who wishes to affirm the judgment on grounds other than that relied on by the court below. The relevant part of her written submissions ran thus:

> "...the draft Counter-Notice of Appeal [filed on behalf of the Bantons] is not a true counter-notice of appeal. The purpose of a counter notice of appeal is "*to affirm the decision of the court below on grounds other than those*

> *relied on by that court*". This is not the case here. In reality this is a draft cross appeal because it seeks to increase the award of damages..." (Italics as in original)

Learned Queen's Counsel relied on rule 2.3(3) of the CAR in support of that aspect of her submissions. On her submissions, therefore, the Bantons should have filed their notice of appeal on or before the expiry of 42 days from 1 April 2015, which was the date of service of the judgment on JRF. That date would have been 13 May 2015.

[19] She was, however, prepared to accept, as applicable, the limit of 14 days from the date of service of the notice of appeal, as prescribed by rule 2.3(1). That, of course, would be 22 April 2015; the date advocated for by Mr Leiba. She argued that in either case the Bantons were tardy in this stage of the matter as they had been at several other points in the proceedings in the court below.

[20] The issues of the point at which time begins to run, and the deadline for filing are, perhaps, to be reserved for another day and another case. What may be said in this appeal is that any party, who is dissatisfied with a final judgment of the Supreme Court, in a civil case, may appeal from that judgment. Either the victor or the unsuccessful party may appeal. Based on rule 1.11 (1) of the CAR, the time for filing a notice of appeal, for any dissatisfied party, is 42 days.

[21] The CAR dub, as a "counter-notice", the alternative that it provides to a party who has not appealed, but who has been served with a notice of appeal. Rule 2.3 governs the procedure that that party should adopt. It states:

"**Counter Notice**

2.3 (1) Any party upon whom a notice of appeal is served may file a counter-notice in form A2.

(2) The counter-notice must comply with rule 2.2.

(3) A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds

(4) The counter-notice must be filed at the registry in accordance with rule 1.11 within 14 days of service of the notice of appeal.

(5) The party filing a counter-notice must serve a copy on all other parties to the proceedings in the court below who may be directly affected by the appeal.

[22] Rule 2.3 applies to that party (party R) who was pre-empted by another party (party A) who files a notice of appeal first. If party R, for any reason, does not agree with the decision of the court below and wishes to appeal from that decision, party R must file a form A2 notice. If party R agrees with the decision but wishes to support it on grounds other than those used in the judgment, party R must file a form A3 notice. In either case, party R must file its notice under rule 2.3 within 14 days of being served with the notice of appeal. The question of whether party R is still entitled to file an original appeal after the 14 days has expired, but within the 42 days allowed by rule 1.11(1), is one which must abide until another day, when full arguments have been placed before the court. It is rule 2.3 that will be used as guidance for this analysis.

[23] In this case, the Bantons are party R. They were served with JRF's notice of appeal on 8 April 2015. They were, themselves, dissatisfied with the decision in the court below. They should have filed their counter-notice of appeal, using form A2, on or before 22 April 2015, in accordance with rule 2.3(1) of the CAR.

[24] As Mr Leiba has submitted, the Bantons were 56 days late in filing their application for an extension of time. Mrs Minott-Phillips quite properly, did not argue that the extent of the delay, by itself, was fatal to the application. This court has previously ruled that delay, by itself, will not be determinative of an application of this type. As was said by McIntosh JA, in **Vendryes v Keane and Another** [2010] JMCA App 12 at paragraph [50] c., the delay is only one of the factors to be considered. The delay, in this case, cannot be said to be egregious. The next factor may therefore be considered.

b. The reason for the delay

[25] Mr Leiba submitted that the difference in approach by different counsel is a recognised factor to be considered in assessing a delay in filing an appeal or grounds of appeal. He submitted that the consequences of the delay should not be visited on the Bantons. He cited **Vendryes** in support of that aspect of his submissions.

[26] Mrs Minott-Phillips pointed out that the Bantons were, up to at least 24 April 2015, that is, after the deadline for the filing of the notice, represented by the attorneys-at-law who represented them at the trial before Batts J. The change of legal representation to DunnCox, she submitted, was effected well after that deadline had

expired. The effect of learned Queen's Counsel's submissions in respect of the reasons for delay is that although the change of legal representation was an explanation for the delay in filing the application for extension of time, there was no explanation for the failure to file the counter-notice of appeal within the prescribed time.

[27] Learned Queen's Counsel adverted to the principle that unless some explanation is given for the failure to comply, there is no material for the court to consider in deciding whether or not to grant the notice of application to extend the time.

[28] Mrs Minott-Phillips is correct in her submissions that an explanation must be submitted in respect of any failure to file a notice of appeal in time. In **Haddad v Silvera** SCCA No 31/2003 Motion No 1/2007 (delivered 31 July 2007), Smith JA emphasised the need for a reason to be proffered. He said at pages 11-12 of his judgment, with which the other members of the panel agreed:

> "…The authorities show that in order to justify a court in extending time during which to carry out a procedural step, there must be some material on which the court can exercise its discretion. If this were not so then a party in breach would have an unqualified right for an extension of time and this would seriously defeat the overriding objectives of the rules….Lord Edmond Davies L.J. in **Revici v Prentice Hall Inc.** [1969] 1 All ER 772; [1969] 1 W.L.R. 157 said:
>
> > '…the Rules of the Supreme Court are there to be observed; and if there is non-compliance (other than of a minimal kind), that is something which has to be explained away. Prima facie, if no excuse is offered, no indulgence should be granted…'
>
> This, in my respectful opinion, is a correct statement of the law applicable in this country. As has already been stated the absence of a good reason for delay is not in itself

> sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered…." (Emphasis as in original)

The court in **Vendryes** stated that Haddad was decided on its own facts. The principles stated in the above extract are, however, of universal application and were adopted by P Harrison JA (as he then was) in **Leymon Strachan v Gleaner Company Ltd**. Harrison JA cited, with approval, an extract from the judgment in **Ratnam v Cumarasamy** [1964] 3 All ER 933, in which the Privy Council stated that there must be some material on which the court could exercise its jurisdiction to extend the stipulated time. The Board stated, in part, at page 935A:

> "The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

[29] However, as attractive as it is, there is a degree of artificiality in Learned Queen's Counsel's submission that a distinction must be drawn, in this case, between the reason for the failure to file the counter-notice of appeal within the stipulated time and the delay in filing the application to cure the default. The decided cases do not generally draw that distinction. They speak, in the main, to the delay in complying with the rule and the reasons for the delay. It is true that where there are gaps in the explanation for the non-compliance, it may be necessary to draw the distinction for which Learned Queen's Counsel advocates. This is, however, not one of those cases.

[30] It is evident from the affidavit of Mr Clive Banton, sworn to on 14 August 2015, that the changing of the legal representation is what brought about the change in approach to the case. He said at paragraph 4 of that affidavit that it was "[a]fter reviewing the documents that Messrs. DunnCox advised [him]…that it was necessary and prudent to file a Counter Notice of Appeal". That explanation, it seems, transcends the boundary that Mrs Minott-Phillips appears to wish to have imposed at the 22 April 2015 marker. That explanation by Mr Banton is a reason that provides the court with "material on which the court can exercise its discretion". It is not determinative of the application, but it is also a factor to be considered.

c. Whether there is an arguable appeal

[31] The issues raised by the proposed counter-notice of appeal are centred on the learned judge's rulings in respect of Allison Pitter's report. One aspect concerns the rejection of the report as it had been originally tendered. Another aspect concerns his findings in respect of the impact that that report, and the report by Blastec Consultant Services, had on the commercial value of the aggregate and sand deposits on the land. The Bantons seek to argue that these were errors by the learned trial judge and they affected the value that he placed on their loss.

[32] In support of those proposed grounds of appeal, Mr Leiba submitted that rule 32.13 of the Civil Procedure Rules (CPR) allow an expert witness, such as Allison Pitter & Co, to rely on the opinion of other experts, such as Blastec Consultant Services. It was therefore, permissible, he submitted, for Batts J to have utilised the Blastec report

in conducting the assessment of the Bantons' loss. The rule to which Mr Leiba referred states, in part, as follows:

> "(1) An expert witness's report must –
>
> (a) …
>
> (b) give details of any literature or other material which the expert witness has used in making the report;
>
> (c) say who carried out any test or experiment which the expert witness has used for the report;
>
> (d) give details of the qualification of the person who carried out any such test or experiment.
>
> (e) …
>
> (f) …"

Mr Leiba submitted that Allison Pitter & Co's report satisfied these provisions.

[33] Mrs Minott-Phillips countered that the learned trial judge properly rejected references in exhibit 6 (the original Allison Pitter report), to the Blastec report, as being "singularly unhelpful". Learned Queen's Counsel submitted that rule 32.6 of the CPR clearly prevented reference to an expert's report unless the court's prior permission was secured. She referred specifically to paragraphs (1) and (2) of that rule, as supporting her stance. Those paragraphs state:

> "(1) No party may call an expert witness or put in an expert witness's report without the court's permission.
>
> (2) The general rule is that the court's permission is to be given at a case management conference."

[34] There is room for argument in these submissions. It cannot be fairly said at this stage that the Bantons' position has no realistic prospect of success. The next factor must therefore be considered.

d. The degree of prejudice to the other party

[35] Mr Leiba argued that the delay and the requested extension of time would cause no prejudice to JRF. On his submissions, the issue of the quantum of damages was already raised on JRF's appeal and the validity of the learned trial judge's decision on that point was a live issue on appeal. He argued that whereas JRF wish to adjust the award downward, the Bantons wish to move it upward.

[36] Mrs Minott Phillips submitted that the degree of prejudice to JRF was significant. Learned Queen's Counsel pointed out that the sum to which the Bantons seek to have the damages varied is a large sum. They wish to increase the figure from US$940,908.80 to US$2,689,772.00. She argued that in the absence, for a period of almost five months (April to September), of any notice of appeal or counter-notice, JRF was entitled to presume that the upper limit of its exposure was the sum of US$940,908.80 that was awarded in the judgment of Batts J. Learned Queen's Counsel pointed to the principle that a party is entitled, in the absence of action, by way of appeal, from its opponent, to presume that the opposition from the opponent will be restricted to a defence of the judgment. She reminded the court that under the regime of the new CAR, "litigants and their attorneys-at-law…ignore the [rules] at their peril" (see paragraph 15 of the judgment of Panton P in **Golding and Another v Simpson-Miller** SCCA No 3/2008 (delivered 11 April 2008)).

[37] Panton JA, at page 19 of his judgment **Leymon Strachan v Gleaner Company Ltd**, referred to the reliance that a successful party may place on a judgment that he has secured. The learned judge of appeal, cited the judgment in **Norwich and Peterborough Building Society v Steed** [1991] 2 All ER 880 at 885g in this regard:

> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant."

Mrs Minott-Phillips would, no doubt, argue that that extract supports her position that JRF was entitled to regard the upper limit of its liability as being fixed at the figure assessed by Batts J.

[38] Mr Leiba submitted that even without the counter-notice of appeal, the figure could have been increased by this court. He, not surprisingly, could cite no authority for that submission. It is without merit. Rule 1.16 precludes a party from relying, without the permission of this court, on any matter not contained in that party's notice of appeal or counter-notice, unless that point "was relied on by the court below".

[39] Although the sum to which the Bantons seek to have the damages varied is a large sum, the size of the financial impact, by itself, does not create the prejudice to be considered in this analysis. If it is that the Bantons were entitled to the larger award at the trial then the granting of the award by this court does not constitute the prejudice to JRF that the analysis envisages.

[40] Apart from citing the financial prejudice JRF has not suggested any other prejudice to its position. There has been no suggestion that its ability to resist the points contained in the proposed counter-notice of appeal has been hampered or compromised in any way. The issues raised in the proposed counter-notice of appeal involve the very documents which are the subject of some of JRF's grounds of appeal, as well as the learned trial judge's findings in respect of those documents. JRF's prejudice does not involve its conduct of the appeal.

e. the decision that justice requires

[41] The various factors considered above do not all point in the same direction. The length of and reason for the delay allow for the application to be considered on its merits. In considering the merits of the proposed counter-notice of appeal, the Bantons may have an arguable point concerning the expert report, but the probability of success cannot be said to be overwhelming in either direction. It is significant that the subject of one of the issues raised on JRF's notice of appeal is the very subject of the proposed counter-notice of appeal, albeit that the parties view the matter from different perspectives. It may also be said in the Bantons' favour that JRF is in no way prejudiced in its ability to resist the proposed counter-notice of appeal. Finally, any complaint by JRF of financial exposure from the granting of the application has its mirror image in potential loss to the Bantons, if their application were refused.

[42] On the other hand, although the financial prejudice to JRF that would be caused by granting an extension would be significant, that factor alone does not mandate a

refusal of the application. The fact that it would have been entitled, for a period of almost five months, to presume that its exposure was limited to the sum awarded in the judgment, does, however, suggest some prejudice.

[43] The "discretionary balancing" of these various elements results in a ruling in favour of the granting of the application. The justice of the case requires the application to be allowed. The potential prejudice to JRF from the grant of an extension, would be restricted to financial terms, however, the potential financial loss to the Bantons from a refusal, would be identical. The other factors, such as the length of the delay, the reason for the delay and the merits of the proposed counter-notice of appeal are more in favour of both parties being allowed to advance their various points to the court on a fully argued appeal.

Conclusion

[44] The Bantons failed to file a counter-notice of appeal within the time stipulated by the Court of Appeal Rules. Their application to extend the time within which to file the counter-notice required the court to assess the various factors including the delay, the effect that a grant or refusal of the application would have on the parties and on the administration of justice. That assessment demonstrated that the justice of the case required that the application be granted.

Costs

[45] This application has been as a result of a default by the Bantons. They, therefore, despite their success in the application, cannot be awarded the costs involved. The appropriate order should be that there is no order as to costs.

F WILLIAMS JA (AG)

[46] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

1. The application for extension of time within which to file a counter-notice of appeal is granted.
2. No order as to costs.