[2016] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 8/2016

APPLICATION NO 18/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**MARGIE GEDDES**	**APPLICANT**
AND	**McDONALD MILLINGEN**	**RESPONDENT**

Michael Hylton QC, Roderick Gordon and Miss Kereene Smith instructed by Gordon McGrath for the applicant

Vincent Chen, Miss Nicole-Ann Fullerton and Malcolm McDonald instructed by Chen Green & Co for the respondent

10, 11 and 20 May 2016

ORAL JUDGMENT

P WILLIAMS JA (AG)

[1] On 9 March 2016 the applicant filed a relisted notice of application seeking several orders which could be viewed as consequential to the main order sought, which was permission to appeal the order made by Morrison J on 20 January 2016. The applicant had applied to have a provisional charging order varied, but Morrison J had refused that application stating that he had no jurisdiction to entertain such an application.

[2] When this application came on for hearing, Mr Michael Hylton QC indicated that he would only be pursuing paragraphs 1 and 9 of the re-listed notice of application namely:

> "1. That this Honourable Court grant permission to Appeal the decision of the learned Mr. Justice B. Morrison in the Court below, issued 20th January 2016.
>
> ...
>
> 9. Costs of this Application to be costs in the Appeal."

[3] Mr Vincent Chen, counsel for the respondent, took a preliminary objection to this application being heard. It was noted that the applicant had filed notice and grounds of appeal on 21 January 2016. An *ex parte* application was placed before a single judge of this court on that date seeking permission to appeal, a stay of execution in respect of the respondent's default costs certificate obtained on 30 January 2012 pending the outcome of this appeal and in respect of the decision of King J on whether to grant the applicant's application to set aside the said default costs certificate. It also sought orders concerning the variation of the provisional charging order. It was ordered that the other side be served. On 9 February 2016, the matter was again brought before the single judge who ordered that:

> "Assuming that Permission to Appeal was refused by the court below, (rule 1.8(2) of the Court of Appeal Rules), the application may be set down for an *inter-partes* hearing before a single judge in respect of paragraphs 1 and 2 of the Notice of Application, with skeleton submissions filed beforehand.

> If the parties (or either of them) would wish for the single judge to consider any of the other paragraphs, full submissions as to the single judge's jurisdiction to do so, would be required."

[4] On 22 February 2016, an *ex parte* application for leave to appeal against the order of Morrison J was heard and refused by Lindo J. Mr Chen complained that this *ex parte* application ought never to have been made as the respondent was improperly denied an opportunity to be heard.

[5] On 23 February 2016, the matter was again placed before the single judge when on the application of the applicant's attorney-at-law the matter was adjourned. On 9 March 2016, as previously indicated, this relisted notice of application was filed. Mr Chen contended that the notice and grounds of appeal had been filed before leave to appeal was obtained thus the order in which things were done was plainly wrong. He further submitted that when the appeal was filed there was no leave to do so hence, the proceedings were a nullity and since this application now before the court arose out of this nullity, according to him, the applicant should not be allowed to proceed in this inappropriate way.

[6] Mr Chen also complained that the re-listed notice of application now before this court differed from that which had been placed before the single judge. He contended that new material was being improperly placed before this court. Thus, he submitted, this application ought not to be entertained.

[7] Mr Hylton conceded that the sequence had been wrong, but he pointed out that at this time there was in effect no appeal yet before this court. Mr Hylton submitted that this application for leave to appeal was properly before the court as leave to appeal had now been made and refused in the court below. The fact that it had been made *ex parte*, he submitted, did not matter. He accepted that there might have been differences between the notice of application filed before the single judge and what was presently before this court, but noted that it was only the permission for leave to appeal which was now being pursued.

[8] This court decided that this preliminary objection must be refused as the application for permission to appeal was properly before us.

[9] In deciding whether to grant permission to appeal it is necessary to provide some background information. This matter arose from a claim which was filed by the respondent against the applicant for work done between 1999 and 2008 on a *quantum meruit* basis. On 19 April 2011, the respondent filed a bill of costs in the court below and it is the respondent's contention that this said bill of costs had been served on the applicant. Having failed to file any points of dispute, on 25 January 2012, a default costs certificate was issued against the applicant in the sum of US$1,048,807.19. The respondent obtained a provisional charging order on 18 December 2012, in respect of shares owned by the applicant and shares held by Bardi Limited in the following terms:

> "1. A Charging Order is hereby granted in respect of the following:

(i) Two (2) ordinary shares (and dividends arising therefrom) held by Margie Geddes in Bardi Limited.

(ii) 84,000,000 ordinary shares (and dividends arising therefrom) in Desnoes and Geddes Limited issued to and registered in the name of Bardi limited.

2. The Defendant, Margie Geddes, is hereby restrained from selling or charging the shares held by her in Bardi Limited and the 84,000,000 shares held by Bardi Limited in Desnoes and Geddes Limited until the hearing of an Application for a final charging order."

[10] On 11 April 2013, the applicant applied to strike out the claim for costs or in the alternative to set aside the default costs certificate. On 21 March 2014, this application was heard by King J and judgment was reserved and is still being awaited at this time.

[11] On 2 December 2015, attorneys-at-law for Heineken Sweden AB enquired of the applicant's attorneys-at-law whether the applicant would be willing to accept an offer to purchase shares held by Bardi Limited and under her control in Desnoes & Geddes Limited "D&G". They indicated a willingness to come to a resolution which would permit the sale of the shares pending the outcome of the litigation in the matter with the encumbrance on the subject shares. Subsequently, the applicant was advised that Heineken Sweden AB would be seeking to acquire majority share ownership and had issued a mandatory offer to purchase the shares in D&G for US$0.259 per share. This was considered a "significant premium to the current trading price" since the closing price trading at the time of the offer on the Jamaica Stock Exchange was Jamaican $7.00 or US$0.061 per share.

[12] A notice of application was filed on 8 January 2016 wherein the applicant sought the following orders:-

> "1. That Provisional Charging Order obtained on 18th December, 2012 be varied to substitute the charged asset from shares in Bardi Limited as well as shares in Desnoes and Geddes Limited, with a United States dollar account in escrow;
>
> 2. This Honourable Court permit the charged shares to be sold, so that the offer made by Heineken Sweden AB, be capable of acceptance by the Defendant, as it is made in United States dollar at a premium, for the outstanding shares in the said Desnoes [&] Geddes Limited, which shares are currently denominated in Jamaican dollars;
>
> 3. That a portion of the proceeds of sale of said shares, in the amount of One Million Four Hundred Thousand United States Dollars (US$1,400,000.00) be placed in an escrow account in the joint name of the Claimant's and Defendant's Attorneys-at-Law, and be held at an agreed financial institution;
>
> 4. In the alternative, that a fair amount being part of the proceeds of sale of the said shares now charged, in a United States Dollar amount that this Honourable Court deems fit, be placed in an escrow account in the joint name of the Claimant's and Defendant's Attorneys-at-Law, and held at a financial institution agreed to by the parties;..."

[13] The grounds on which the applicant sought these orders are as follows:-

> "(a) Under Rule 48.11 of the CPR, this Honourable Court can order that the subject of a charging order be sold at a price that is fair to both judgment creditor and debtor.
>
> (b) Varying the charging order by substituting the form of asset is fair and just, and in permitting the sale of the said shares and exchanging a United States dollar

amount, part of the proceeds of sale instead of the shares themselves as subject of the Charging Order, will not prejudice the Claimant's interest in any way, but will allow a better security to be provided - in United States currency, the subject currency of the default cost[s] certificate.

(c) The Provisional Charging Order secures the sum being claimed by the Claimant as per the award in its Default Cost[s] Certificate, in the amount of US$1,048,807.19. The value of the shares being charged greatly exceeds the amount claimed by the Claimant inclusive of any interest that may be applied, should the Claimant be successful at the end of the proceedings.

(d) The Defendant's Attorneys-at-Law were recently notified by Heineken that it is in the process of acquiring the shares in Desnoes & Geddes Limited by way of a mandatory offer of purchase. The original deadline of 22nd December, 2015, has been extended to 21 January 2016.

(e) The Defendant wishes to take advantage of Heineken's offer of purchase, as the offer made by Heineken is in United States dollars and at a significant premium and it is unlikely that the Defendant will be presented with such an offer any time in the near future. This is especially so, since Heineken's offer includes payment in United States currency, where the shares are denominated in Jamaican currency.

(f) On 18th December, 2012, upon the Claimant's ex-parte application, the learned Mr Justice Daye issued a Provisional Charging Order in respect of two (2) shares held by the Defendant in Bardi Limited, and 84,000,000 ordinary shares in Desnoes & Geddes Limited registered in the name of Bardi Limited. An application to set aside the default costs certificate which is the basis of the said Provisional Charging Order, has been made by the Defendant, and the parties are awaiting the Court's decision on the matter.

(g) It is in the best interests of Justice and in keeping with the Overriding Objective that this Honourable Court allows the variation that will result in certain currency being the charged asset."

[14] We have not had the benefit of any reasons Morrison J may have given for his decision to refuse the application. However, it seems agreed that his refusal was rooted in his determining that he had no jurisdiction to grant the orders prayed in the application made before him.

[15] In this application, this court is guided by rule 1.8(9) of the Court of Appeal Rules, 2002 (CAR) which stipulates the general rule concerning applications for permission to appeal. It states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[16] In considering whether the applicant's proposed appeal would have a real chance of success it is necessary to determine whether it is arguable that the learned judge erred in making a finding that he had no jurisdiction to deal with the application.

[17] Mr Hylton submitted that the learned judge plainly had the power to vary the provisional charging order. The order was made *ex parte* pursuant to part 48 of the Civil Procedure Rules, 2002 (CPR). Mr Hylton noted that the court can always vary or set aside an order made in the absence of a party pursuant to rule 11.18 of the CPR, and the CPR specifically provides in rule 48.10, that the court can vary a final charging order which would include, he submitted, the lesser power to vary a provisional charging order.

[18] Mr Hylton said that rule 26.1(7) of the CPR provides that "a power of the court under these Rules to make an order includes a power to vary or revoke that order". He further relied on a decision from this court where he noted a provisional charging order was varied in not dissimilar circumstances. In **DYC Fishing Limited v Perla Del Caribe Inc** [2012] JMCA App 18, Phillips JA in delivering the leading judgment observed at paragraph [32]:

> "...I do not agree with counsel for the respondent that the provisional charging and attachment orders, having been made by a judge in the lower court, and which may be in the process of being considered by another judge in that court, can only be discharged by that court..."

[19] Mr Hylton submitted that the real issue will be whether and how that power should be exercised, and no question of interference with the judge's exercise of discretion arose since the learned judge in the court below did not purport to exercise a discretion. He submitted therefore that this court may exercise its original jurisdiction and as Phillips JA said at paragraph [31] in **DYC Fishing Limited v Perla Del Caribe Inc**, the court would be, "exercising an unfettered discretion, which of course must be exercised judicially".

[20] Mr Hylton argued that since a charging order is made for the purpose of securing a judgment debt, it could therefore be made against property of equivalent value. In the instant case, he submitted there was no dispute that:

> "(a) The value of the property charged far exceeds the amount of the judgment debt;

(b) The property charged can be divided, so that the charge can apply to property of equivalent or approximate value; and

(c) The Applicant is prepared to replace the property charged by cash."

[21] Mr Chen argued that in enforcement proceedings such as these a judgment creditor is free to choose any asset of the judgment debtor to be the subject of a charging order and once so chosen, the court cannot vary it. The judgment creditor is ultimately at liberty to efficiently collect the judgment debt under the supervision of the court. Mr Chen submitted that the court had a duty to ensure that the interests of the judgment creditor is protected but given the provisions of part 48 of the CPR, the court does not have the jurisdiction to vary or substitute the property the judgment creditor had sought to have charged. Rule 48.10 speaks specifically to how the final charging order may be discharged or varied and that, Mr Chen contended, is the extent of the court's jurisdiction.

[22] Mr Chen further submitted that the other parts of the CPR to which learned Queen's Counsel sought to rely, namely part 11 and part 26, do not apply to enforcement proceedings. These provisions, he contended, deal with matters before judgment is entered and with matters arising during the course of a trial. He contended therefore that the learned judge below was ultimately correct that he had no authority to vary a provisional charging order.

[23] The success of this application for permission to appeal depends on whether the court is of the view that the appeal will have a real chance of success. "Real chance of success" has been interpreted in several cases in this court. Indeed, in his submissions before us, Mr Hylton had relied on one such decision **Humphrey Lee McPherson v Damion Chambers and Another** [2010] JMCA App 7 where McIntosh JA at paragraph [13] stated:

> "…the authorities are clear on what is meant by 'real chance of success'. **Swain v Hillman** [2001] 1 All ER 91, referred to by Mr McPherson, is one such authority. It simply means that the prospect (the word used in the authorities and which I consider to be synonymous with 'chance') of success must be realistic rather than fanciful. Further, in considering a request for permission to appeal, a court is not required to analyse whether the grounds of the proposed appeal will succeed but whether there is a real prospect of success (See **Hunt v Peasegood** (2000) The Times, 20 October, 2000)."

[24] In this case, the submissions made by learned Queen's Counsel as to the grounds on which the proposed appeal will be made cannot be said to have no merit. Whether the learned judge was correct that he had no jurisdiction to vary a provisional charging order in circumstances where the judgment debt would continue to be secured requires closer analysis. Such an analysis should be conducted in an appeal and it cannot be said it could not be determined in the applicant's favour.

[25] Section 28D of the Judicature (Supreme Court) Act states:

> "The Court may, on application of the person prosecuting a judgment or order for the payment of money, make a charging order in accordance with the Civil Procedure Rules, 2002 in relation to the enforcement of judgments."

This court will have to interpret this provision to assess whether provisional charging orders can be varied pursuant to rules 11.18 and 26.1(7) and part 48 of the CPR as suggested by Mr Hylton, or whether part 48 of the CPR is a regime in and of itself and does not embrace any other part of the CPR or has any provisions for varying a provisional charging order as Mr Chen submitted. Since one possible interpretation would favour the applicant, this is one aspect of the appeal which would have a real prospect of success.

[26] In light of the above, permission to appeal the decision of Morrison J issued 20 January 2016 is granted with costs to be costs in the appeal.

[27] We also make the following consequential orders:

1. Notice and grounds of appeal to be filed and served on or before 3 June 2016.
2. The appellant to file and serve written submissions with authorities within 14 days of the filing of the notice of appeal.
3. The respondent to file and serve written submissions with authorities within 14 days of receipt of the notice of appeal.
4. The appellant to file record of appeal comprising all the documents that were before Morrison J on or before 4:00 pm on 10 June 2016.
5. The parties to file their respective bundles comprising submissions and authorities on or before 4:00 pm on 21 June 2016.

6. The appeal is set down to be heard in open court in the week commencing 4 July 2016 for two hours with each party being allotted one hour each for oral submissions.