[2016] JMCA App 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 13/2015

MOTION NO 6/16

BETWEEN	**HDX 9000 INC**	**APPLICANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**RESPONDENT**

Written submissions filed by G Anthony Levy & Co on behalf of the applicant

Written submissions filed by Livingston Alexander & Levy on behalf of the respondent

26 SEPTEMBER 2016

IN CHAMBERS

(Considered on paper pursuant to rule 2.10(3) of the Court of Appeal Rules 2002).

F WILLIAMS JA

Nature of application

[1] This matter comes before me as a procedural application for conditional leave to appeal to Her Majesty in Council, pursuant to Practice Direction No 1/2016 dated 10 May 2016, on which date it took effect. It gives practical effect to certain provisions of

the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962. The background to the making of the application is set out in the paragraphs that follow.

The background

[2] As a result of its failure to comply with "unless orders" made on 13 May 2014 by Sinclair-Haynes J (as she then was) to file certain bundles and redact certain documents which had previously been filed, the applicant HDX 9000 Inc (HDX) was visited with the sanction of having its claim struck out. Laing J granted relief from the sanction on an application in that regard brought by HDX. The respondent, Price Waterhouse, then appealed to this court against the granting of that relief. At the time that that appeal was brought, the issue was whether the learned judge had erred in granting relief from sanctions pursuant to rule 26.8 of the Civil Procedure Rules (CPR) which states:

> "26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –
>
> (a) made promptly; and
> (b) supported by evidence on affidavit.
>
> (2) The court may grant relief only it is satisfied that –
>
> (a) the failure to comply was not intentional
> (b) there is a good explanation for the failure; and
> (c) the party in default has generally complied with all other relevant rules, practice directions, orders and directions
>
> (3) In considering whether to grant relief, the court must have regard to-
>
> (a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;
(c) whether the failure to comply has been or can be remedied within a reasonable time;
(d) whether the trial date or any likely date can still be met if relief is granted; and
(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

[3] By its written judgment delivered on 8 April 2016, this court allowed the appeal. It found that the learned judge ought not to have granted relief, as the requirement at rule 26.8(1)(a) of the CPR, for the application to have been filed promptly, had clearly not been met by HDX and therefore there was no need to consider the other provisions of the rule.

The application for leave to appeal

[4] By this application, the applicant, HDX, is seeking leave to appeal to Her Majesty in Council as of right pursuant to section 110(1) of the Jamaica (Constitution) Order in Council 1962 (the Constitution) against the decision of this court on 8 April 2016. It contends that the decision of this court to reverse the decision of the learned judge below and consequently to reinstate the sanction imposed, brings the matter to an end, that is, it is a final judgment. It also avers that the correct test to be applied in determining whether the order was final is that discussed in the case of **Strathmore Group Ltd v AM Fraser and Others** [1992] AC 172 in which, although the matter

was essentially a split hearing, the court adopted the reasoning of Sir John Donaldson MR in **White v Brunton** [1984] QB 570, 573 that:

> "...where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have both appealed against such order without leave if both parts had been heard together and the order had been made at the end of the complete hearing."

[5] The respondent however offers to the court the view that the result of the substantive appeal in this matter did not bring the matter to an end and that it would have continued whether or not the sanction had been imposed, thus making the order interlocutory and not final. The respondent further contends that the correct test to be applied in determining whether a decision is interlocutory or final is the "application test" as applied by this court in **Jamaica Public Service v Rose Marie Samuels** [2010] JMCA App 23. That approach considers the nature of the application to the court and not the nature of the order which is made, as determining whether a matter is final or interlocutory. The respondent further avers that the application does not satisfy the criteria required by section 110(2) of the Constitution.

The issue(s) on this application

[6] The issue now arising for determination is whether HDX's application for conditional leave to appeal is being correctly made as being as of right pursuant to section 110(1)(a) or, alternatively, meets the conditions applicable under section 110(2) of the Constitution. In deciding this matter the court must consider the following:

whether or not the decision of the Court of Appeal in refusing the applicant's appeal against the grant of relief from sanctions and re-instating the judgment in favour of Price Waterhouse brought the matter to an end.

The relevant Law

[7] The Constitution of Jamaica makes provision for appeals to be made from decisions of the Court of Appeal to Her Majesty in Council. Section 110 provides in part:

> "(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **as of right** in the following cases-
>
> (a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question of one thousand dollars or upwards, **final decisions in any civil proceedings**;
>
> (b) final decisions in proceedings for dissolution or nullity of marriage;
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; and
>
> (d) such other cases as may be prescribed by Parliament.
>
> (2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council **with the leave of the Court of Appeal** in the following cases-
>
> (a) Where in the opinion of the Court of Appeal the question involved in the appeal is one

that, **by reason of its great general or public importance or otherwise**, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) Such other cases as may be prescribed by Parliament." (Emphasis added).

[8] The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 at sections 3 and 5 states that:

"3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the judgement to be appealed from and the applicant shall give all other parties concerned notice of his intended application.

...

5. A single judge of the Court shall have the power and jurisdiction-

(a) to hear and determine any application in any case where under any provision of law an appeal lies as of right from a decision of the Court.

...

Provided that any order, directions or decision made or given in pursuance of this section may be varied discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decisions."

The applicable test

[9] Section 110(1)(a) of the Constitution requires the determination of the issue of whether the matters or questions in dispute are "final decisions in any civil

proceedings". The test which has been adopted by the Court of Appeal is the "application test". This approach was discussed by Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734 where at page 735 he stated:

> "Taking into consideration all the consequences that would arise from deciding in one way and the other respectively, I think the better conclusion is that the definition which I gave in Standard Discount Co. v. La Grange (4) is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. **The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.** That is the rule which I suggested in the case of Standard Discount Co. v. La Grange (5) and which on the whole I think to be the best rule for determining these questions; the rule which will be most easily understood and involves the fewest difficulties." (Emphasis added).

[10] That approach was adopted by Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, where he confirmed the approach of Lord Esher in **Salaman v Warner and Others**:

> "An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution--every such order is regarded as interlocutory... So I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would

> clearly be interlocutory. So equally when it is refused, it is interlocutory."

[11] As previously indicated (see paragraph [5] of this judgment), this court has considered in a number of cases the matter of whether an application should be regarded as final or interlocutory. In **Jamaica Public Service Company Limited. v Rose Marie Samuels** for example, Morrison JA (as he then was) observed at paragraph [23] that:

> "Summary judgment in fact seems to me to provide a classic example of the operation of the application principle, since if it is refused, the judge's order would clearly be interlocutory and so, equally where it is granted, the judge's order remains interlocutory."

[12] This observation of Morrison JA in **Jamaica Public Service Company Limited v Rose Marie Samuels** was referred to by Brooks JA in **Exclusive Holiday of Elegance Limited v ASE Metals NV** [2014] JMCA App 2, who considered it to be definitive in deciding that a summary judgment application is interlocutory. Brooks JA also observed at paragraph [26] of the judgment:

> "... the decision, even though it may result in a judgment bringing the litigation to an end, does not constitute a final decision."

[13] Similarly, Phillips JA in **Viralee Bailey Latibeaudiere v The Minister of Finance and Planning and the Public Service and Others** [2010] JMCA App 7, at paragraph [32] confirmed that the "application test" was the proper test to be used:

> "It is well accepted that the approach to be adopted in determining whether an order/decision is interlocutory or final is the application approach."

[14] As recently as in May 2015, the appropriateness of the use of this test in this court was confirmed in **Alexander Okuonghae v University of Technology Jamaica** [2015] JMCA App 22. In that case again Phillips JA stated at paragraph [3] thereof that:

> "Whether a judgement is interlocutory or final in nature will be determined by the 'application approach' which has been the settled approach in these courts for many years and utilized consistently."

Discussion

[15] The foregoing review of the authorities clearly demonstrates what is the settled position: that is, to determine whether a matter is final or interlocutory for the purposes of applications for leave to appeal pursuant to Section 110(1)(a) of the Constitution, the "application test" is that which is to be used. The applicant wishes to appeal against the reversal of the grant of relief from sanctions and the consequent setting aside of the judgment of Laing J. The question, therefore, was whether the application for relief was final or interlocutory, that is, whether it would have brought the matter to an end if the relief had been granted or not. The answer to that question is this: either way, the matter would have continued so the application for relief from sanctions should be regarded as interlocutory. Therefore, the application for conditional leave cannot meet

the main criterion of section 110(1)(a) of the Constitution as being a final decision in a civil matter.

[16] A further observation on the applicant's submissions was that the applicant clearly disagrees with the approach adopted by this court based on the use of the application test. It contends that the approach in **Strathmore Group Ltd v AM Fraser and Others** is that which should direct the court. I wish firmly to reject this contention, as the position of this court has been clearly stated and restated in a number of decisions. To my mind, the approach in **Strathmore Group Ltd v AM Fraser and Others** was informed by the duality of issues that existed in that case: the first issue dealing with an agreement for the parties to discontinue all litigation; and the second dealing with the cancellation of the compromise due to the non-payment of sums due. While one issue had been resolved, there still remained others to be determined. As mentioned earlier, the approach of the court was to allow the appeal against an order without leave if one issue had been properly disposed of. If, in this case, the applicant considers that there are other issues to be determined, then whether relief from sanctions was granted or not, that would not have brought the matter to an end.

The alternative application

[17] In an alternative approach, the applicant requested that, in the event that its application brought under subsection (1)(a) did not succeed, the court should consider

granting the application pursuant to subsection (2) which deals with leave to appeal other than as of right.

[18] The applicant did not cite any law in support of this ground. The respondent cited the case of **Michael Levy v Attorney General of Jamaica and Jamaica Redevelopment Foundation Inc** [2013] JMCA App 11, in which several authorities addressed the criteria for applications falling within this sub-section. At paragraph [32] of that judgment Morrison JA (as he then was) stated that the authorities suggest that-

> "the consideration of whether a question is of general or public importance is for the purposes of section 110(2)(a) primarily a legal one. The Court is required to have regard to the nature and difficulty of the legal question involved in the matter, its gravity, its general importance to some aspects of the practice, procedure or administration of the law, and the public interest."

[19] Interesting though a discussion of that issue promises to be, regrettably, it is not a matter that I am permitted, as a single judge, to resolve. The reason for this is to be found in section 1.5 of Practice Direction No 1 of 2016. That section provides as follows:

> "1.5 Applications for conditional or final leave to appeal to Her Majesty in Council where appeals do not lie as of right shall continue to be heard before the Court."

[20] In the result, I am limited in dealing with this matter to a consideration of section 110(1)(a) of the Constitution alone.

Conclusion

[21] It is my considered view that this application does not meet the threshold requirement of sections 110(1)(a) of the Constitution. The application for relief against sanctions was interlocutory and not final. Therefore the applicant cannot claim conditional leave to appeal as of right. The application pursuant to sections 110(2) is referred for consideration by the full court, wherein jurisdiction lies.

[22] This aspect of the application is refused, with costs to the respondent to be agreed or taxed.

Order

(i) Application for leave to appeal to Her Majesty in Council as of right, refused.

(ii) The application pursuant to Section 110(2) is referred for consideration by the court, wherein jurisdiction lies.

(iii) Costs to the respondent to be agreed or taxed.