[2017] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 219/2016

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

BETWEEN LEROY JOHNSON APPLICANT

AND BANK OF NOVA SCOTIA JAMAICA LTD RESPONDENT

Keith Bishop instructed by Bishop & Partners for the applicant

Mrs Daniella Gentles-Silvera and Francois McKnight instructed by Livingston Alexander and Levy for the respondent

27 March and 7 April 2017

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing further to add.

F WILLIAMS JA

Background

[2] By way of notice of application dated 24 November 2016, the applicant has applied for the following orders:

> "a. Leave to appeal the decision of the Honourable Mrs. Justice A. Lindo issued on the 11th November 2016 is granted to the Applicant;
>
> b. The decision of the Honourable Mrs. Justice A. Lindo issued on the 11th November 2016 is stayed until an appeal of the said decision is determined;
>
> c. Such further and other relief as this Honourable Court thinks just."

[3] This application has been made as a result of Lindo J's refusal to grant to the applicant permission to appeal, consequent on her granting the respondent an extension of time to file its defence and counterclaim in the court below.

History of the matter

[4] The applicant had obtained a mortgage loan from the respondent in or about the year 1989, surrendering to the respondent in the process the duplicate certificate of title to his mortgaged land. That land is registered at volume 1203, folio 105 of the Register Book of Titles and is located at Walkerswood in the parish of Saint Ann. On the applicant's contention, he not only repaid the loan in full; but also overpaid the sum of $100,000.00 which was later refunded to him by the respondent.

[5] By way of claim form and particulars of claim filed on 14 August 2014, the applicant claimed against the respondent the following relief:

> "1. An Order for the Defendant to return to the Claimant Duplicate Certificate of Title registered at Volume 1203 Folio 105 of the Register Book of Titles:
>
> 2. Damages (General & Exemplary);
>
> 3. Interest
>
> 4. Attorneys-at-Law costs; and
>
> 5. Costs."

[6] In the claim form, the claim was said to be one for "breach of contract and damages". In it, the applicant also contended that he had "discharged all obligations to the Defendant and [that] the Defendant has stated in writing since 1994 that it has no further interest or claim against the Claimant...". Further, in his particulars of claim at paragraph 8, the applicant averred that by letter dated 31 May 1994, from the respondent to The Office of the Trustee in Bankruptcy, the respondent had indicated that it had no further interest in the bankruptcy proceedings against the applicant. That statement, the applicant claimed, could only be understood to mean that the debt was at an end.

[7] The claim form was served on the respondent on or about 3 November 2014. In response, the respondent filed an acknowledgement of service on 5 November 2014. No defence was filed until 13 November 2015 - that is, more than a year after the service of the claim form. The defence, therefore, was filed out of time. The respondent sought to regularize the status of its defence by filing, on 9 December 2015, an

application for extension of time to file defence. Supporting it was an affidavit of Mrs Julie Thompson-James, the respondent's legal counsel, filed on 15 December 2015. That affidavit sought to make several points. The main ones may be summarized thus: (i) that, given the age of the loan, it took some time to locate the records relating to the relevant account in order for the respondent to be able to instruct its attorneys-at-law; and in fact the respondent originally thought that the certificate of title had been mislaid and gave instructions for the making of an application for replacement of the lost title; (ii) that it was discovered that the applicant in fact owed a balance of $3,481,353.94, with interest calculated at the rate of 25.5% per annum; and (iii) that the fact that the loan was not settled in full gives the respondent the right to continue to retain the duplicate certificate of title.

[8] It is perhaps convenient at this stage to mention that what the respondent filed was a defence and ancillary claim (that is, a counterclaim). In that counterclaim it claimed the sum of $3,481,353.94, the particulars showing a principal balance of $645,450.00 and interest of $2,835,903.94, making up the total claimed. The defence denied all the material averments in the claim form and particulars of claim. In relation to the letter of 31 May 1994, on which the applicant sought to rely, the defence stated at paragraph 6 as follows:

> "6. Save that a letter dated the 31st May, 1994 was sent to the Claimant, the Defendant denies paragraph 8 of the Particulars of Claim and states that what the letter indicates is that the Defendant had no further interest in the Bankruptcy proceedings and not that the debt had been repaid. The Defendant further says that withdrawing a creditor's claim in relation to the

> Bankruptcy Proceedings does not waive a creditor like the Defendant's rights to recover the moneys outstanding by other means."

[9] In response to the affidavit of Mrs Julie Thompson-James, the applicant swore and filed an affidavit on 25 July 2016. These are the main points that were made therein: (i) that from as long ago as 26 November 2013, the respondent's agent had indicated that the appellant owed the sum of $1,735,290.00 so this cast doubt on their contention in 2015, as to difficulty in obtaining instructions; (ii) that correspondence between the parties evince a commitment on the part of the respondent to return to the applicant his duplicate certificate of title (which could only have happened on repayment of the loan); and (iii) that the applicant maintained that he was not indebted to the respondent (and referred to exhibits relating to bankruptcy proceedings in 1994, ending with a certified copy of an order of revocation of a provisional bankruptcy order dated 1 June 1994).

[10] By affidavit filed on 26 October 2016, Mrs Julie Thompson-James replied to the applicant's affidavit. In her affidavit, she deposed, in summary, that: given the "long tenure of the facility", details on the loan were not readily available. The main reason for this was that the respondent's document-retention policy stipulates that its documents be held for no more than six years after the last transaction on an account.

The issue(s)

[11] The main issue that falls for the court's determination in this application is whether the applicant has satisfied the test stipulated in rule 1.8(9) of the Court of

Appeal Rules (CAR) for applications for permission to appeal. The main requirement of that 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."
> (Emphasis added)

[12] In deciding whether the applicant in this case has a real chance of success, consideration must be given to rule 10.3(9) of the Civil Procedure Rules (CPR), pursuant to which the order granting an extension of time to file the defence and ancillary claim was made. That section reads as follows:

> "The defendant may apply for an order extending the time for filing a defence."

[13] Recognizing that this rule does not set out the matters that a court should consider in hearing applications for extension of time, this court has previously relied for guidance on dicta of Lightman J in the case of **Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Limited and others** (2000) Times, 7 March. In that case, it was decided that in these matters there should not be an application of a rigid formula; but that it is a consideration of what is in the interests of justice that ought to hold sway. Lightman J further observed that:

> "Among the factors which had to be taken into account were the length of the delay, the explanation for the delay, the prejudice of the delay to the other party, the merits of the appeal, the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of

> the parties which might, in particular, be relevant to the question of prejudice."

[14] No useful purpose would be served by an examination of each and every one of these considerations separately. Indeed, the application was based mainly on the issue of delay - that is, its duration and whether the explanation offered for it ought to have been accepted as being satisfactory by the learned judge.

[15] On behalf of the applicant, Mr Bishop submitted that the explanation proffered for the delay lacked credibility in that, although the contention was that the respondent was not in a position to have instructed its attorneys-at-law until November 2015, when the defence and counterclaim was filed, there was correspondence from the respondent's agent from 2013, indicating the sum that the respondent was contending that the applicant owed. Another consideration would be whether the way in which the bankruptcy proceedings were resolved meant that the respondent had to have been acknowledging that the debt had been repaid.

[16] Mr Bishop also raised two other matters: (i) the application of the Limitation of Actions Act - to say that the debt was statute-barred; and (ii) the application of section 77 of the Bankruptcy Act to buttress the submission that the debt must have been discharged in the bankruptcy proceedings. In fairness to the learned judge, however, submissions on the Bankruptcy Act were not made before her.

[17] On behalf of the respondent, Mrs Gentles-Silvera took the approach that the learned judge's decision was the result of a proper exercise of her discretion and the applicant had not successfully demonstrated that he had a real chance of success. She

argued that there was not enough evidence at this stage to support the applicant's contention as to the implication that he wished to be read into the conclusion of the bankruptcy proceedings - that is, that it meant that the debt had been satisfied. It could mean, for example, that the respondent simply had chosen to forgo its claim in the bankruptcy proceedings and pursue instead its recourse under the mortgage deed. She sought as well to defend the contention that the delay was not inordinate in all the circumstances.

Discussion

[18] In the case of **The Attorney General v Universal Projects Limited** [2011] UKPC 37, the Board assessed what was required to constitute a good explanation for a breach. In that case there was a failure to comply with an unless order granting an extension of time within which to file the defence, in the absence of which, leave would be granted to the claimant to enter judgment in default.

[19] The Board discussed the reason offered in that case at first instance for the non-filing of the defence, which was based on internal issues within counsel's chambers that led to a failure promptly to retain outside counsel to deal with the matter. The Board observed at paragraph 23 as follows:

> "...if the explanation for the breach...connotes real or substantive fault on the part of the defendant, then it does not have a 'good' explanation for breach...Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly if the explanation for the breach is administrative inefficiency."

[20] In the light of that, the Board refused to accept the submission of counsel that a "good" reason merely required a proper explanation of how the breach occurred and that the question of "fault" for the occurrence of the breach was of no moment.

[21] From one perspective, the explanation offered by the respondent for the delay in the matter (that is, inability to find records for over a year) could very well be viewed as having been due to administrative inefficiency. On that basis, the applicant may be able to show that there was no good explanation for the delay and so the learned judge should not have granted the application for an extension of time to file a defence. If the applicant should be successful in persuading a full court to view it in this light, then, on the basis of this authority, it would appear that he would have a real chance of succeeding on appeal. This real chance of success might also be regarded as being strengthened by questions as to the credibility of the explanation for the delay in light of the 2013 letter stating an amount as still then being due.

[22] However, the court recognises that while the issue of good reason or the lack thereof, in an application for an extension of time, may be a valid ground of appeal, it is mindful of the fact that there are authorities that show that the absence of a good reason for the delay by itself is not determinative of an application for extension of time; but rather the court should look at all the circumstances of the case, recognising the overriding principle that justice must be done (see, for example, **Finnegan v Parkside Health Authority** [1998] 1 All ER 595).

[23] With regard to possible prejudice to the respondent in the form of delay, it appears to me that, should the respondent succeed in the appeal and eventually in the substantive trial, it would be compensated for the delay by way of the interest that it would calculate as being due on the principal sum, along with an award of costs. On the other hand, should the applicant's appeal be allowed and, at the end of the day, he should be successful at trial, he could only partially be compensated in costs, as, on his case, he would be saddled with the payment of a principal and interest accruing over many years on a debt that he contends had long ago been repaid. So that a consideration of the question of prejudice would seem to point to a resolution in the applicant's favour.

[24] Although these are but a few of the considerations in this matter, they suffice to demonstrate that, taking a broad approach, the applicant has shown that he has a real chance of success on appeal; and, for that reason, his application should be granted. At the hearing of such an appeal all the issues can be explored and such determination as that court might see fit, might be made.

[25] In relation to the applicant’s request for a stay of the orders of the learned judge, no submissions were made by either side on this aspect of the matter. However, the utility of making such an order in these circumstances is not readily apparent. And, bearing in mind that an appeal has not yet been filed (the court usually making those orders where an appeal already exists), it would not have been possible for the court to have made such an order.

[26] In the result I propose that the application be granted, with the costs of the application to be costs in the appeal.

EDWARDS JA (AG)

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

PHILLIPS JA

ORDER

i. Leave to appeal the decision of the Honourable Mrs Justice A Lindo dated 11 November 2016, is granted to the applicant.

ii. Costs of this application to be costs in the appeal.