[2018] JMCA App 9

JAMAICA

IN THE COURT OF APPEAL

MOTION NO 9/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**ICILDA MYRIE**	**1st APPLICANT**
AND	**DONAVAN BAKER**	**2nd APPLICANT**
AND	**TENLOY BAKER**	**3rd APPLICANT**
AND	**ALICE FAGON**	**RESPONDENT**

Douglas Leys QC and Miss Felicia Williams instructed by LeySmith for the applicants

Lawrence Haynes for the respondent

16, 30 January and 11 May 2018

MORRISON P

[1] This is an application for conditional leave to appeal to Her Majesty in Council ('the Privy Council'), from a decision of this court given on 11 July 2017.

[2] The application is brought, in the first place, pursuant to section 110(1)(a) of the Constitution of Jamaica ('the Constitution'), on the basis that the applicants have an

appeal as of right. But further, or in the alternative, the applicants also seek leave, pursuant to section 110(2)(a), on the basis that the questions involved in the matter are such that, by reason of their great general or public importance or otherwise, ought to be submitted to the Privy Council.

[3] The matter arises in this way. On 29 October 2015, Evan Brown J gave judgment against the applicants in an action brought against them by the respondent for recovery of possession of certain lands in the parish of Saint Thomas. In the final judgment filed by the respondent's attorney-at-law on 4 November 2015, the terms of the judgment are recorded as follows:

> "1. That possession is granted to the Claimant of all that parcel of land situate at Spring Gardens, St. Thomas and bounded as follows:-
> On the East by the Main Road from Middleton to Morant Bay. On the West by lands belonging to Stephen Buckley and IRIS SINCLAIR. On the North by lands belonging to IRIS SINCLAIR and on the South by lands belonging to Stephen Buckley and measuring about 981.27 square metres more or less and more particularly described in a Survey Identification Diagram by Commissioned Land Surveyor Rixon E. Richards dated 25th May, 2008.
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> 2. That a mandatory injunction is directed to the Defendants by themselves, their servants or howsoever otherwise to pull down, demolish and remove any building, outhouse wall or foundation constructed upon the said parcel of land.
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> 3. Damages to the Claimant in the sum of One Hundred Thousand Dollars (**$100,000.00**)
>
> 4. Costs to the Claimant to be taxed if not agreed."

[4] The applicants wished to appeal against this judgment. However, they did not file their appeal within the 42-day period limited for this purpose by the Court of Appeal Rules 2002 (rule 1.11(1)(c)). As a consequence, it was necessary for them to apply to the court for an extension of time within which to appeal (rules 1.11(2) and 1.7(2)). This they did by notice of application for court orders filed on 13 July 2016.

[5] In a decision ([2017] JMCA App 19) given on behalf of the court by Brooks JA on 11 July 2017, the application for extension of time was refused, with costs to the respondent to be agreed or taxed. Brooks JA considered, applying the test usually applied by the court in these matters, that (i) the delay in filing the appeal was inordinate and, in any event, inadequately explained; and (ii) there was no merit in the proposed appeal (see **Leymon Strachan v The Gleaner Company Limited**, (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999).

[6] On the question of merit, Brooks JA said the following (at paras [4]-[8]):

> "[4] There are two main aspects to the important question of merit, or whether the appeal has a realistic prospect of success. The first aspect to be considered is the learned trial judge's decision to proceed with the trial despite the applicants' application for an adjournment on the date that the matter was set for trial. The learned judge had a discretion as to whether or not to grant their application for an adjournment for them to have applied for relief from sanction.
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> [5] The applicants have not shown any basis on which this court, if it were to hear an appeal, would disturb the learned trial judge's exercise of his discretion. The applicants appeared before him not having obeyed the order to file

witness statements and without any ready application for relief from sanction.

[6] On the second aspect, we see that, on the face of it, the case in the court below turned on whether or not the parcel of land which Ms Fagon claimed is a separate parcel from that which the applicants claimed. Ms Fagon claimed that there were in fact two separate parcels, while the applicants asserted that the land claimed by Ms Fagon was part of a single parcel of land which belonged to them.

[7] The surveyor's report, which was ordered by the court as an investigative tool in clarifying the issues between the parties, suggests that there are in fact separate parcels having separate valuation numbers according to the Commissioner of Lands. There was also evidence before the learned trial judge from Miss Fagon and her brother to support the surveyor's report. There seems, therefore, to be no arguable case for appeal on the merits. There was no evidence from the applicants before the learned trial judge, and none has been placed before us, which contends that the surveyor was wrong in his analysis which supported Ms Fagon's case.

[8] It is accepted that there will be significant prejudice to the applicants who will have their structure, which they built on the land, torn down, but their situation results from their failing to obey the orders of the court to file the witness statements, and, importantly, to cease construction. Ms Fagon will also be prejudiced if this application were to be granted. She would be denied, at least for a time, of the fruits of her judgment. But prejudice by itself is not determinative of the application. As was said in the **Commissioner of Lands v Homeway Foods** [2016] JMCA Civ 21, it is the consideration of all the various aspects, mentioned in **Leymon Strachan v Gleaner Company**, which decides the achievement of the overriding objective (see paragraphs [125] to [126] of **Homeway Foods**)."

[7] The application for conditional leave was supported by an affidavit filed on 2 August 2017 by the 2nd applicant on behalf of the applicants. The 2nd applicant stated

that the applicants had been advised that, in the absence of written reasons for his decision from the trial judge, it would be necessary for the transcript of the proceedings at trial to be made available to the court for the purposes of the extension of time application. However, despite letters to the registrar of the Supreme Court requesting the transcript, and despite the fact that the hearing was once adjourned in order for it to be obtained, the court had in the end proceeded to hear and dismiss the extension of time application without the benefit of the transcript. Accordingly, the 2nd applicant stated, given that neither the applicants nor their attorneys-at-law had any control over when the transcript might have become available, they should have been given the opportunity to have the appeal heard with the transcript.

[8] Moving the application for conditional leave before us on behalf of the applicants, Mr Leys QC submitted, firstly, that this was a final decision, within the meaning of section 110(1)(a), in the sense that it left the applicants with no recourse other than an appeal to the Privy Council. However, when reminded by the court that this court has consistently applied the 'application test' to the issue of whether a decision in respect of which leave to appeal is sought is final or not, Mr Leys submitted that the matter in any event involved questions of great general or public importance, within the meaning of section 110(2)(a). In particular, Mr Leys submitted, there was the question of whether the applicants' rights under section 16(2) of the Constitution to a fair hearing had been breached by the non-availability in this court of a transcript of the proceedings in the court below.

[9] For the respondent, Mr Haynes declined to take any position in relation to the appropriate test for determining whether a decision is final for the purposes of section 110(1)(a). However, as regards section 110(2)(a), Mr Haynes submitted that the question of great public or general importance must derive from the matter itself and that there was nothing in this matter which could possibly satisfy this criterion.

[10] In so far as is relevant, section 110(1)(a) of the Constitution provides as follows:

> "(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 respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;
>
> ..."

[11] After a characteristically careful review of the relevant decisions of this court, in **HDX 9000 Inc v Price Waterhouse (A Firm)** [2016] JMCA App 25, F Williams JA concluded that the settled position of this court was that, "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". Accordingly, in the case of an application for an extension of time such as that brought by the applicants in this case, the relevant question for the court is whether the nature of the application was such that, whatever outcome ensued, it

would have brought finality to the matter. It is only if the matter would have satisfied this test that it will be considered final for the purposes of section 110(1)(a). I think it is only necessary to state the principle for it to be clear that the application in this case was interlocutory and not final: had it been granted, the applicants would have been allowed to file their appeal out of time and the appeal would have proceeded in the usual way, but, because it was refused, the appeal could not get off the ground at all.

[12] So the applicants do not have an appeal as of right in this case. In order to bring themselves within section 110(2)(a), the applicants must demonstrate to the court that they have an appeal which gives rise to a question of great general or public importance. It is clear from a long and unchallenged line of authority in this court that, in order to satisfy this criterion, the applicants must show that the question of law involved in the proposed appeal is not only an important question of law, but one which goes beyond the rights of the particular litigants (see, for instance, the decision of this court's predecessor in **Vick Chemical Company v Cecil DeCordova and others** (1948) 5 JLR 106, per MacGregor J at page 109; **Michael Levy v Attorney General of Jamaica and Jamaican Redevelopment Foundation Inc** [2013] JMCA App 11, per Morrison JA at paragraph [32]; and **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7, per Phillips JA at paragraph [34]).

[13] In my view, as attractively as the case was put on their behalf by Mr Leys, the applicants have also failed to satisfy this criterion. In considering whether to proceed

with the application for an extension of time to file the appeal without the aid of the transcript of the proceedings in the trial court, this court had to have regard to all that had gone before. The matter had already been once adjourned to facilitate the obtaining of the transcript. When the application came on for hearing the second time, there appears to have been no indication as to when that transcript was likely or expected to become available. The court was therefore required to act in the exercise of its discretion. Against this background, the court's decision involved a straightforward application of the well-known principles upon which this court acts in considering applications for extension of time. And so, despite Mr Leys' brave attempt to eke out a fair hearing issue from the facts of this case, it seems to me that there is absolutely nothing in it which is likely to be of any significance to anyone except the parties themselves.

[14] I would therefore refuse the application, with costs to the respondent to be agreed or taxed.

PHILLIPS JA

[15] I have read in draft the judgment prepared by the learned President. I agree with his reasoning and conclusions and have nothing to add.

P WILLIAMS JA

[16] I also agree.

MORRISON P

ORDER

Motion for conditional leave to appeal to Her Majesty in Council is refused. Costs to the respondent to be taxed if not agreed.