[2012] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2004

MOTION NO 3/2012

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**THE ATTORNEY GENERAL**	**APPLICANT**
AND	**NATIONAL TRANSPORT CO-OPERATIVE SOCIETY**	**RESPONDENT**

Douglas Leys QC, Mrs Michelle Champagnie and Miss Haydee Gordon instructed by the Director of State Proceedings for the applicant

Lord Anthony Gifford QC and Patrick Bailey instructed by Bailey Terrelonge Allen for the respondent

1 and 11 June and 30 November 2012

MORRISON JA

[1] I have had the advantage of reading the judgment of McIntosh JA in draft. I agree with it and there is nothing that I can possibly add.

PHILLIPS JA

[2] I have had the opportunity of reading the draft reasons for judgment of my learned sister and am in agreement with same. I have nothing further I wish to add.

MCINTOSH JA

[3] On 29 March 2012 the applicant filed a notice of motion seeking conditional leave to appeal to Her Majesty in Council from the decision of this court in respect of an appeal remitted to it by the Privy Council on 26 November 2009. Two conditions were requested in the motion relating to the time for payment of security for the due prosecution of the appeal and for the preparation and dispatch of the record to England, for the hearing of the appeal. The applicant also sought an order that costs of and incidental to its application be costs in the appeal to Her Majesty in Council.

[4] The court heard arguments from Mr Douglas Leys QC for the applicant and Lord Anthony Gifford QC for the respondent, on 1 June 2012 and made the following order on 11 June 2012 with a promise that written reasons would be provided:

> "1. Leave is granted to the applicant to appeal to Her Majesty in Council from the decisions of this Honourable Court given on 20 December 2010, 30 September 2011 and 9 March 2012, in respect of the case remitted to it by the Judicial Committee of the Privy Council on 26 November 2009, **ON CONDITION THAT**:
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> i. The applicant shall within ninety (90) days from the date of this Order enter into good and sufficient security in the sum of $1,000.00 for the due prosecution of its appeal and the payment of all such costs as may become payable by the applicant in the event of his not

obtaining an order granting final leave to appeal, or the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the Applicant to pay the costs of the appeal (as the case may be);

ii. the applicant shall within ninety (90) days of the date of this order or such later period as may be ordered by the court, take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England.

2. The costs of and incidental to the application shall be costs in the appeal to Her Majesty in Council."

Below are my reasons for agreeing that conditional leave should be granted to the applicant to appeal to Her Majesty in Council.

[5] The background to the motion is adequately reflected in the supporting affidavit of Haydee Gordon and may be summarized thus:

i) A contractual dispute between the parties involving certain franchise agreements was taken to arbitration and on 2 October 2003 damages with interest and costs were awarded to the respondent.

ii) The applicant successfully challenged the arbitration award in the Supreme Court and that decision was upheld on appeal by the respondent to the Court of Appeal.

iii) The respondent then appealed to the Judicial Committee of the Privy Council (the Committee) where on 2 November 2009, its appeal was allowed and the case was remitted to the Court of Appeal for: (a) the

> court's consideration of the consequences of the Committee's finding that the duration of the franchise agreements was three and not 10 years as well as issues relating to quantum of damages (particularly the relevance of the duty to mitigate) and (b) the court's decision on all issues of costs in the Court of Appeal, the Supreme Court and the arbitration.

[6] The court discharged its mandate from the Committee in three stages, delivering its first decision on 20 December 2010 on the scope of the referral and the admissibility of evidence (the December decision). The second decision dealt with issues concerning quantum of damages, mitigation and interest and was handed down on 30 September 2011 (the September decision) and the third decision followed on 9 March 2012, wherein the court determined the issue of costs (the March decision).

[7] In paragraph 11 of Miss Gordon's affidavit she indicated that the applicant challenges several aspects of the court's decisions, listing nine of them, including the court's interpretation of the scope of the Committee's referral on the quantum of damages and the court's failure to properly address the Committee's finding, confirming the conclusion of Brooks J (as he then was) that the franchise agreements were not in compliance with the Public Passenger Transport (Kingston Metropolitan Transport Region) Act, making them illegal and ineffective. According to Miss Gordon the applicant also intends to argue that the respondent had failed to discharge its burden of proof relating to quantum of damages. Additionally, she averred that the requirements for the grant of leave have been satisfied, in that the value of the matter is in excess of

$1000.00 and the decisions of this court together constitute a final determination of the issues remitted to it by the Committee.

[8] It is the applicant's contention that its notice of motion for leave, filed on 29 March 2012, was in full compliance with the requirement of section 3 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (the Rules), which reads as follows:

> "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 judgment to be appealed from, and the applicant shall give all other parties concerned notice of his intended application."

Since the court completed its mandate from the Committee on 9 March 2012, the applicants contended, the notice was filed well within the stipulated period and leave should therefore be granted to it as prayed.

[9] However, it was the respondent's submission that that contention was erroneous and Lord Gifford vigorously opposed the application. His submission was that the motion was hopelessly out of time as it was not filed "within 21 days of the date of the judgment to be appealed from", which would have been either the December judgment or the September judgment. Further, learned Queen's Counsel submitted, the authorities make it clear that there is no power under the rules or otherwise to extend that 21 day period, and the cases of **R v Lancy Simpson** (1977) 15 JLR 190 and **Chas E Ramson Ltd and Another v Harbour Cold Stores Ltd** SCCA 57/1978, delivered on 27 April 1982 were cited to bolster this submission. Lord Gifford also referred to the

case of **Jamaica Steel Works v Vasconcellos** [2010] JMCA Civ 15 in which the court held that the position remains unchanged with the adoption of the new Privy Council rules.

Undisputed matters

[10] There was no dispute between the parties about the contents of the Privy Council's reference. It was also not in dispute that the application is governed by the provisions of section 110(1)(a) of the Constitution (hereafter section 110(1)(a)) and section 3 of the Rules referred to above. Further, the parties accepted that the sole issue for determination was whether the 21 day period within which to activate the applicant's right to seek leave was to be computed after the December decision, expiring on 11 January 2011 or after the September decision, expiring on 21 November 2011 as contended by the respondent, or after the March decision as contended by the applicant, expiring on 30 March 2012. It was also accepted that if the operative starting point for the computation of the period was determined in the applicant's favour then it would be entitled as of right to the grant of leave since it had satisfied two of the criteria for the grant.

The contending arguments

[11] Mr Leys submitted that the argument that the notice of motion is out of time was based on the respondent's misunderstanding of the true nature and scope of the jurisdiction vested in the Court of Appeal by the Constitution and particularly by section

110(1)(a). It was counsel's contention that the Rules cannot be interpreted in such a manner as to restrict the right of citizens who wish to exercise their right to appeal to the Privy Council from the Court of Appeal but must instead be interpreted in a manner consistent with the objectives stated in section 110(1)(a), which provides as follows:

> "110.---(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 decision in any civil proceedings;
>
> … ."

In this regard, he referred to the case of **Crawford and Others v Financial Institutions Services Ltd** (2003) 63 WIR 169 where the court interpreted the breadth of section 110 and considered how it should be interpreted vis-à-vis the Rules.

[12] Up to the moment when the Court of Appeal gave its judgment on 9 March 2012, learned Queen's Counsel argued, it was seised with jurisdiction in this matter and was lawfully carrying out the mandate given to it by the Privy Council. The powers of the court with regard to this appeal were only spent when the court delivered its March decision and the Registrar issued the certificate of final judgment, counsel submitted. It was his contention that that is when the Rules become applicable, conferring on the court a narrow jurisdiction of permitting persons who so desire and who can meet the

conditions imposed in the Rules, to apply for and obtain leave from the Court of Appeal. Mr Leys submitted that this explains why all the cases show that after the court has rendered a final decision in the matter there is no power to extend the time. The only lifeline for a person wishing to appeal to the Privy Council is the 21 day period laid down in the Rules and if one does not utilize this procedure for whatever reason, counsel contended, the Court of Appeal, however sympathetic to the cause, has no power to extend the time.

[13] It was never the intent of the Rules that the Privy Council and the Court of Appeal would enjoy overlapping or concurrent jurisdiction in relation to the same appeal (save for the specific jurisdiction to deal with interlocutory appeals set out in section 110(2) of the Constitution), contended Mr Leys, as this would result in the Privy Council being seised of jurisdiction relating to certain issues in one part of the appeal while the Court of Appeal would be seised of jurisdiction in relation to other issues in the same matter. Mr Leys submitted that a final decision must be interpreted to mean final in the context that the Court of Appeal's jurisdiction is spent and it can exercise no further jurisdiction in relation to the appeal. The Privy Council's jurisdiction begins, he submitted, where the Court of Appeal's jurisdiction ends. The issue of costs had arisen not only in respect of the proceedings before the court but was an issue specifically referred for the court's consideration by the Privy Council consequent upon the Committee's decision to set aside all previous costs orders in the matter. Thus, the 21 day period did not begin to run until 9 March 2012 when the order was made on the

costs issue thereby bringing to an end the jurisdiction of the Court of Appeal in this matter.

[14] Lord Gifford took an entirely different approach in his opposition to the application. He referred to section 2(1) of the Rules where judgment is defined as "a judgment the Court given in the exercise of any jurisdiction conferred upon it by any law for the time being in force in Jamaica and includes a decree, order, ruling, sentence or decision of the Court". In this matter, learned Queen's Counsel argued, there has been three such judgments. Learned Queen's Counsel contended that the applicant cannot successfully argue that those were not final judgments within the meaning of section 3 as defined in section 2. A successful appeal of the December judgment would have meant that the mitigation issue would be moot and the second hearing which lasted five days would therefore not have been required. Lord Gifford further contended that the applicant's argument that the December and September decisions were not final judgments within the meaning of section 110(1)(a) assumes that in a case where the court, for good reason, hears different issues at different times and delivers separate judgments, each one being final on the issue considered, then its judgment does not become final until every issue has been determined. That, Lord Gifford argued, is contrary to principle and is contradicted by authority.

[15] Learned Queen's Counsel submitted that in many cases a court may decide to hold a split hearing and in the instant case it was eminently sensible to divide the matters in issue into three hearings. The applicant's argument that it had no right of appeal against the December decision until all three issues had been determined would

have the effect of utilizing valuable court time and putting the parties to expense unnecessarily and would involve arguments on issues that might have become irrelevant if the Privy Council determined the first issue in a different way. This, counsel submitted, offends common sense and justice. He relied on the case of **White v Brunton** [1984] 2 All ER 606 which was followed in **Olasemo v Barnett Ltd** (1995) 51 WIR 192. In the former, he referred to an extract from the judgment where the court held that:

> "It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part… ."

[16] Lord Gifford submitted that in the case of split hearings where each issue considered would give rise to a right of appeal if the hearings were not split, the right of appeal arises at the end of the consideration of the first issue. Applying **White** and **Olasemo** the right of appeal without discretionary leave arose on the December decision as that was a final judgment on that issue. The right of appeal also arose on the September decision as that too was a final decision for the purposes of section 110(1). Learned Queen's Counsel submitted that this argument is well grounded in common sense and is supported by both Jamaican and United Kingdom authorities. If leave to appeal had been sought after the December or September decisions, the strict time limit of 21 days applied in respect of each judgment and there would be no

inconsistency between the provisions of the Constitution and the Rules, counsel submitted.

[17] He referred to paragraph 11 of the applicant's supporting affidavit from Miss Gordon which listed issues arising from the December and the September decisions but no motion was filed in either case. Further, learned Queen's Counsel submitted, there is a right of appeal against the order on the costs issue but, although that decision was made in light of the two earlier ones, there is not a word of criticism about that judgment in the supporting affidavit.

[18] Finally, it was contended for the respondent that the cases cited on behalf of the applicant (**Electrotec Services Ltd v Issa Nicholas (Grenada) Ltd (No1)** (1997) 52 WIR 134 and **Crawford**) were of no assistance to them as no issue of time limit split hearings or interlocutory proceedings arose and in **Crawford** the court was concerned with whether it was entitled to impose conditions (though counsel accepted that they were cited on the point of constitutional rights). Mr Leys, on the other hand, argued that no assistance is to be derived from the respondent's authorities as the principle concerning split hearings has no application to the instant case.

Disposal

[19] I was strongly attracted to the arguments of the applicants and, after careful consideration, I accepted that they held the key to resolving the issue for the court's determination, namely, whether or not the applicant's notice of motion was filed in compliance with the requirements of section 3 of the Rules.

[20] It seemed to me that the respondent's argument concerning split hearings overlooked an essential factor which, of necessity, would be the court's prime consideration, in that the appeal was being heard at the dictate of Her Majesty's Privy Council with clear guidelines as to the matters to be dealt with by the court. It was, in my view, not for this court or the parties to choose to omit any aspect of that mandate. The court was quite entitled, however, to decide how it would conduct the hearing and it decided to deal with the matter first, in two stages and, on application, added a third stage to the proceedings. After the first stage was concluded, the mandate was not complete and as Mr Leys, submitted, correctly, in my opinion, the court's jurisdiction in the matter continued.

[21] When the second stage was concluded, there was a remaining issue, specifically formulated by the Board, when their Lordships ordered that "[t]he order for costs below be set aside, and all issues of costs in the Court of Appeal, the Supreme Court and the arbitration be remitted to be dealt with by the Court of Appeal or as they direct". The court reserved its ruling on this issue, clearly indicating that there was more to be done before it would have completed the Board's mandate. It was therefore not until the decision was handed down on 9 March 2012 that the Court of Appeal could be said to have satisfied all aspects of the mandate and I agreed with Mr Leys that it was then that time would begin to run for the purposes of section 3 of the Rules.

[22] Viewed within the context of the Privy Council's mandate, the argument advanced by Lord Gifford that had the applicants appealed the December decision the mitigation issue would have been moot and the second hearing would not have been

required is, in my view, entirely misconceived. So too is the argument that "to seek to appeal the December judgment after there had been a further hearing which was mandated by that judgment amounts to an abuse of process and is an attempt to keep the respondent from the fruits of the judgment in his favour". With the greatest respect, the issue of mitigation was not to be viewed as arising from the December decision but as a specific part of the Privy Council's referral and the court was therefore obliged to deal with it. The respondent could do no more than await the conclusion of the entire process.

[23] In my opinion, the circumstances in the instant case were not analogous to those considered appropriate for split hearings in the cases cited by the respondent. To my mind, the proposition to be distilled from those cases concern trial proceedings where the court takes the view that the issues which are the subject of the trial may be appropriately dealt with in parts and that it would save time and expense if the decision on the first part is appealed as it may determine whether the matter is concluded on the outcome of the appeal. That was not the case in the matter before this court and the decisions in **White** and **Olasemo** were of no assistance to the respondent.

[24] It was clear to me that the applicant was entitled to regard the court's determination of the costs issue on 9 March 2012 as the completion of the referral from the Privy Council and to view that date as the starting point from which the 21 day period should be computed. The notice of motion filed on 29 March 2012 was therefore in compliance with the requirements of section 3 of the Rules.

[25] There was no dispute between the parties that the other criteria required for the grant of leave had been satisfied. The absence of any formulated complaint in the supporting affidavit of Haydee Gordon, touching on the court's ruling on costs, is not of the significance contended for by Lord Gifford because the applicant was not required to set out its grievances in detail at this stage, so that once it was determined that the application was filed in time, there was no obstacle to the grant of leave.

[26] By virtue of the foregoing, I agreed that the application should be granted in the terms set out in paragraph [4] above.