[2011] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 125/2010

BETWEEN THE ATTORNEY GENERAL OF JAMAICA APPLICANT

AND JOHN McKAY RESPONDENT

Miss Lisa White instructed by the Director of State Proceedings for the applicant

Gavin Goffe instructed by Myers Fletcher and Gordon for the respondent

1, 15 February and 16 August 2011

IN CHAMBERS

PHILLIPS JA

[1] On 7 July 2010, the applicant filed an application in this court asking that leave be granted to appeal the decision of Anderson J given on 28 May 2010 refusing to set aside the default judgment granted by Rattray J on January 12 2010 in favour of the respondent. The application also asked that an extension of time be granted for leave to appeal; that the judgment in default be set aside; that the defendant be permitted to file a defence; and that the matter be set for trial. The applicant had previously filed in the court below, an application for permission to appeal the decision of Anderson J,

which was heard and refused by Anderson J on 7 July 2010. This refusal resulted in the filing of the application and before me on the said day.

[2] The applicant conceded from the outset that on the application before me, as a single judge of appeal, I could not consider and set aside a default judgment entered in the court below, and/or give leave to file a defence, or make an order for the matter to be set down for trial. The issues on the application were therefore: (i) should I grant permission to appeal the decision of Anderson J, and (ii) should I extend the time for the filing of the application for permission to appeal.

[3] The submissions on behalf of both counsel were very detailed but because of the decision I am impelled to take, I will say as little as possible with regard thereto, save to say that I sincerely apologise for not readily appreciating the position I now adopt, and for the delay in communicating the same to the parties.

[4] There is no doubt that the order being appealed from, which is the order of Anderson J refusing to set aside the default judgment granted by Rattray J, is an interlocutory order, based on the principles enunciated in cases such as ***White v Brunton*** [1984] 2 All ER 606, ***Leymon Strachan v The Gleaner Co Ltd*** SCCA No 133/1999 delivered 6 April 2001 and ***Rayton Manufacturing Ltd et al v Workers Savings and Loan Bank Ltd et al*** SCCA No 20/2009 delivered 30 July 2009. In these cases, the court recognises the "application approach" and if the applicant's application

had been successful, permission would have been granted for an extension of time to file the defence and the matter would have proceeded to trial. This was not really an issue between the parties on this application. The applicant therefore was required to obtain permission to appeal. Permission was granted in the court below in the required time frame and was refused, but was not filed in time in this court, which was why the application also requested an extension of time to do so. The interpretation to be given to rule 1.8 of the Court of Appeal Rules (CAR) has been set out with clarity by Smith JA in ***Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited*** SCCA No 109/2007, delivered 26 September 2008. He stated that rule 1.8 (1) of the CAR stipulates "that permission to appeal must be made within fourteen days of the order against which permission to appeal is sought. By virtue of rule 1.8 (2) of the CAR the application for leave, in such a case, must first be made to the court below". Smith JA also held that, "it seems clear to me that the application to this court for permission must be made in writing and within fourteen (14) days of the order appealed. The fact that the application to the court below was made within the prescribed time does not remove the time limitation in respect of an application to this court". As a consequence if an order is not obtained in the court below within the 14 day period, then an application should also be filed timeously in the Court of Appeal **abundante cautela**.

[5] Rule 1.8 (5) of the CAR states:

> "An application for permission to appeal made to the court may be considered by a single judge of the court unless it is an appeal involving a sentence of death."

However it is trite law to say that subsidiary legislation cannot override the substantive legislation, and the Judicature (Appellate Jurisdiction) Act (the Act) section 11(1) states:

> "No appeal shall lie
> (a) ...
> (b) ...
> (c) ...
> (d) ...
> (e) ...
> (f) without the leave of the Judge or of the Court of Appeal from any interlocutory judgment or any interlocutory order given or made by a Judge except ...."

(There are six exceptions, none of which is relevant to this application.)

Section 11(2) states:

> "In this section "Judge" means Judge of the Supreme Court."

It is clear, that in respect of an interlocutory appeal, for the appeal to have efficacy, not being in respect of one of the exceptions listed in the section, leave of the judge below, or the Court of Appeal must first be obtained.

Smith JA also accepted the view held by counsel in ***Evanscourt Estate***, that if permission ought not to be given, it would be futile to enlarge the time within which to apply for the leave, with which I also entirely agree. However, that too poses a problem with regard to the jurisdiction of the single judge.

[6] Under the heading "The court's general powers of management", rule 1.7 (1) and (2) of the CAR read as follows:

> "1.7 (1) The list of powers on this rule is in addition to any powers given to the court by the Act or any other rule.
>
> (2) Except where these Rules provide otherwise, the court may-
>
> (a)...
> (b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed.
> (c) ..."

[7] There is no other specific provision in the rules with regard to the grant of extension of time, and the above provision clearly states that the power to extend time for compliance resides in the Full Court. Section 12 of the Act gives the power to the Court of Appeal in respect of civil appeals from the Resident Magistrates' Courts to extend the time within which notice of appeal inter alia may be given. Section 32 of the Act gives the power to the court and the single judge in respect of criminal matters. The reference in rule 2.11 of the CAR under the heading "Powers of single judge" viz

2.11 (1) "A single judge may make orders –

...

(e) on any other procedural application"

cannot in my view be referring to the extension of time to file an appeal in circumstances where leave to appeal is required and which leave can only be given by

the Court of Appeal. Such an application goes to the heart of the jurisdiction of the court, and the other powers of the single judge referred to in rule 2.11 of the CAR relate to matters ancillary to the appeal, it having already been properly filed. To the extent that "the procedural application" referred to in rule 2.11(1)(e) relates to extending the time to take any action subsequent to the filing of an appeal, it would refer to matters procedural, such as the filing of skeleton arguments and the record of appeal, and may also refer to the extension of time to file an appeal, when leave is required, but which leave can be granted by a single judge of appeal.

[8] The conclusion to all of this therefore, is that I am of the view, that the single judge of appeal does not have the power to either extend the time for the filing of a civil appeal nor to give permission to appeal to this court, in respect of an interlocutory order in civil proceedings, not being exempt from section 11(1)(f) of the Act. This issue with regard to the jurisdiction of the single judge of appeal to hear and consider these types of applications has been a source of concern and controversy. It may therefore be useful in any event for the Full Court to deliberate on the same and give a clear and comprehensive decision in relation thereto.

[9] As a consequence, this matter must be placed before the Full Court to be heard as early as possibly convenient to the parties. I will therefore refrain from making any comment with regard to those detailed submissions by counsel, on the issues of: whether there was any information before Anderson J addressing the issues of

reasonable prospect of success or any explanation for the delay of the filing of the defence; whether the learned judge applied the applicable principles to the application; whether the applicant should be permitted at this stage to raise a limitation defence not raised before; and also whether that particular defence could have been considered by the respondent to have been waived by the applicant.

[10] I therefore direct that this matter be referred to the Full Court for deliberation due to the lack of jurisdiction of a single judge of this court to consider the application. There will be no order as to costs.