[2021] JMCA App 22

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE BROWN-BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2019CV00097

MOTION NO COA2020MT00023

BETWEEN	**CRICHTON AUTOMOTIVE LIMITED**	**APPLICANT**
AND	**ZULFIQAR MOTORS COMPANY LIMITED**	**RESPONDENT**

Christopher Dunkley and Chad Lawrence instructed by Samuda & Johnson for the applicant

Miss Dian Johnson instructed by Garth McBean & Co for the respondent

7 June 2021 and 19 July 2021

MCDONALD-BISHOP JA

[1] I have read, in draft, the reasons for judgment of my sister, Foster-Pusey JA and have endorsed them as being reflective of my reasons for concurring in the decision of the court. I have nothing useful to add.

FOSTER-PUSEY JA

Background

[2] This is a further amended notice of motion brought by the applicant, Crichton Automotive Limited, for conditional leave to appeal to Her Majesty in Council from the

decision and order of the court made on 23 October 2020, dismissing the applicant's procedural appeal from the judgment of Wolfe-Reece J ('the judge'), made on 12 October 2019.

[3] This court affirmed the decision of the judge but did not provide any written judgment. For all intents and purposes therefore, the court determined that the applicant had not shown that Wolfe-Reece J erred in the exercise of her discretion.

[4] The applicant also sought a stay of execution until the hearing of the substantive appeal to Her Majesty in Council, or, alternatively, until the conclusion of the hearing of the application for conditional leave to appeal to Her Majesty in Council.

[5] On 7 June 2021, we heard the arguments of counsel on the further amended notice of motion and the amended notice of application for a stay of execution, and gave our decision as follows:

> "1. The further amended notice of motion for conditional leave to appeal to Her Majesty in Council, filed 5 January 2021, is refused.
>
> 2. The amended notice of application for stay of execution filed 5 January 2021, is refused.
>
> 3. Costs of both applications to the respondent, to be agreed or taxed."

We promised then to produce written reasons for the decision at a later date. This is in fulfilment of that promise.

Proceedings in the court below

[6] On 28 July 2009, the respondent sued the applicant for monies owed. The respondent claimed that it had supplied 180 motor vehicles to the applicant, and the applicant had paid only a portion of what was due, leaving a balance of US$1,180,654.00 owing. In addition, the applicant had failed to pay delayed payment charges of US$25.00

per day for each vehicle. The respondent claimed the sum of US$1,923,979.00 with interest at a commercial rate pursuant to the Law Reform (Miscellaneous) Provisions Act.

[7] In the course of the proceedings, the court ordered the applicant to disclose certain documents. On 5 February 2018, Laing J, at a pre-trial review in a number of consolidated matters between the parties, according to the filed, but unperfected, order, ordered as follows:

> "1. Unless [the applicant(s)] on or before 4th May 2018 comply with the order for disclosure made by the Court previously its Statements of Case is [sic] to stand as struck out and Judgment entered for [the respondent] without further order.
>
> 2. Pre-Trial Review is further adjourned to 26th June 2018 at 3:00 p.m. for one hour.
>
> 3. Costs to be costs in the claim."

[8] It is clear that the order for disclosure had been made before 5 February 2018 when Laing J made the unless order.

[9] A further pre-trial review came up on 26 June 2018 before Rattray J, who ordered:

> "1. On the failure of [the applicant] to comply with the order of the Court made on the 5th February 2018, the Statement of Case of [the applicant] stands struck out and judgment entered in favour of [the respondent] with respect to its claim herein.
>
> …"

[10] On 11 September 2018, the respondent filed a judgment, which was later signed by the registrar. The judgment stated that on the failure of the applicant to comply with the order of the court made on 5 February 2018, the applicant's statement of case stood struck out, and judgment was entered in favour of the respondent in the sum of US$1,923,979.00.

[11] Before that, however, the applicant, by notice of application filed on 11 July 2018, applied for the following orders:

> "1. The time limited for [the applicant] to comply with the Order of the Honourable Mr. Justice K. Laing made on February 5, 2018 requiring [the applicant] to comply with the Order previously made for disclosure of its financial statements for period of January 1, 2006 to December 31, 2009 on or before 4th of May 2018, be extended to the date of this Order hereof and all steps taken be [sic] [the applicant] in pursuance of the said Order be permitted to stand in good stead.
>
> 2. [The applicant] be granted relief from sanction that the Statement of Case of [the applicant] stands struck out and Judgment entered in favour of [the respondent] pursuant to the order of the Honourable Mr. Justice A. Rattray dated June 26, 2018.
>
> …"

The judge's ruling – Relief from sanctions

[12] Wolfe-Reece J, heard the application on 16 July 2019, and on 4 October 2019, refused the application for relief from sanctions. She examined rule 26.8(1) of the Civil Procedure Rules, 2002 ('CPR') which requires the prompt filing of an application for relief from sanctions, as well as rule 26.8(2) which states that the court may grant relief only if 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."

[13] In its affidavit evidence in support of the application for relief from sanctions, the applicant stated that its delay in complying with the order of the court was due to the fact that the Revenue Protection Division ('RPD') had the documents which the court required it to disclose, and its officers' efforts to secure the documents yielded no success

until 19 June 2018. The applicant stated that it provided the documents to the respondent on 26 June 2018.

[14] The judge noted that the sanction of the unless order would have become effective on 4 May 2018 once there was no compliance, however the applicant filed its application for relief from sanctions on 11 July 2018. This was a delay in excess of two months. The judge acknowledged that the circumstances of each case must be "properly and carefully scrutinized for determination" as to whether an application was made promptly. Having done her own assessment of the facts, she concluded that the application for relief from sanctions had not been made promptly.

[15] Although that finding by itself would have justified the refusal of the application, the judge went on to consider other issues relating to the application. She concluded that although the failure to comply was not intentional, the applicant failed to provide a good explanation. The judge expressed the view that the timeline of events, which the applicant provided, did not show it taking much action to comply with the order of the court, and more stringent measures should have been taken to secure the documents from the RPD. After referring to **The Attorney General v Universal Projects Limited** [2011] UKPC 37, the judge opined that the explanation that the applicant gave reflected a case of administrative inefficiency as opposed to "an insurmountable challenge in procurement of the requisite documentation" (see paragraph [46] of the judgment).

[16] The judge stated that the applicant had failed to establish that the application was made promptly in the circumstances, therefore the application for relief from sanctions must be refused. As a result, by virtue of the order made by Rattray J on 26 June 2018, the judgment entered in favour of the respondent stood. The judge, however, also ruled that an assessment of damages hearing was to be scheduled.

The appeal

[17] The applicant appealed from the judge's decision. Since the decision that the judge made was in the exercise of her discretion, there is no dispute that it is only where the

exercise of a judge's discretion was based upon a misunderstanding of the law, or of the evidence before her, or upon an inference that particular facts existed or did not exist, that the appeal court may set the judge's decision aside (see **Hadmor Productions Limited and Others v Hamilton and Another** [1983] 1 AC 191 and **The Attorney General of Jamaica v Mackay** [2012] JMCA App 1).

[18] In light of the fact that this court did not allow the applicant's appeal, it is clear that no error was identified in the judge's ruling.

The application for conditional leave to appeal to Her Majesty in Council

[19] The further amended notice of motion for conditional leave was curiously drafted. Neither the motion nor the affidavits in support referred to the section of the Constitution pursuant to which the application for conditional leave was made. It was only in the submissions of counsel that we gleaned that the applicant was seeking conditional leave as of right, pursuant to section 110(1)(a) of the Constitution, and, in the alternative, on the basis that the question that arose in the appeal was one of great general or public importance or otherwise, pursuant to section 110(2)(a).

[20] Section 110(1) of the Constitution reads:

> "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 decisions in any civil proceedings;
>
> (b) …
>
> (c) …
>
> (d) such other cases as may be prescribed by Parliament."

[21] Section 110(2) of the Constitution is also relevant in light of the arguments made in this application. It reads:

> "110. -(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."

Submissions

Final decisions in any civil proceedings

Applicant's submissions

[22] In its written submissions, counsel for the applicant stated, as a basis for the grant of conditional leave, that the matter in dispute on appeal, or the questions on appeal, were in respect of a final decision in civil proceedings. However, they did not make any written submissions on this point.

Respondent's submissions

[23] Counsel for the respondent, relying on the decision of **Paul Chen Young, Ajax Investments Limited and Domville Limited v Eagle Merchant Bank Jamaica Limited, Crown Eagle Life Insurance Company Limited and The Attorney General for Jamaica** [2018] JMCA App 31, referred to the principles utilized by this court to determine whether a matter was a final decision in civil proceedings. She highlighted the application approach to the determination of that issue, and submitted that if the applicant were to succeed in the proposed appeal to Her Majesty in Council, then the judgment of Rattray J and Wolfe-Reece J would be set aside, and the matter

would proceed to trial. On that approach therefore, the matter in dispute on the proposed appeal to Her Majesty in Council was not a final decision in civil proceedings.

Question of great general or public importance or otherwise

Applicant's submissions

[24] Although the applicant had not outlined a question which ought to be submitted to Her Majesty in Council for determination, counsel Mr Dunkley, in oral arguments, formulated the following question:

> "In consideration of the overriding objective whether two months is in all the circumstances sufficiently prompt so as to provoke the court to grant its relief from sanctions [sic] to consider what if any would be appropriate relief and appropriate sanction."

[25] Counsel urged that the court below ought to have considered whether striking out was the only sanction which could have been considered in light of "US$1.9 million" worth of consequence. He submitted that the court could have considered imposing costs or other sanctions.

[26] Counsel in his written submissions also urged that:

> "a. The judge erred in law and in fact by failing to consider all the particular circumstances, and took an unnecessarily constrained and unreasonably restricted view to find a lack of promptitude on the applicant's part, when the unchallenged evidence contradicted that finding;
>
> b. The timely compliance with the court's orders was beyond the applicant's control, the applicant's failure to comply was unintentional and there was a good explanation for non-compliance;
>
> c. the judge's misunderstanding of law and fact justified interference with her exercise of discretion;
>
> d. there is an important question of law regarding the exercise of judicial discretion in the face of clear and

unchallenged evidence which contradicts the judge's findings;

e. there is an important question of law whether a judge may ameliorate an order of the court where that order was a nullity in law;

f. the matter affects property of a considerable amount with the claim being US$1,923,979.00 which would place the applicant in financial ruin; and

g. the matter also falls within the definition of 'or otherwise' being a matter of general importance that may require the Privy Council's intervention. (Counsel relied on **Norton Hinds and others v The Director of Public Prosecutions** [2018] JMCA App 10 and **Olasemo v Barnett Ltd** (1995) 51 WIR 191)."

[27] Concerning the question as to whether a judge could ameliorate an order of the court, where that order was a nullity in law, counsel for the applicant raised the issue as to the propriety of the judgment entered for the sum of US$1,923,979.00, as well as the subsequent order made by the judge that an assessment of damages hearing should take place. Counsel conceded, however, that that issue could be pursued at the level of the Supreme Court, and it had not been raised as a ground of appeal in this court.

Respondent's submissions

[28] Miss Johnson, counsel for the respondent, also relied on the authorities of **Norton Hinds and others v The Director of Public Prosecutions** and **Olasemo v Barnett Ltd**. Counsel submitted that the question, which counsel for the applicant posed, was not of any great general or public importance. She observed that the question posed focused on the overriding objective, and whether, when the applicant filed the application for relief from sanctions, two months after the sanctions were to have taken effect, this was prompt in the circumstances. Counsel argued that the case law on promptitude was settled and established, and the judge relied on the appropriate case law.

[29] On the question as to whether the issue raised by the applicant would need to be referred to Her Majesty in Council under the rubric of the 'or otherwise' phrase, counsel

submitted that there was no matter arising in the case at bar in respect of which this court needed guidance on the law from the Privy Council.

Discussion

[30] The first question to be determined, therefore, is whether the matter in dispute on appeal, or the questions on appeal, are in respect of a final decision in civil proceedings. It was clear from the applicant's written submissions that they did not have much faith in this ground, as, although it was outlined as a basis for the grant of conditional leave, no submissions were made on the point.

[31] At the hearing of the further amended notice of motion, the applicant conceded that, having read the respondent's submissions, the matter in dispute was not a final decision in civil proceedings. This concession was well made.

[32] In **Paul Chen Young, Ajax Investments Limited and Domville Limited v Eagle Merchant Bank Jamaica Limited, Crown Eagle Life Jamaica Company Limited and the Attorney General,** McDonald-Bishop JA reviewed this court's approach in determining whether a decision is seen as final. At paragraphs [27] - [28] she wrote:

> "[27] With regards to the requirement that the decision must be a final decision in civil proceedings, the dicta of Morrison JA (as he then was) in **Ronham & Associates Ltd v Gayle & Wright**; **Gayle v Ronham Associates & Wright** [2010] JMCA App 17 proves quite instructive. Morrison JA opined at paragraph [21]:
>
> > '[21] … The question whether an appeal is from an interlocutory or final order is one of those old controversies which, happily, may now be considered to be settled, it having been held in **White v Brunton** [1984] 2 All ER 606 that, in considering whether an order or judgment is interlocutory or final for the purposes of leave to appeal under the equivalent English statutory provisions, **regard should be had to the nature of the application or proceedings**

> **giving rise to the order or judgment and not to the nature of the order or judgment itself.** Accordingly, where the nature of an application is such that any order made will finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal. However, if the nature of the application that is before the court is such that the decision on that application, if given one way, will finally dispose of the matter in dispute, but if given the other way, will allow the action to go on, the matter is interlocutory; irrespective of the actual outcome. **This approach, known as the 'application approach' (to be contrasted with the 'order approach')**, was approved and applied by this court in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (SCCA No. 54/97, judgment delivered 18 December 1998).'

[28] Brooks JA in **John Ledgister**, by reference to several authorities, stated that **this court has established in numerous cases that the 'application test' is the appropriate test for determining what constitutes a final decision in civil proceedings.** At paragraph [19] of the judgment, Brooks JA reiterated the dicta of Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, 735, as 'the clearest exposition' on the subject. Lord Esher stated:

> '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.'" (Emphasis supplied)

[33] This court has therefore made it clear that the approach to be adopted in determining whether an order/decision is interlocutory or final is the application approach. The court looks at the nature of the application to the court, and not the nature of the order which is made.

[34] Applying the application test, it is clear that if relief from sanctions had been granted, the action would have continued. The decision is therefore not regarded as a final decision in civil proceedings for the purposes of an appeal as of right, pursuant to section 110(1)(a) of the Constitution.

[35] The applicant would, therefore, need to satisfy the requirements of section 110(2)(a) of the Constitution, and convince this court that the question involved in the proposed appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

[36] In **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, McDonald-Bishop JA helpfully summarized the relevant principles to be considered. At paragraph [27], she stated:

> "The principles distilled from the relevant authorities may be summarised thus:
>
> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.
>
> ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.
>
> iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires

debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. It is for the applicant to persuade the court that the question is of great general or public importance or otherwise."

[37] At paragraph [40] of the judgment, McDonald-Bishop JA also highlighted another basis for the grant of conditional leave. She stated:

> "Another legitimate basis for leave to be granted for an appeal to Her Majesty in Council is under the rubric of 'or otherwise' contained in section 110(2)(a). See, for instance, **Olasemo v Barnett Limited** and **Sagicor Bank Jamaica Limited v Marvalyn Taylor-Wright**. Wolfe JA (as he then was) explained in **Olasemo v Barnett Limited** at page 201 that **the phrase 'or otherwise' was included by the legislature 'to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion**

> **of the court may require some definitive statement of the law from the highest judicial authority of the land'.** The phrase, he continued, 'does not per se refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can, in effect, refer a matter to their lordships' Board for guidance on the law'." (Emphasis supplied)

See also **Norton Hinds and others v The Director of Public Prosecutions**, per Phillips JA at paragraph [32], where she outlined the relevant principles in this regard.

[38] I agreed with the arguments made by counsel for the respondent. The question which the applicant's counsel wished to pose to Her Majesty in Council is not of any great general or public importance or otherwise. What counsel has outlined, questions the exercise of the judge's discretion in the circumstances, which were before her, and whether she ought to have found that the application for relief from sanctions had been made promptly. There is no issue concerning the relevant law that was applied. There is no difficult or important question of law. The question which the judge determined in the exercise of her discretion, which was not interfered with on appeal, relates specifically to the rights of the applicant, and is not "apt to guide and bind others in their commercial, domestic and other relations" (see **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell**). Furthermore, when I examined the question that was posed, it did not arise from the decision of this court. As noted above, when the appeal was heard by this court, the focus, I surmise, would have been on whether the judge erred in the exercise of her discretion. The applicant has not shown that any issue arose from the approach that this court took, which would require a definitive statement of the law from Her Majesty in Council.

[39] It was for the above reasons I agreed that the application for conditional leave to appeal to Her Majesty in Council should be refused.

[40] As a result, it would have been inappropriate to grant a stay of execution, and so that application was also refused.

BROWN-BECKFORD JA (AG)

[41] I too have read in draft the reasons for judgment of my sister Foster-Pusey JA and they accord with my own reasons for concurring in the order outlined at paragraph [5] herein.