[2021] JMCA App 1

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00115

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA

BETWEEN	**L-3 COMMUNICATIONS CORPORATION (t/a PRIME WAVE COMMUNICATONS)**	**APPLICANT**
AND	**GO TEL COMMUNICATIONS LIMITED**	**1ST RESPONDENT**
AND	**ENOS GEORGE NEIL**	**2ND RESPONDENT**

Written submissions filed by Myers Fletcher and Gordon for the applicant

Written submissions filed by Michael Williams for the respondents

12 February 2021

PROCEDURAL APPEAL

(Considered on paper by order of the court)

BROOKS P

[1] On 12 September 2006, L-3 Communications Corporation (L-3), a company incorporated in Arizona in the United States of America, filed an application for summary judgment against Go Tel Communications Limited (Go Tel) and its principal, Mr Enos Neil, referred to hereafter collectively as "the respondents". The application

was heard by a judge (the judge) of the Supreme Court, who, on 16 May 2019, refused the application.

[2] The judge also refused L-3's application for permission to appeal from his decision, and it has applied to this court for that permission. The respondents have objected to the grant of permission.

[3] The issue in the application is whether L-3 has demonstrated that it has a real prospect of success, on appeal, in showing that the judge erred in the exercise of his discretion to refuse the application for summary judgment.

The background

[4] The background to L-3's application is an agreement (the supply agreement) by which Go Tel agreed to purchase telecommunication equipment on credit from Prime Wave Communications (PWC). Financing for the purchase was secured by a debenture from Go Tel and a guarantee from Mr Neil. Mr Neil's guarantee was secured by a mortgage of certain real property owned by him.

[5] The equipment was supplied but the parties disagreed thereafter. PWC asserted that Go Tel had failed to pay for the equipment. It sued them in the commercial division of the Supreme Court, for the recovery of the outstanding monies and the enforcement of the security.

[6] The respondents, in their defence and counter-claim, contended that the equipment was defective and not fit for the purpose. They also claimed damages for breach of warranty and misrepresentation.

[7] Some months after that claim was filed, L-3 filed:

a. an amended claim form and an amended particulars of claim substituting itself as the claimant and asserting that it traded as "Prime Wave Communications";

b. an application in that claim for rectification of the supply agreement and the security documents;

c. another claim, this time in the civil division of the Supreme Court, seeking to rectify the supply agreement and the security documents on the basis that PWC is not an incorporated body, but rather L-3's trading name; and

d. an application for summary judgment for rectification of the same documents and for the consolidation of the two claims.

[8] There was no dispute about the consolidation, and that was ordered. The contest was whether the judge ought to have granted the rectification by way of summary judgment.

This application

[9] In this application, L-3 asserts that it ought to be allowed to appeal from the judge's decision. It asserts this, because it contends that it has a real prospect of showing that the judge erred in his decision on at least two bases. Firstly, it asserts, the judge was inconsistent in finding that the respondents may not have been aware that PWC was not a separate legal entity, as L-3 now asserts. L-3 also contends that some of the documentation, to which the judge referred, strongly suggested that the respondents not only knew that at the time of contracting, but also treated with PWC in that way, thereafter. For these points, L-3 relied on the learning in **ED & F Man Liquid Products v Patel** [2003] EWCA Civ 472 and **Spiro v Lintern and others** [1973] 3 All ER 319.

[10] Secondly, L-3 also asserts that the judge was wrong in not giving full weight to the affidavit of its vice-president, Mr John Leshinski, who deposed that the respondents were made aware, during the original negotiations, that PWC was L-3's trading name. That complaint is based on the fact that the judge found that Mr Leshinski was not a party to those negotiations and did not state that he was relying on information and belief as allowed by the Civil Procedure Rules (CPR). L-3 complains that in his position, Mr Leshinski was entitled to depose to that information on behalf of L-3, whether or not he was personally involved in the negotiations.

[11] Learned counsel for L-3, in their written submissions, also relied on the well-established cases in this area, including **Swain v Hillman** [2001] 1 All ER 91, **ASE Metals NV v Exclusive Holiday of Elegance Limited** [2013] JMCA Civ 37 and the

decision of the Privy Council in **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12.

[12] The application in this court was not heard in open court because, at the time that it had originally been scheduled for hearing, the COVID-19 disease had just been declared a pandemic, and this country had been declared a disaster area. It, therefore, was decided to hear the application on paper. Although it had been filed as a without-notice application, the court decided that it wished to have a response from the respondents. There, however, was a delay due to attempts to secure a response from counsel for the respondents. The respondents have secured different representation in the interim. The matter was set before this panel, when the original panel had to be reconstituted.

The response

[13] In his response to the application, learned counsel for the respondents asserted that the judge was not wrong in finding that there were disputes of fact, which required a trial. Learned counsel argued that the documentation supported the respondents' assertion that they intended to contract with PWC and not L-3, and that they first knew of L-3's assertions about PWC when they were served with L-3's claim against them.

[14] Learned counsel submitted that this was a matter which involved an exercise of the judge's discretion and that there was no basis for disturbing the decision.

The analysis

[15] Rule 1.8(7) of the Court of Appeal Rules 2002 (as amended) (the CAR) guides this court in respect of applications for permission to appeal. The rule states:

> "The general 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."

[16] The law with regard to applications for permission to appeal is now well settled. In order to be allowed leave to appeal, L-3 must show that its prospective appeal has a realistic prospect of success. Morrison JA, as he then was, set out in **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and another** [2015] JMCA App 27A, the way in which the threshold should be interpreted. He said at paragraph [21]:

> "This court has on more than one occasion accepted that the words 'a real chance of success' in rule [1.8(7)] of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'. Although that statement was made in the context of an application for summary judgment, in respect of which rule 15.2 of the Civil Procedure Rules 2002 ('the CPR') requires the applicant to show that there is 'no real prospect' of success on either the claim or the defence, Lord Woolf's formulation has been held by this court to be equally applicable to rule [1.8(7)] of the CAR (see, for instance, **William Clarke v Gwenetta Clarke** [2012] JMCA App 2, paras [26]-[27]). **So, for the applicant to succeed on this application, it is necessary for him to show that, should leave be granted, he will have a realistic chance of success in his substantive appeal**." (Emphasis supplied)

[17] In deciding whether to grant permission to appeal, it is also necessary to refer to another well-known principle, that is, that this court will not disturb a decision based on the exercise of a judge's discretion, unless it is shown that that judge has plainly erred. The cases of **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 are authorities for that principle. In the latter case, Morrison JA, as he then was, stated, in part, at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[18] Bearing in mind those two principles, the application ought to be refused for at least two reasons. Firstly, contrary to the submissions of learned counsel for L-3, the judge did not find that the respondents had accepted that L-3 and PWC were one and the same entity. He assessed the evidence that was available to him and said that he was not satisfied that the respondents knew that L-3 and PWC were not separate legal entities. He said, in part, at paragraph 56 of his judgment:

> "…Moreover, there is no evidence before the Court to indicate the status of PWC, that is, whether PWC is a separate legal entity from [L-3], or whether it is in fact a division of [L-3]."

[19] In truth, it seems that the only evidence that the judge had in this regard was Mr Leshinski's statement, on affidavit, that PWC was not an incorporated body, despite the

fact that the supply agreement asserted that it was incorporated and that it had a separate address in a different state from L-3.

[20] That is, in light of the dispute as to identities of PWC and L-3, an issue which requires resolution at a trial, where evidence may be taken on oath and subject to cross-examination. If PWC is or was an incorporated body, then the matter of rectification would make a significant difference to the case.

[21] The judge went on to say that the positions of both parties had inconsistencies. He stated however that he was of the view that the evidence did not "prove that the respondents knew that PWC was not a separate legal entity, but instead a division of [L-3]" (see paragraph 57 of the judgment). He then found that a trial was necessary to determine the respective intention of each party when the agreement was executed (see paragraph 58 of the judgment).

[22] The second basis for refusing L-3's present application is, admittedly, not a reason given by the judge. It is based on the principle that, as the judge recognised, the remedy of rectification is an equitable remedy and that the party who seeks that remedy, or any equitable remedy, is required to have, itself, acted equitably in the circumstances. This court, in **Crown Motors Limited and others v First Trade International Bank & Trust Limited (in liquidation)** [2016] JMCA Civ 6, has declared, at paragraph [36] that "[t]he equitable maxims, he who seeks equity must do equity and he who comes to equity must come with clean hands, cannot be ignored".

[23] The respondents' defence and counter-claim alleges breach of warranty and/or misrepresentation in that the equipment supplied was not fit for the purpose for which it had been supplied. They contend that L-3 "knew this but did not disclose that the said equipment was defective" (paragraph 3 of the judgment).

[24] It is not for this court to decide whether those allegations are true, but if L-3 is allowed the remedy of rectification, it will be allowed to enforce the security, which the respondents have provided. That remedy may well be all that L-3 needs, and it would have no need to pursue the claim in respect of the debt.

[25] On the other hand, if the respondents are successful in their defence and counter-claim, any success they achieve may well be rendered nugatory by an inability to collect the fruits of its judgment, without severe difficulty, or at all. L-3, which is incorporated and based in Arizona, has not indicated that it has any presence or assets in this jurisdiction.

Conclusion and disposal

[26] The result of that reasoning is that it cannot be said that the judge was plainly wrong in deciding that this was a case that should be resolved at a trial, with evidence on oath and cross-examination. As a result, the application ought to be refused.

Costs

[27] The court is minded to award costs of the application to the respondents. If either of the parties are of a different view, they may file written submissions in that regard within 14 days of the date hereof. The other party will have a further period of

14 days from the date of service to file their own submissions. If neither party files written submissions opposing this court's decision on costs, within the stipulated time, the order is that costs are awarded to the respondents to be agreed or taxed.

STRAW JA

[28] I have read the draft judgment of Brooks P and agree with his reasoning and conclusion. There is nothing that I wish to add.

FRASER JA

[29] I too have read the draft judgment of Brooks P. I agree with his reasoning and conclusion and have nothing to add.

BROOKS P

ORDER

1. The application for permission to appeal is refused.
2. Unless submissions are filed to the contrary within 14 days of the date hereof, costs of the application are awarded to the respondents, which are to be taxed if not agreed.
3. If submissions are filed by either party in respect of costs within 14 days of the date hereof, the other party is to reply in writing within 14 days of being served with those submissions.
4. The court will give its decision on costs in writing after receiving the parties' submissions.