[2020] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 41/2008

MOTION NO COA2019MT00007

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN MAHOE BAY COMPANY LIMITED APPLICANT

AND SANDALS ROYAL MANAGEMENT LIMITED RESPONDENT

Captain Paul Beswick, Ms Gina Chang and Ms Aisha Thomas instructed by Ballantyne Beswick and Co on behalf of the applicant

Mr Christopher Kelman and Yakum Fitz-Henley instructed by Myers Fletcher and Gordon for the respondent

11 February and 27 April 2020

BROOKS JA

[1] On 30 April 2019, this court granted an application by Sandals Royal Management Limited (Sandals) to dismiss, for want of prosecution, a procedural appeal that Mahoe Bay Company Limited (Mahoe Bay) had filed, some 11 years previously, on 27 April 2008. The appeal had not yet been heard.

[2] Mahoe Bay is aggrieved by this court's decision. It asserts that the delay was not its fault. In the application presently before this court, Mahoe Bay sought permission to appeal to Her Majesty in Council, pursuant to section 110(2)(a) of the Constitution of Jamaica.

[3] On 11 February 2020, after having heard submissions from counsel for both parties, this court refused Mahoe Bay's application. It made the following orders:

1. The motion for conditional leave to appeal to Her Majesty in Council is refused.
2. Costs to the respondent to be agreed or taxed.

At that time, the court promised to put it reasons in writing at a later date. This is the fulfilment of that promise.

[4] Among its grounds supporting its application, Mahoe Bay asserted that the issue involved in the decision to dismiss its case is "one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council". It further asserted that it is "necessary to clarify the law governing the circumstances in which the act of striking out for want of prosecution is duly applicable where there has been no default on the part of the Appellants". According to Mahoe Bay, the issue is a serious one of law, "which would have widespread effects on any litigant in the Courts of Judicature in Jamaica and therefore the Jamaican public".

[5] Sandals opposed the application on the basis that the decision, from which Mahoe Bay seeks to appeal, raises no important points of law and has no general or

public importance. It contended that Mahoe Bay's case does not qualify under section 110(2) of the Constitution and, therefore, it should not be granted leave to appeal to Her Majesty in Council.

The history of the litigation

[6] The history of Mahoe Bay's case is a doleful tale of delay and inactivity. In August 1992, it filed a claim for trespass against Sandals, which is its neighbour in a land subdivision, carried out by Mahoe Bay. The claim was filed 10 years prior to the introduction of the Civil Procedure Rules, 2002 (CPR). After some delay, requiring consent from Sandals, Mahoe Bay filed a statement of claim on 7 January 1993. On 25 January 1993, Sandals filed a defence and counter-claim. In its counter-claim, Sandals sought, among other things, an order to vest certain lands, some of which are the subject of Mahoe Bay's claim, in the local authority. The vesting was said to be in accordance with a condition of the subdivision approval that was granted to Mahoe Bay.

[7] Mahoe Bay filed a reply on 4 February 1993, and, on 25 May 1993, filed a summons for directions. Thereafter, it seems, Mahoe Bay was unable to maintain the services of attorneys-at-law, who would advance its case. It changed several, and delay was associated with each change. By December 1997, two trial dates were vacated, at least one of which was on the application of Mahoe Bay's then attorneys-at-law.

[8] With the advent of the CPR in 2002, Mahoe Bay's case management conference (CMC), after several adjournments, came on for hearing on 9 January 2007. The CMC was adjourned to 4 June 2007, with a stipulation for Mahoe Bay to have a

representative present on the latter date, as required by rule 27.8(2) of the CPR. On 4 June 2007, Mahoe Bay did not have a representative present. In light of that failure, Jones J, who was the judge at the CMC, struck out Mahoe Bay's claim, with costs to Sandals, and entered judgment for Sandals on its courter-claim. The judgment not only granted an easement to Sandals over part of the disputed land, but vested other portions of the land in the local authority.

[9] Mahoe Bay applied to set aside those orders and for relief from sanctions. That application also went before Jones J, and, on 18 April 2008, he refused it. The claim, after almost 16 years, had come to an end, but without a trial.

[10] The case started life in this court on 24 April 2008, when Mahoe Bay filed its notice of appeal. It was not until 21 January 2009 that irregularities, to which both sides contributed, were corrected. Thereafter, nothing happened until 12 January 2011 when Sandals filed a notice of application to strike out the appeal for abuse of process. On 1 March 2011, Sandals withdrew the application, "without prejudice" to its rights, in order to facilitate settlement discussions between the parties.

[11] According to Sandals, Mahoe Bay did not approach Sandals to have any discussions and no discussions were held. Nothing was communicated to this court.

[12] Again, the matter stood in limbo, until Mahoe Bay retained its present attorneys-at-law, who, on 10 December 2018 (seven and a half years after the last action in the appeal), filed a notice of change of attorneys-at-law. Apparently, the attorneys-at-law,

either actively, or by virtue of having filed a document in the appeal, secured the listing of the appeal for hearing. As Mahoe Bay filed no affidavits in the matter, it is not known what triggered the listing. Upon being served with the notice of change of attorneys-at-law and the notice of hearing, Sandals filed a fresh notice of application to strike out the appeal for want of prosecution or as an abuse of the process of the court.

[13] Sandals supported its application with an affidavit recounting the history of the matter, and the prejudice it would suffer if its application were refused. As mentioned above, Mahoe Bay filed no affidavit in response. It opted to oppose Sandals' application by relying only on legal arguments and authorities.

[14] It is on Sandals' application that this court ruled, dismissing Mahoe Bay's appeal. This was done almost 27 years after the claim had been filed, and 11 years after the appeal had been filed.

The essence of the dispute in this court

[15] The essence of the issue on which Mahoe Bay wishes to engage the Privy Council is whether it is just to strike out an appeal, purely on the basis of delay, when the appellant has breached no rule of procedure. Mahoe Bay's position is summarised as follows:

a. it was not required to do anything else in order for the appeal to have been listed before the court for hearing;

b. the setting down of the appeal for hearing was an action required of the registry of this court;

c. the failure of the registry to do what it should have done, should not be visited on the appellant;

d. this court, having rejected that position, has placed a burden on the appellant, which the rules do not prescribe;

e. it is a ripe issue for clarification by the Privy Council;

f. it is an important issue, which will have widespread application for the practice of law; and

g. the Privy Council's decision will provide guidance as to how a litigant can compel the court to schedule their matter for hearing, so as to avoid being held responsible for delay.

Mahoe Bay filed an affidavit in support of the present application. It sought to adduce evidence that was not before this court when it heard Sandals' application.

[16] Learned counsel for Mahoe Bay sought to argue that it was not for Mahoe Bay to seek to have the registry list the case for hearing. He said it would have been fruitless to have even made an enquiry of the registry of the status of the matter as such enquiries, almost invariably, went unanswered.

[17] Sandals not only supported this court's decision on its application, it contended that Mahoe Bay has failed to satisfy the tests for a grant of conditional leave to appeal to the Privy Council, pursuant to section 110(2) of the Constitution. According to Sandals, its application, and the court's decision thereon, raised no new issues regarding the dismissal of cases for want of prosecution. Sandals contended that the decision was based on the facts of the particular case and that Mahoe Bay gave no evidence at the hearing of Sandals' application. Sandals asserted that the evidence that Mahoe Bay sought to adduce at the hearing of the present application, that it had done all it was required to do, was not before the court at the hearing of Sandals' application.

[18] In addition, Sandals asserted that the issues Mahoe Bay raised did not:

a. arise from the judgment as there was no evidence to show that Mahoe Bay had complied with all requirements of the Court of Appeal Rules (CAR);

b. go beyond the rights of the parties in the present case; or

c. disclose any difficult or important question of law.

The analysis

[19] Section 110(2) of the Constitution states:

> "(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." (Emphasis supplied)

[20] McDonald-Bishop JA, in **General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16, after considering a number of decisions of this court in respect of section 110(2) of the Constitution, set out a concise tabulation of the matters to be considered in respect of that section. She said at paragraph [27] of her judgment in that case:

> "[27] 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 to 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 ..."

[21] If ever there was a case that did not merit "debate before Her Majesty in Council", it is this one. There is no serious issue to be considered in this case. Mahoe Bay was content to let the appeal lie dormant from January 2009 to December 2018. For much of that time it did not even have an attorney-at-law on the record, as the attorneys-at-law before the present ones had their names removed from the record in August 2010 (see paragraph [22] of the judgment handed down on 7 June 2019). Mahoe Bay clearly had other priorities. Mahoe Bay patently failed to prosecute their appeal, and this court had ample basis to so find.

[22] The issues involved in this case are also unique. The facts of the case as outlined by the evidence presented by Sandals and recorded in the judgment of this court, show a singular disinterest by Mahoe Bay in its case. It failed to take any step in the matter and after an indication that it was going to pursue settlement discussions, not only failed to conduct any such discussions, but failed to inform this court that there were no discussions. It is unlikely that there would ever be a repetition of such abandonment of a party's appeal for such a long time. Learned counsel's arguments that there was no onus on Mahoe Bay to take any steps in these circumstances were advanced during the hearing of Sandals' application and were rejected at paragraph [76] of the judgment. The rejection was grounded on long established legal principles.

[23] Foster-Pusey JA, with whom the other members of the panel agreed, demonstrated that the decision was based on established principles emanating from "a line of cases including **Grovit v Doctor and others** [[1997] 1 WLR 640]". The learned judge of appeal said at paragraph [76]:

> "…It is not correct, contrary to [counsel for Mahoe Bay's] assertions, that there can be no delay or inaction unless there is a breach of the Rules. Neither is it correct that in order to succeed in its application Sandals Royal Management must demonstrate some breach of which Mahoe Bay is guilty. In the case of **Grovit v Doctor and Others**, Lord Woolf highlighted the fact that the evidence relied upon to establish an abuse of process may be 'the plaintiff's inactivity'; and that same evidence will 'then no doubt be capable of supporting an application to dismiss for want of prosecution' (see also the case of **Icebird Limited v Alicia P Winegardner** [2009] UKPC 24)…."

There is no new principle to be elicited from the Privy Council.

Conclusion

[24] It is for those reasons that this court made the orders refusing Mahoe Bay's application for leave to appeal to the Privy Council.

MCDONALD-BISHOP JA

[25] I have read, in draft, the reasons for judgment of Brooks JA. The reasons he has given were the basis of the decision of the court and I fully endorse them with nothing useful to add.

F WILLIAMS JA

[26] I too have read the draft judgment of Brooks JA and agree that it accurately reflects my own reasons for agreeing to the orders made by the court.