[2017] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 68/2010

APPLICATION NO 48/2016

BETWEEN	GORDON STEWART	APPLICANT
AND	SENATOR NOEL SLOLEY, SR	1st RESPONDENT
AND	NOEL SLOLEY, JR	2nd RESPONDENT
AND	GORDON BROWN	3rd RESPONDENT
AND	DEBORAH LEE SHUNG	4th RESPONDENT
AND	JAMAICA TOURS LIMITED	5th RESPONDENT

SUPREME COURT CIVIL APPEAL NO 37/2016

BETWEEN	HON GORDON STEWART, OJ	APPELLANT
AND	JAMAICA TOURS LIMITED	RESPONDENT

Hugh Wildman and Jerome Spencer instructed by Patterson Mair Hamilton for Hon Gordon Stewart, OJ

Mrs Denise Kitson QC, Kevin Williams and Miss Khian Lamey instructed by Grant Stewart Phillips & Co for Gordon Brown and Deborah Lee Shung

Abraham Dabdoub instructed by Dabdoub Dabdoub & Co for Jamaica Tours Limited

7, 8, 16 December 2016 and 5 July 2017

MORRISON P

[1] These matters were heard together. In Supreme Court Civil Appeal No 68/2010 (Application No 48/2016), the Honourable Gordon Stewart OJ ('Mr Stewart') seeks, among other things, an order discharging an order made by P Williams JA in chambers on 18 February 2016; while in Supreme Court Civil Appeal No 37/2016, Mr Stewart seeks an order setting aside an order made by Sykes J in chambers on 11 April 2016. For ease of reference, I will refer to Supreme Court Civil Appeal No 68/2010 as 'the 2010 appeal'; Application No 48/2016 as 'the 2016 application'; and Supreme Court Civil Appeal No 37/2016 as 'the 2016 appeal'.

[2] Both the 2010 and the 2016 appeals stem, either directly or indirectly, from Claim No HCV 00133 of 2009 ('the Supreme Court action'), in which Mr Stewart is the claimant and the respondents to the 2010 appeal are the defendants. In November 2009, Mr Stewart commenced committal proceedings against the respondents in the Supreme Court action, based on their alleged disobedience of court orders made in that action. On 19 May 2010, R Anderson J dismissed the committal proceedings, with costs to the respondents to be agreed or taxed, and the 2010 appeal was Mr Stewart's appeal against this decision. On 29 July 2011, this appeal was dismissed, with costs to the respondents to be taxed if not agreed. Mr Stewart applied to this court for leave to appeal against this decision to the Privy Council and this was refused on 25 November

2011, again with costs to the respondents, to be taxed if not agreed. Mr Stewart's further petition to the Privy Council for leave to appeal against this court's decision was also refused.

[3] Bills of Costs having been laid by the 3rd-5th respondents in respect of the orders for costs made against Mr Stewart in this court, the registrar of the Court of Appeal ('the registrar') in due course issued default costs certificates in their favour. Mr Stewart's applications to set aside the default costs certificates were heard by the registrar on 30 March 2015 and refused by her in a ruling issued on 14 April 2015. On 20 May 2015, Mr Stewart applied for an order discharging the registrar's order and setting aside the default costs certificates. And, on 18 February 2016, P Williams JA refused this application. In the 2016 application, therefore, Mr Stewart seeks to discharge P Williams JA's order.

[4] By a without notice application filed on 10 March 2016 (in a procedurally unconnected move), the 5th respondent, Jamaica Tours Limited ('JTL') applied for, among other things, a provisional charging order over certain shares owned by Mr Stewart, as well as an injunction preventing him from charging or disposing of those shares. This was in furtherance of the steps being taken by JTL to enforce its order for costs against Mr Stewart in the Supreme Court action, which had resulted in the signing of a default costs certificate in its favour by the registrar of the Supreme Court on 7 September 2012. On 11 March 2016, Laing J granted a provisional charging order over 499,999 shares held by Mr Stewart in a company known as Gorstew Ltd, and an

injunction preventing him from dealing with, charging or disposing of those shares. In addition, the judge issued a stop notice, the effect of which was to prevent registration of any transfer or charge of the shares or the making of any payment in respect of the shares, and made an order for the sale of Mr Stewart's shares in Gorstew Ltd when the final charging order was made.

[5] In short order, Mr Stewart applied to set aside Laing J's orders on various grounds, which included the contentions that JTL had been guilty of material non-disclosure to the judge and that the order was not in compliance with the Civil Procedure Rules, 2002 ('the CPR'). However, in a judgment given on 11 April 2016[1], Sykes J refused to set aside those orders. Accordingly, in the 2016 appeal, Mr Stewart seeks an order setting aside both Sykes J's judgment and Laing J's orders.

[6] As will have appeared from this very brief summary, the 2016 application and the 2016 appeal are essentially concerned with, on the one hand, the costs payable by Mr Stewart to the 3rd-5th respondents as a result of the costs orders made against him in the 2010 appeal; and, on the other hand, the costs payable by Mr Stewart to JTL in respect of the failed committal proceedings in the Supreme Court action.

[7] It is against this background that both the 2016 appeal and the 2016 application were heard together on 7, 8 and 16 December 2016. On 16 December 2016, the court reserved judgment in both matters.

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[1] [2016] JMSC CIV 50

[8] On 21 February 2017, while the decision of the court was still pending (and before any member of the court had either prepared or circulated a draft judgment to the others), Mr Dabdoub advised the registrar that, in both matters, the parties had "fully and finally settled" their disputes, "and all issues have been laid to rest"[2]. In addition, Mr Dabdoub advised that "the Bills of Costs laid before the Court of Appeal for taxation and awaiting a date are NOT being pursued" (emphasis as in the original).

[9] In proof of this assertion, the court was supplied, firstly, with a copy of the formal order made on an application for a final charging order in the Supreme Court action, which had come on for hearing before Harris J on 19 January 2017. Present at the hearing were counsel representing Mr Stewart and the 3rd and 4th respondents. The formal order records the following:

> "1. Matter settled in accordance with the terms and conditions endorsed in Counsel's Brief.
>
> 2. Liberty to the parties to seek to enforce the terms endorsed on Counsel's Brief by entering judgment in the event of noncompliance with any of the terms and conditions thereof.
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> 3. At the request of the 3rd and 4th [respondents] and by and with the consent of [Mr Stewart], the Provisional Charging Order, Injunction, Stop Notice and Order for Sale ... are hereby discharged.
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> 4. That there be no order as to costs."

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[2] Email dated 21 February 2017, Abraham Dabdoub to the registrar Jerome D Spencer and Mrs Denise Kitson QC

[10] As will have been seen, this order related to the matters in dispute between Mr Stewart and the 3rd and 4th respondents, but not JTL. So, secondly, we were also provided with copies of two statements which appeared in the edition of the Jamaica Observer newspaper published on 4 February 2017. These notices confirmed that the matters in dispute between all the parties, including JTL, were settled. The first statement reads as follows:

> "STATEMENT
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> The Honourable Gordon Stewart OJ, Senator Noel Sloley, and Mr Noel Sloley Jnr, chairman and director of [the 5th respondent], and their counsel [the 3rd respondent] and [the 4th respondent] are all pleased to announce that pending legal proceedings have been amicably resolved between the parties, to the mutual satisfaction of all concerned."

[11] The second statement, different only in its scope, reads as follows:

> "STATEMENT
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> The Hon. Mr Gordon Stewart OJ of Gorstew Limited and Senator Noel Sloley CD, and Mr Noel Sloley Jnr, chairman and director of [the 5th respondent], are all pleased to announce that all defamation and contempt proceedings brought by Mr Stewart were dismissed and on his initiative discontinued.
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> The Provisional Charging Order and Injunction obtained by [the 5th respondent] over the shares of Gorstew Limited have, at the request of [the 5th respondent], been discharged by the Court. The parties are pleased that these legal proceedings have now been resolved to the satisfaction of all concerned and they look forward to the resumption of cordial relations."

[12] Mr Dabdoub and Mrs Kitson QC have both taken the view that the court's decision in the matters under consideration has been overtaken by these events and that it is no longer necessary for the court to render a judgment in respect of either the 2016 application or the 2016 appeal. However, while not disputing that "certain costs issues have been agreed", Mr Spencer for Mr Stewart in both matters strongly maintains that "... these costs have no impact on the pending matters being pursued by the Appellant in which we are awaiting judgment"[3]. Mr Spencer also stated that:

> "We however wish to indicate that the appeal and applications have not been withdrawn or abandoned by our client and we are currently awaiting confirmation from you as to when the judgments will be delivered. We await further, early word from you."[4]

[13] In the light of these contrary indications from the parties, the court invited submissions from counsel as to what course it should adopt in the circumstances, bearing in mind that, as Lord Mustill observed in **Attorney General's Reference (No 3 of 1994)**[5], "[t]he courts have always firmly resisted attempts to obtain the answers to academic questions, however useful this might appear to be".

[14] Mr Spencer was the first to respond. In a letter to the registrar dated 14 March 2017, he said this:

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[3] Email dated 21 March 2017, Mr Spencer to the registrar and others
[4] Email dated 21 February 2017, Mr Spencer to the registrar and others
[5] [1997] 3 All ER 936, 952

> "At no time did we inform this Honourable Court that either [the 2016 appeal] or [the 2016 application] had been withdrawn or settled; this is why we have continually pressed for the timely delivery of the judgments in the captioned matters in keeping with the representation made on December 16, 2016.
>
> It is our respectful view, that any mention of a settlement that this Honourable Court may have heard has nothing to do with the pending matters before it and we see no reason why the matters are now perceived to be academic.
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> We continue to await the delivery of the judgments."

[15] In written submissions, both dated 16 March 2017, Mrs Kitson and Mr Dabdoub pointed out that (i) the underlying disute with which both the 2016 appeal and the 2016 application are concerned has to do with the costs payable in respect of matters long disposed by this court; and (ii) while the judgment of this court in both the appeal and the application remains reserved *cur adv vult*, the parties have settled the dispute and published an agreed statement notifying the public of this fact. It was accordingly submitted that, in these circumstances, there is no remaining dispute for the court to settle and a determination of the issues now under consideration by the court is therefore now of academic interest only.

[16] In support of these submissions, we have been referred to a number of authorities. First, there is **Sun Life Assurance Company of Canada v Jervis**[6], in which leave to appeal to the House of Lords was granted on condition that the defendant/appellant undertook (i) to pay the costs as between solicitor and client in the

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[6] [1944] AC 111

House of Lords in any event; and (ii) not to ask for a return of any money paid to the respondent as a result of the order of the Court of Appeal. It was held that the effect of these conditions was to make it a matter of complete indifference to the respondent whether the appellant won or lost and there was therefore no live issue to be tried in the appeal. Viscount Simon LC stated the relevant principle in this way[7]:

> "My Lords, in my opinion, the House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties. The difficulty is that the terms put on the appellants by the Court of Appeal are such as to make it a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent, in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties ...
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> I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

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[7] At page 113 and 114

[17] Next, there is **Ainsbury v Millington**[8] in which by the time the matter reached the House of Lords, the parties' joint tenancy of property which was the subject matter of the dispute between them no longer existed. Thus, any order which the House might have been minded to make as regards the property would have been completely ineffectual. The House accordingly declined to hear any argument on the merits of the appeal, Lord Bridge of Harwich observing[9] that:

> "It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

[18] However, Mrs Kitson and Mr Dabdoub acknowledge that, despite this general rule, the court does have a discretion to determine whether to hear an appeal that is of academic interest only. This was confirmed in **Regina v Secretary of State for the Home Department, Ex parte Salem**[10], in which, before a matter came on for hearing in the House of Lords, the appeal became academic, by reason of the granting of refugee status to the appellant who had been seeking an order for judicial review of the earlier decision to refuse it. The appellant nevertheless contended that the appeal should be heard, since it raised an issue of general importance.

[19] It was held that the appeal would be dismissed. The House accepted that,

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[8] [1987] 1 WLR 379
[9] At page 381
[10] [1999] AC 450

in a case where there is an issue involving a public authority as to a question of public law, the House of Lords has a discretion to hear the appeal, even if by the time the appeal reached the House, there was no longer a *lis* to be decided which would directly affect the rights and obligations of the parties *inter se*. However, that discretion has to be exercised with caution, and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exists or are anticipated, so that the issue would most likely need to be resolved in the near future. The instant case was not such a case, since, although it involved a question of statutory construction, the facts were by no means straightforward and in other cases the problem of when a determination was made might depend on the precise factual context of each case. Accordingly, the unusual facts of the case did not provide a good basis for the matter to be raised as a general principle, the particular *lis* having gone.

[20] There is, of course, a difference between these cases to which we were referred, in which the appeals became academic before they were heard, and the case which we are now considering: in this case, at the point at which the *lis* between the parties is said to have disappeared, the appeals has already been heard and a decision is awaited by the parties. But the authorities suggest that the considerations which will guide the court's approach may not be significantly different in such cases. **HFC Bank PLC v**

HSBC Bank PLC (formerly Midland Bank PLC)[11], a decision of the Court of Appeal of England and Wales, was just such a case. The court had granted an expedited hearing of an appeal at the request of the claimant, and the members of the court then gave priority to preparing their judgments over the preparation of judgments in earlier cases which were not of the same degree of urgency. A couple days before the draft judgments of the court were scheduled for distribution to the parties, the court was told that the parties had come to terms and wished that the appeal should be dismissed.

[21] In deciding what to do in these circumstances, the Court of Appeal was at pains to make it clear that, as Nourse LJ put it[12], "...the court will always encourage the parties to settle their differences even at a late stage...". The court's principal concern was that it had not been informed of the settlement until after notice of the judgment had been given. However, once the circumstances in which the settlement had been arrived at were satisfactorily explained to the court, it had no difficulty in withholding the draft judgments and making the consent order for the dismissal of the appeal sought by the parties.

[22] A different result was reached in **Prudential Assurance Co Ltd v McBains Cooper (a firm) and others**[13], in which the settlement was arrived at after the parties had seen and considered the draft judgment prepared by the court. Indeed, it

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[11] [2000] EWCA Civ 461
[12] At para 9
[13] [2001] 3 All ER 1014

was arrived at on the basis of what Brooke LJ described[14] as "...the mutual understanding that, as a consequence of their compromise, the judgment would not be handed down". As Brooke LJ went on to observe –

> "This mutual understanding is unenforceable, in that public policy dictates that the judge should have an independent discretion to decide whether to deliver his judgment or not. The wishes of the parties are just one factor, but not an overriding factor, which a judge should take into account in deciding how to exercise his discretion."

[23] In the particular circumstances of that case, it was held that, it being a matter for the judge in his discretion to decide whether to hand down his judgment or not, there were no grounds on which the Court of Appeal could interfere with the judge's decision to hand down his judgment.

[24] Finally, I will mention **Barclays Bank Plc v Nylon Capital LLP**[15], a decision of the Court of Appeal of England and Wales. In that case, after judgment had been reserved and after a member of the panel had prepared and circulated a draft judgment to his colleagues (but not to the parties), the court was informed that the parties had settled. I cannot help quoting in full the following passage from Lord Neuberger MR's judgment, in which he explained the court's decision to hand down the judgment, notwithstanding the indication from the parties that, in the light of the settlement, it

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[14] At para 34
[15] [2011] EWCA Civ 826

was no longer required:[16]

> "[74] Where a case has been fully argued, whether at first instance or on appeal, and it then settles or is withdrawn or is in some other way disposed of, the court retains the right to decide whether or not to proceed to give judgment. Where the case raises a point which it is in the public interest to ventilate in a judgment, that would be a powerful reason for proceeding to give judgment despite the matter having been disposed of between the parties. Obvious examples of such cases are where the case raises a point of law of some potential general interest, where an appellate court is differing from the court below, where some wrongdoing or other activity should be exposed, or where the case has attracted some other legitimate public interest.
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> [75] It will also be relevant in most cases to consider how far the preparation of any judgment had got by the time of the request. In the absence of good reason to the contrary, it would be a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case. On the other hand, where the judgment is complete, it could be said (perhaps with rather less force) that it would be a retrospective waste of judicial time and effort if the judgment was not given.
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> [76] The concerns of the parties to the litigation are obviously also relevant and sometimes very important. If, for their own legitimate interests, they do not wish (or one of them does not wish) a judgment to be given, that request should certainly be given weight by the court. (Of course, in some cases, the parties may request a judgment notwithstanding the fact that there is no longer an issue between them).
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> [77] Where there are competing arguments each way, the court will have to weigh up those arguments: in that connection, the reasons for any desire to avoid a judgment will be highly relevant when deciding what weight to give to

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[16] At paras 74-78

that desire.

> [78] In this case, I consider that the argument for handing down our judgments is compelling. First, by the time we were informed that the parties had settled their differences, the main judgment, representing the views of all members of the court, had been prepared by Thomas LJ, in the form of a full draft which has been circulated to Etherton LJ and me. Secondly, a number of the issues dealt with in that judgment are of some general significance. Thirdly, although we are upholding the judgment below, we are doing so on a rather different basis, so it is right to clarify the law for that reason as well. Fourthly, so far as the parties' understandable desire for commercial privacy is concerned, we have not said anything in our judgments which are not already in the public domain, thanks to the judgment below. Finally, so far as the parties' interests otherwise are concerned, no good reason has been advanced for us not giving judgment."

[25] In so far as this case is concerned, the position therefore appears to be this. As a general rule, courts are concerned to decide disputes between the parties before them, so they do not hear appeals or pronounce on abstract questions of law when there is no dispute to be resolved. Nevertheless, even in cases in which there is no longer a *lis* to be decided between the parties, the courts reserve a discretion to hear appeals, or to deliver judgment, where there are good reasons in the public interest to do so. Such reasons may include the fact that the case or the appeal raises a point of law of some general public interest which it may be important to resolve for the benefit of other litigants. In cases in which the parties have arrived at a settlement in between the hearing of the appeal and the delivery of judgment, further considerations relevant to the exercise of the court's discretion may also include the wishes of the parties themselves and how far the preparation of any judgment has got by the time the court

is advised of the settlement.

[26] Mr Stewart's appeal against the decision of this court in the 2010 appeal was conclusively determined against him by the refusal of the Privy Council to grant him leave to appeal. There is therefore now no live issue as to his liability to pay the various orders for costs made against him in favour of JTL and the 3rd and 4th respondents by either R Anderson J in the Supreme Court action or this court in the 2010 appeal.

[27] It is therefore clear that, at the outset of the hearing of the 2016 application and the 2016 appeal, the only substantial *lis*, or matter in controversy, between the parties related to how the costs payable by Mr Stewart as a result of those orders should be arrived at; and the actual quantum of those costs. Subsequent to the hearing of the application and the appeal, but before any judgment has either been rendered or even prepared, those matters have now been settled between the parties. Beyond Mr Spencer's reminder to the court that "the appeal and applications have not been withdrawn or abandoned by our client and we are currently awaiting confirmation from you as to when the judgments will be delivered", no argument has been advanced on Mr Stewart's behalf in support of the court delivering a judgment in these circumstances. It seems to me that, in this case, which involves purely private rights between private parties, and no issue of public law, particular public interest or general significance, it would be, as Lord Neuberger MR put it in **Barclays Bank Plc v**

Nylon[17], "...a highly questionable use of judicial time to prepare a judgment on an issue which was no longer live between the parties to the case".

[28] In any event, the court's policy is to encourage and facilitate the settlement of disputes at whatever stage of any proceedings. In these circumstances, it further seems to me, any pronouncement by this court on the merits of the 2016 application and the 2016 appeal at this stage could well have the wholly undesirable effect of encouraging one or other or all of the parties to, in effect, second-guess the settlement at which they have freely arrived.

[29] I would therefore propose that both the 2016 application and the 2016 appeal should be dismissed, with no order as to costs. It naturally goes without saying that dismissal of the application and the appeal in these circumstances is not intended to suggest or imply any judgment or view on their merits.

McDONALD-BISHOP JA

[30] I have read in draft the judgment of Morrison P. I agree with his reasoning and conclusion and have nothing further to add.

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[17] See para [24] above

F WILLIAMS JA

[31] I too have read in draft the judgment of Morrison P. I agree with his reasoning and conclusion and have nothing further to add.

MORRISON P

ORDER

The 2016 application and the 2016 appeal are both dismissed. No order as to costs.