In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 16

MITRA JOHNSTON

Appellant

-v-

MARK PROCTOR

Respondent

JUDGMENT

(in Court)[1]

Appeal against refusal of Magistrates' Court to set aside a default judgment-appropriate test-procedure for pursuing interlocutory appeals-Magistrates' Court power to order security for the costs of appeals-unsatisfactory nature of automatic stay pending appeal provisions-Civil Appeal Act 1971, sections 3,4,5 and 8-duty of counsel to avoid filing hopeless appeals

Date of hearing: May 17, 2017
Date of Judgment: May 23, 2017

Mr Tyrone Quin, Phoenix Law Chambers, for the Appellant
The Respondent appeared in person

[1] The present judgment was circulated to the parties without a formal hearing in order to save costs.

Background

1. By an Ordinary Summons issued on February 9, 2016, the Respondent sued the Appellant for $1500 with a view to recovering the price he paid for a defective electric bed.

2. On or about March 18, 2016, the Respondent obtained judgment in default when the Appellant failed to appear. A Judgment Summons was issued on March 24, 2016, requiring the Appellant to appear on April 27, 2016. The Magistrates' Court on April 27, 2016, being satisfied that the Judgment Summons had been served on the Appellant, issued a warrant of arrest when she again failed to appear. The Appellant instructed counsel who filed an 'Application to Set Aside Judgment in Default', asserting, without any particulars, that there was a "*serious issue to be tried*".

3. The application to set aside the Default Judgment was first heard (Wor. Tyrone Chin) on June 3, 2016 when the Learned Magistrate directed a Notice of Hearing be sent to the Respondent for a hearing on July 6, 2016. For reasons which are unclear, the Respondent did not appear on July 6, 2016 and the matter was adjourned to July 20, 2016 when the Appellant again appeared through counsel and the Respondent appeared in person. On this date, the Court (Wor. Juan Wolffe) fixed a hearing date for the application to set aside on August 11, 2016and quite appropriately ordered the Appellant to:

   (a) file a Defence within 14 days; and

   (b) file and serve Affidavit explaining her failure to appear at the hearing when judgment was entered in default.

4. The Appellant's application to set aside the Default Judgment was heard on August 24, 2016 in the Magistrates' Court (Wor. Tyrone Chin). The Appellant had failed to comply with either limb of the Magistrates' Court's directions ordered on July 20, 2016 and merely relied on counsel's argument. Meanwhile the Respondent placed an email chain and photographs before the Court. Unsurprisingly, the application was dismissed.

5. The present appeal is against that refusal to set aside the Default Judgment and was advanced by way of a Notice of Appeal dated September 2, 2016 which disclosed no arguable grounds of appeal. The Notice of Appeal advanced grounds which might have supported an appeal against a final judgment on the merits; but no complaint was made that the Learned Magistrate had applied the wrong legal test or adopted an incorrect approach to the task which he actually undertook: deciding whether the Appellant had established grounds for setting aside a Default Judgment.

The procedure for appealing interlocutory decisions

6. I did not raise the question of whether a right of appeal existed with counsel as it was only after reserving judgment that the character of the decision under appeal occurred to me. Appeals are not ordinarily listed for substantive hearing unless they have been properly constituted.

7. A ruling on an application to set aside a default judgment is quite obviously an interlocutory decision. A judgment at the end of a trial is quite clearly a final decision. Leave is required to appeal interlocutory decisions. Final decisions can be appealed as of right. Section 3 of the Civil Appeals Act 1971 provides:

> "***Appeals; as of right or only with leave***
>
> *3 Subject to this Act and of any rules made thereunder, an appeal against a final judgment of a court of summary jurisdiction shall lie as of right, and an appeal against—*
>
> > *(a) an interlocutory order; or*
> >
> > *(b) an order for costs,*
>
> *made by a court of summary jurisdiction shall only lie with the leave of such court, or, if such leave is refused, with the leave of the Court.*" [Emphasis added]

8. The Appellant ought to have filed a Notice of Intention to Appeal pursuant to section 4 of the Civil Appeals Act, which would have then entitled the Magistrates' Court to consider requiring security for costs under section 5 in respect an extremely dubious appeal. This jurisdiction appears to have fallen into disuse but is very important case management tool, which can be deployed in all appeals, both against final and interlocutory decisions alike. Ordering security for costs in a proportionate manner, avoiding the dangers of denying access to the Court, could potentially stem the tide of unmeritorious appeals which often seems to flow from the Magistrates' Court to the Supreme Court.

9. That said, legislative reform still seems desirable to abolish the automatic stay which comes into force if the appeal conditions are complied with. It is difficult to understand why it should be easier in the Magistrates' Court to deprive successful plaintiffs of the fruits of their litigation success than it is in the Supreme Court. In this Court a stay must be justified and defendants cannot ward off the enforcement of

judgments for months or years by filing unmeritorious appeals. Regretfully, section 8 of the Civil Appeals Act allows this to happen all too often in the Magistrates' Court. Summary justice is intended to be speedy; the reverse is too often the case where filing an appeal secures an automatic stay of the enforcement of judgment process.

10. The Act also provides:

- a notice of intention to appeal must be filed within 14 days of an interlocutory decision (section 4(2));

- there is no stay merely by filing a notice of intention to appeal (section 4(3));

- all proceedings in the Magistrates' Court are automatically stayed when all of the requirements of the Act have been complied with by an appellant (section 8).

11. No Notice of Intention to Appeal at all was filed in the present case and the Notice of Appeal was filed on September 2, 2016, which was within the 14 days required for filing the document which was never filed. More importantly still however, no application for leave to appeal was sought in the Magistrates' Court or in the Supreme Court so:

    (a) the appeal record ought not to have been prepared;

    (b) the Respondent ought to have been permitted to enforce his judgment; and

    (c) the appeal ought not to have been listed for hearing;

12. As these jurisdictional points were not taken by the Respondent or the Court on his behalf at the hearing of the appeal, I propose to deal with the appeal on its merits as if leave to appeal had been granted even though, as I indicated to the Appellant's counsel, on the face of the record no arguable appeal was disclosed. The appeal ought to have been summarily dismissed but, because of a diary error on the Appellant's counsel's part which meant he had not prepared for the hearing, I reserved judgment to enable him to file any arguments he could formulate in support of the appeal.

The merits of the appeal

13. In *Curtis Richardson-v-Sugarcane Company Limited* [2016] SC (Bda) 93 App (15 November, 2016), I dismissed an appeal against a similar decision by the same

Magistrate refusing an application to set aside a default judgment. I summarised the legal test for such an application as follows:

> "*8…This Ruling was difficult to fault in terms of resolving the application to set aside the aside the Default Judgment.* <u>*The Court clearly decided on the basis of the correct legal test, central to which is the requirement that the applicant not merely disclose an arguable defence but a "defence which has reasonable prospects of success"; it "must carry some degree of conviction"*</u>*: Ball-v-Lambert [2001] Bda LR 81, citing Sir Roger Ormrod in Alpine Bulk Transport Co. Inc.-v- Saudi Eagle Shipping Co. Inc. [1986] 2 Lloyd's 221 at 223. Mr Williams also aptly relied upon more recent decisions of this Court applying the same principles: Wakefield and Accardo-v- Marshall [2010] Bda L.R. 53 (Wade-Miller J); M & M Construction Ltd.-v- Claudio Vigilante [2013] Bda L.R. 6 (Kawaley J).*" [Emphasis added]

14. In the present case, the Learned Magistrate might be said to have applied an overly generous test to the Appellant because he used the term "triable case". However, in substance he clearly found that the Appellant had failed to meet the double-barrelled requirements of demonstrating (1) a "*defence with reasonable prospects of success*", and (2) a defence with "*some degree of conviction*". He summarised his reasons for reusing the application to set aside the Default Judgment, noting that he had heard counsel's arguments and reviewed the Respondent's emails and photographs, as follows:

> "*1) The Defendant does not have a triable case.*
>
> *2) The Defendant failed to file and serve her Defence by virtue of Court Order dated 20th July 2016 and*
>
> *3) The Defendant failed to file and serve her affidavit to support her absence in Court on 18th March 2016.*"

15. This Ruling was delivered on August 24, 2016, nearly nine months ago. Having had her application to set aside the Default Judgment set aside for those reasons, one would have expected some attempt to be made before the appeal was heard to meet those objections by demonstrating that there were indeed good reasons for the Appellant failing to appear in the Magistrates' Court on March 18, 2016 and, more importantly still, that a defence with some degree of conviction to it did exist.

16. By the time the appeal was listed for hearing, the Appellant had made no attempt to cure her non-compliance with two Magistrates' Court Orders, each of which were designed to afford her an opportunity to demonstrate, respectively:

    (a) that the Appellant had a genuine excuse for allowing the Default Judgment to be entered (the Respondent suggested before me that the excuse advanced through counsel was not a genuine one); and

    (b) that the Appellant had a convincing defence with reasonable prospects of success.

17. Meanwhile, this Court was able to peruse the email chain upon which the Respondent relied in the Magistrates' Court which created the distinct impression that even before the Respondent commenced the proceedings to recover the price for the defective bed, the Appellant's response had been a similar pattern of avoidance and delay which was evident in her defence of the proceedings when they were under way. In short, the documentary evidence suggested that she never disputed that the bed was defective and never followed through on offers to collect it from the Respondent.

18. It is difficult to see, based on the material which was before the Magistrates' Court, how any reasonable tribunal, properly directing itself, could have arrived at a different result than the Learned Magistrate reached. It followed that the appeal was hopeless.

19. The Appellant nevertheless invited the Court to consider supplementary submissions by May 22, 2017, which submissions may be summarised as follows:

    (a) the Appellant's counsel informed the Court by letter dated May 22, 2017 that his services had been terminated after he advised the Appellant, in light of the provisional views which I expressed in the course of hearing and having considered the judgment in *Curtis Richardson-v-Sugarcane Company Limited* to which I expressly referred;

    (b) the Appellant herself wrote to the Court on May 22, 2017 asserting that she had not received notification of the hearing in sufficient time to attend Court. The Notice of Hearing was sent to her attorney on or about March 13, 2017, over two months' before the hearing, so effective notice in legal terms was clearly given of the hearing on May 22, 2017 at which the Appellant's personal attendance was wholly unnecessary;

    (c) The Appellant also advanced her version of the events relating to the sale of the bed, matters which did not assist in any way to undermine the

validity of the decision made in the Magistrates' Court. Those matters might have been relevant if she had complied with the Senior Magistrate's Order dated July 20, 2016 to (1) file a Defence, and (2) file an Affidavit explaining her failure to appear at the hearing on March 18, 2016 when the Default Judgment was obtained, by August 3, 2016.

20. The view formed by counsel that the appeal was unmeritorious and first communicated to the Court on May 22, 2017 ought to have been formed before the appeal was filed. As the Judicial Committee of the Privy Council opined only yesterday in *Sumodhee (No 3) et al-v-The State of Mauritius* [2017] UKPC 16 (22 May 2017), counsel have a duty to avoid filing unmeritorious appeals. According to Lord Hughes:

> "*23. The importance of this duty has nothing at all to do with avoiding occasioning irritation to the court. Judges must and do consider on their merits arguments properly advanced whether they turn out to be good, bad or indifferent. The importance of the duty lies in enabling the court to deal efficiently with the very large number of applications made to it, and to concentrate on those which raise properly arguable points. If the court is pre-occupied with hopeless points, possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the time which they deserve. An appellate court needs to rely on the professional duty of counsel to avoid this.*"

Conclusion

21. The Appeal against the refusal of the Magistrates' Court in a Ruling dated August 24, 2016 to set aside the Default Judgment entered against the Appellant in the Magistrates' Court on March 18, 2016 is accordingly dismissed.

22. The Appellant shall pay the Respondent's costs of the appeal, which I summarily assess at $50.00.

Dated this 23rd day of May, 2017 ____________________________

IAN R.C. KAWALEY CJ