[2017] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 101/2015

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

BETWEEN	**MIGUEL GONZALES**	**1st APPELLANT**
AND	**SUZETTE SAUNDERS**	**2nd APPELLANT**
AND	**LEROY EDWARDS**	**RESPONDENT**

Written submissions filed by Mrs Pauline Brown-Rose for the appellants

Written submissions filed by Messrs Reitzin & Hernandez for the respondent

20 February 2017

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

PHILLIPS JA

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing useful to add.

MCDONALD-BISHOP JA

[2] I too have read the draft judgment of my brother F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

[3] By an amended notice of appeal filed on 20 November 2015, the appellants seek to set aside an order of a judge of the Supreme Court (hereafter referred to as "the learned judge") for specific disclosure and inspection contained in case management orders dated 5 October 2015. The order was to the effect that:

> "1. All motor vehicle accident claim forms submitted to the Defendants' Insurers concerning the accident to be made available for inspection by the Claimant within 7 days of the order herein;"

Background

[4] The respondent is the claimant and the appellants are the defendants in the court below, in a claim for damages for negligence arising from a motor-vehicle accident which occurred on or about 5 February 2008. The accident involved a motor vehicle which was being driven by the respondent and a motor vehicle owned by both appellants and which was being driven by the 2nd appellant. The respondent, on 30 June 2011, filed a claim against the appellants, who in turn filed a defence and counterclaim, completely denying liability and alleging, in the alternative, contributory negligence on the part of the respondent.

[5] The respondent, on 8 September 2015, filed a notice of application for court orders which sought specific disclosure of 'all motor vehicle accident claim forms' submitted to the insurance company and 'investigators' reports' pertaining to the accident, in addition to other usual case management orders. It was stated in ground 3 of the amended notice of application that the orders for disclosure were "…necessary and/or desirable to deal with the proceedings justly".

[6] On 16 September 2015, Mrs Pauline Brown-Rose, attorney-at-law on the record for the appellants, swore to and filed an affidavit in opposition to the respondent's application. By that affidavit, Mrs Brown-Rose objected to the respondent's application for specific disclosure and claimed a right to withhold from disclosure the documents sought. In the affidavit she stated that there was no investigator's report as no investigation had been conducted into the accident and that there had been only a motor-accident report form ("the form") submitted by the appellants to their insurance company, JN General Insurance Company Limited (JNGI) on 7 February 2008, two days after the accident had occurred.

[7] On 17 September 2015, the respondent filed an amended notice of application for court orders. The notice was amended to include a request for an order for the inspection of the documents which it had been sought to have specifically disclosed in the original notice of application. It was also declared in the amended notice that the respondent, pursuant to rule 28.15(5) of the Civil Procedure Rules (CPR), was opposing the applicants' claim of right to withhold disclosure of the form.

[8] At the case management conference, which had previously been set by the court for 18 September 2015 (that is, prior to the making of the order being challenged in this appeal), the learned judge ruled on a part of the respondent's amended application. He ordered that all investigators' reports, if any, were to be produced. The learned judge also adjourned the case management conference to 5 October 2015, to allow for the filing of written submissions and further affidavit evidence and for a ruling on the request for the specific disclosure of the form(s).

[9] In that regard, Mrs Nicossie R Dummett, legal officer at JNGI, on 21 September 2015, swore to and filed an affidavit in further support of the appellants' right to withhold disclosure.

Proceedings in the court below

[10] Written submissions were filed by both parties. The appellants submitted that the form requested to be disclosed was (i) irrelevant to the issue of liability; and (ii) exempted from discovery on the basis of litigation privilege, as it had come into existence for the purpose of aiding in the conduct of litigation. On the other hand, the respondent, to a large extent, posited that the appellants' claim of litigation privilege had not been made out and that the affidavit of Mrs Brown-Rose, claiming a right to withhold the document from disclosure, offended against certain rules of the CPR, in that she had failed to identify the source of the information and belief which formed the basis of some statements made therein.

[11] In his written judgment, delivered on 5 October 2015, the learned judge found that: (i) the form was relevant to the determination of the issue of liability in the proceedings; (ii) the affidavits filed on behalf of the appellants were insufficient to demonstrate that the form was created for the dominant purpose of litigation; and that "none of the affidavits gave evidence of what the intention of the insured was when the document was submitted, but seems based upon a presumption of what is generally expected when a [sic] insured submits a report to its insurer" (see paragraph [29] of the judgment); and (iii) there was no affidavit evidence to show that an inspection of the document by the court would be useful.

[12] Consequently, the learned judge ruled in favour of the respondent and granted the order for specific disclosure of 'all motor vehicle accident claim forms' (as stated at paragraph [3] herein).

The appeal

[13] The appellants, by their amended notice of appeal, based their challenge to the learned judge's ruling on the following grounds:

> "i. The learned judge erred in fact and or in law in that he wrongly concluded that the motor accident report form submitted by the second defendant to her insurer was relevant to the determination of the issue of liability in the proceedings.
>
> ii. The learned judge erred in fact in that he improperly construed the affidavit of Nicosie R. Dummett and wrongly concluded that it is from the motor accident report form the insurer determines the particulars of the incident to determine whether its obligation under the policy has arisen.

iii. The learned judge erred in fact and or in law in concluding that the Insurance company is not a party to the claim and that it is third party [sic] through whom the document was submitted failed [sic] to give proper or any proper consideration to the principle of subrogation and the right of the insurer to step into the shoes of the defendants and to defend the claim on behalf of the defendants. Further the learned judge failed to consider that in the instant case there was no dispute as to indemnity and that the insurance company has a legal obligation under the policy of insurance to appoint and instruct counsel to conduct litigation on behalf of its insured.

iv. The learned judge erred in fact and or law when he failed to give any or any proper consideration to paragraphs 7 & 9 of the affidavit of Nicossie [sic] Dummett which not only demonstrated a claim to litigation privilege but Attorney/client privilege.

v. The Learned judge erred in fact and or law when failed [sic] to have identified any or any proper basis for concluding that the Affidavit of Nicosie R. Dummett did not establish that the dominant purpose of the motor accident report form was prepared in contemplation of litigation.

vi. The learned judge erred in fact and or law in concluding that none of the affidavits gave evidence of the intention of the insured when failed [sic] to properly consider the evidence of the representative of insurer [sic] in that motor accident report form represents communication between an insured and his insurer who is obligated to provide legal representation under the policy of insurance.

vii. The learned judge erred in law in arriving at a conclusion that the affidavits did not establish that the dominant purpose of the motor accident report was prepared in contemplation of litigation failed [sic] to exercise his discretion pursuant to Rule 28.15(8) to examine the motor accident report form, which would have assisted him in arriving at a correct ruling on the question whether the defendants' claim of litigation privilege was justified.

viii. That the learned judge erred in law in concluding that inspection of the document by the court was not necessary.

ix. In arriving at his conclusion the learned judge erred in fact and or in law when he failed to properly look at the surrounding circumstances and apply an objective analysis of the document so as to properly determine whether the claim to litigation privilege is applicable.

x. The Learned Judge erred in fact and or in law in that he wrongly ordered that the motor accident report form submitted to the defendants' insurer is to be made available to the Claimant for inspection with [sic] seven (7) days of the order herein."

Issues

[14] Having reviewed the amended notice and grounds of appeal, along with the submissions of counsel, I find that these are the issues that fall to be determined:

(i) did the learned judge correctly find that the form was relevant to the determination of liability in the proceedings? (ground of appeal i)

(ii) having regard to the affidavit evidence, did the learned judge correctly find that the form was not protected from disclosure on the basis of litigation privilege? (grounds of appeal ii, iv, v, vi, vii ix and x)

(iii) was the role of JNGI in the proceedings properly regarded by the learned judge? (ground of appeal iii)

(iv) did the learned judge wrongly exercise his discretion by not inspecting the form? (grounds of appeal vii and viii)

Scope of review

[15] The appellate court's approach to the review of the exercise of the discretion of a judge in a lower court is entrenched in the decision of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, where Morrison JA (as he then was) stated that:

> "[19] ...It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [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'."

[16] Thus, this court must exercise great care in deciding whether to disturb the findings of the learned judge below, and may only proceed to do so in the face of clear evidence of the learned judge's breach of his duty to act judicially.

Issue (i) relevance of the form to the proceedings

Summary of submissions for the appellants

[17] Counsel for the appellants submitted that the form was irrelevant to the proceedings, would be of little assistance in the determination of liability and that the learned judge was wrong to have not so found. Moreover, counsel submitted, there had been no evidence brought below to show that the form provided clarification on, or was relevant to, the issue of liability.

Summary of submissions for the respondent

[18] In opposition, counsel for the respondent asserted that the form was indeed relevant to the proceedings within the meaning of rule 28.6(5) of the CPR and that, further, it was at the discretion of the court whether to order specific disclosure irrespective of the direct relevance of the form to issues in the proceedings.

Findings of the learned judge

[19] The learned judge, in his assessment of the matter at paragraph [25] of the judgment, found that two days had passed between the date of the accident and the submission of the form to JNGI and that the form would have constituted the first formal communication between the insured and JNGI about the facts and circumstances of the accident. The learned judge also found that the issue of liability was at the heart

of the claim, especially in the light of the appellants' claim that the respondent was contributorily negligent. On those grounds the learned judge found the document to be relevant to the matter in accordance with rule 28.6(5) of the CPR.

Discussion

[20] In any application for specific disclosure, it is a primary requirement that the document sought to be disclosed be "directly relevant" to the proceedings in question. This requirement is embodied in rule 28.6(5) of the CPR, which provides that:

> "An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings." (Emphasis added)

[21] Providing clarification of the use of the term 'directly relevant', rule 28.1(4) of the CPR states that a document is to be regarded as being directly relevant only if:

> "(a) the party with control of the document intends to rely on it;
>
> (b) it tends to adversely affect that party's case; or
>
> (c) it tends to support another party's case."

[22] By these provisions, a pre-requisite for disclosure is a finding that a document is, not just relevant in the usual layman's sense, but "directly relevant" within the meaning of the rule. The rule uses the phrase "only if" in delimiting the matters to be considered in deciding whether a document satisfies the definition. This means that a finding that a document is directly relevant can only be made in the three circumstances outlined in the rule.

[23] One important observation that it is necessary to make at this stage, is that there is no affidavit evidence by the respondent addressing any of the three circumstances mentioned in the rule. The respondent did not at first instance put forward any evidence showing that the documents that he wished to have disclosed (i) were going to be relied on; or (ii) would either assist his case or (iii) adversely affect that of his opponents. (Although it is to be noted that part 28 of the CPR does not require the filing of affidavit evidence, it is not, in my view, unreasonable to expect that there must be some material upon which the court would be expected to exercise its discretion.) Indeed, there is nothing indicating specifically what is contained in the documents. From one perspective, the breadth of the request for disclosure (that is: 'all motor vehicle accident claim forms') could itself be taken as suggesting that the exact document sought and its contents are not known. All that was put forward were submissions on behalf of the respondent as to what, in the general course of things, such documents would be expected to contain. So that, for example, the simple fact that the documents were prepared and submitted as a result of the accident, although perhaps suggesting relevance in a general sense, would not be enough to satisfy the particular requirements of rule 28.1(4)(b) and (c) of the CPR, given the specific definition and criteria in those parts of the rule.

[24] In relation to rule 28.1(4)(a) of the CPR, its two requirements are that: (i) "the party with control of the document"; (ii) "intends to rely on it". "Party" is defined in rule 2.4 of the CPR to mean:

> "'party' includes both the party to the claim and any attorney-at-law on record for that party unless any rule specifies or it is clear from the context that it relates to the client or to the attorney-at-law only."

[25] In the instant case at first instance, the only affidavit evidence that there is speaks to the form being prepared for submission to the insurance company that insures the appellants. Given the definition of "party", it is, at best, doubtful that it would encompass the appellants' insurer. It appears that the insurance company is the entity with control of the documents. However, let us consider as well rule 28.2 of the CPR in which the phrase "control of a document" is explained. Rule 28.2(2) of the CPR reads as follows:

> "(2) For this purpose a party has or has had control of a document if-
>
> (a) it is or was in the physical possession of that party;
>
> (b) that party has or has had a right to possession of it; or
>
> (c) that party has or has had a right to inspect or take copies of it."

[26] Even if we were to say, for the sake of argument, that the appellants at one stage had possession of the form; and even if it could be accepted that "party" includes the insurance company, it is my view that there is no material available to suggest that either the appellants or the insurance company intends or intended to rely on it. That, therefore, would still prevent the respondent from successfully establishing the two requirements of rule 28.1(4)(a) of the CPR. As regards the requirements of rule 28.1(4)(b) and (c) of the CPR, (which, on a proper interpretation of rule 28.1(4) in its entirety, should be read disjunctively from rule 28.1(4)(a)), the respondent (applicant at

that stage) would have had to show that the said documents either (i) aid the appellants' case or (ii) negatively affect his case. There was no material before the learned judge to satisfy either of these requirements.

[27] In relation to my view on the desirability of affidavit evidence from the respondent in the circumstances of this case (accepting, as I have, that part 28 does not mandate the giving of affidavit evidence), I am aware of dicta in at least one other case that suggest that affidavit evidence may not necessarily be required. That case is the first instance judgment of **Maxwell Gayle and others v Desnoes and Geddes Limited and others**, claim no HCV 1339 of 2004, judgment delivered 13 May 2005. At paragraph 9 of that judgment, Mangatal J observed as follows:

> "...the determination of the question whether the documents are directly relevant can be made by looking at the Claim and at the law, whatever the contents of the application or of the Affidavit."

[28] In that case, however, (in contradistinction to this one) Mangatal J, in particular at paragraph 12 of the judgment, conducted a fairly-detailed examination of the claim form and compared it with the contents of the affidavits. In this case, an examination of the nature of the claim appears to be limited to paragraph [25] of the judgment, which mentions, in a brief and general sense, the nature of the claim. In my respectful view, that paragraph does not delve into the matter in a manner that would assist with a decision on whether the documents in question were "directly relevant". The following are the contents of paragraph [25] of the judgment of the court below:

> "[25] The motor vehicle accident report was submitted two days after the incident and would have been the first formal communication between the insured and the insurer as it relates to the fact and circumstances of the accident. The Defendants though not disputing the fact of the accident are at odds with the Claimant as to the circumstances, a factor that goes to the root of the Claim: liability for the accident. Especially as the Defendant [sic] assert that there is an element of contribution on the part of the Claimant in the accident, the documents are therefore, in accordance with Rule 28.6 (5), relevant to the determination of the issue of liability in these proceedings."

[29] The use of the phrase "directly relevant" in rule 28.6(5) of the CPR (on which rule the learned judge purported to rely) seems to be more restrictive than the approach taken to the question of relevance and specific disclosure at common law.

[30] For example, we may consider the case of **The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company** (1882) 11 QBD 55, 63. In that case, Brett LJ, giving what he described as: 'as large an interpretation' to the phrase 'a document relating to any matter in question in the action', opined that:

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* - not which *must* - either directly or indirectly enable the party requiring [discovery] either to advance his own case or to damage the case of his adversary."

[31] In further consideration of what would be regarded as constituting relevant documents in applications for specific disclosure at common law, Mr Livesy QC (sitting as a deputy judge of the Chancery Division), at paragraph 6 of **African Strategic**

Investment (Holdings) Limited, Randgold and Exploration Company Limited v Christopher Paul MacDonald Main [2012] EWHC 4423 (Ch), stated that:

> "...Where a party makes an application for specific disclosure, the primary exercise for the court is to identify the factual issues that would arise for decision at the trial in accordance with an analysis of the pleadings. An order for disclosure should be limited to documents which are relevant to the pleaded issues."

[32] As an examination of rule 28.1(4) of the CPR shows, however, the specific criteria needed to establish that a document is "directly relevant" in this jurisdiction, are different and need to be met.

[33] On the basis of the foregoing principles, in this case, where the "direct relevance" of the document for which disclosure was sought was a crucial consideration, in light of the guidance enounced in **The Attorney General of Jamaica v John Mackay**, there seems to be a reasonable basis on which the learned judge's decision may be faulted or found to be palpably wrong. The learned judge appears to have focussed on the possibility of the documents being "relevant" in the general sense; and not "directly relevant", with its delimiting criteria, as the rule requires.

[34] It is not impossible that the contents of the form could have been used by the respondent to attempt to establish a previous inconsistent statement or to ascertain whether the appellants were being consistent in putting forward, at the trial and in their pleadings, the account of events that they first advanced shortly after the accident. No clear conclusion can be made in this regard, however, as there is no evidence as to

what the form contained. In the absence of affidavit evidence as to the contents of the form and/or addressing the requirements of rule 28.1(4) of the CPR, it might very well have been useful for the learned judge to have inspected the form itself in order to gain assistance in deciding whether he could properly have made the order for specific disclosure.

Rule 28.7 - criteria for ordering specific disclosure

[35] Rule 28.7 of the CPR sets out matters to be considered by a judge when deciding whether to grant an application for specific disclosure. This is what that rule states:

> "28.7 (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (2) It must have regard to -
>
> (a) the likely benefits of specific disclosure;
>
> (b) the likely cost of specific disclosure; and
>
> (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.
>
> (3) Where, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may however make such an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event."

[36] There not having been any affidavit evidence or any other material fact put before the court by the respondent, he would not have sufficiently demonstrated that the documents sought were "directly relevant" within the meaning of rule 28.1(4) of the CPR. There not having been proof that the documents were directly relevant, or even what their contents were, the learned judge would not have been put in a position properly to address the considerations set out in rule 28.7 of the CPR. So that, for example, he could not have spoken to the necessity for specific disclosure in order to dispose fairly of the claim and/or to any likely benefits of ordering specific disclosure of the said documents.

[37] Additionally, it not having been demonstrated by the respondent that the documents were "directly relevant", it was not required of the learned judge to have proceeded to the other hurdle of considering whether the document would have been privileged or not. Or, if he could properly have done so, the appellants' opposition to the documents being disclosed would have been strengthened by the failure to satisfy the required prior consideration of whether the test of direct relevance had been satisfied.

[38] It is apparent from a reading of part 28 of the CPR that an applicant in applications for specific disclosure must satisfy the judge or master in chambers on the basis of evidentiary or other material that the requirements of part 28 of the CPR have been scrupulously complied with. Failure to do so will necessarily result in such an application being unsuccessful.

[39] It is my view that my finding in relation to this preliminary hurdle renders it unnecessary for me to consider the remaining issues and grounds of appeal.

Conclusion

[40] It seems to me that in the court below there would have been an onus on the respondent (he being the applicant then) to (i) satisfy the court that the documents in respect of which he sought disclosure were "directly relevant" within the meaning of rule 28.1(4) of the CPR; and/or (ii) that specific disclosure was necessary in order to fairly dispose of the claim or to save costs, as required under rule 28.7(1) of the CPR. In failing to satisfy itself that the respondent had crossed this first hurdle, the court below regrettably fell into error. I propose, therefore, that the appeal be allowed; and that the order for specific disclosure and inspection be set aside, with costs to the appellants to be agreed or taxed.

[41] The delay in delivering this judgment is regretted.

PHILLIPS JA

ORDER

i. Appeal allowed.

ii. The order made in the court below for specific disclosure and inspection is set aside.

iii. Costs to the appellants to be agreed or taxed.