[2022] JMCA App 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

APPLICATION NO COA2022APP00029

BETWEEN	**THE ADMINISTRATOR-GENERAL FOR JAMAICA (Administrator of estate Andrew Wayne Lawrence, deceased)**	**APPLICANT**
AND	**GARY WHITTAKER**	**RESPONDENT**

Miss Oraina Lawrence and Miss Janeak Bailey for the applicant

Miguel Palmer for the respondent

4 July and 18 November 2022

MCDONALD-BISHOP JA

[1] This is an application brought by the Administrator-General for Jamaica ('the applicant') seeking permission to appeal the decision of Master R Harris ('the learned Master') made on 28 January 2022. The learned Master, among other things, had refused the applicant's application for an extension of time to file a claim under the Fatal Accidents Act ('FAA') and had awarded costs to Gary Whittaker ('the respondent') to be agreed or taxed.

[2] On 4 July 2022, this court heard the application and made the following orders:

> "1. The applicant's notice of application for court orders filed on 11 February 2022 for permission to appeal the decision of Master R Harris made on 28 January 2022, is refused.

2. Costs of the application to the respondent to be agreed or taxed."

[3] We promised, then, to provide written reasons for the orders made. In fulfilment of that promise, these are my reasons for concurring with the decision of the court.

Background

[4] On 20 November 2015, Mr Andrew Wayne Lawrence ('the deceased') lost his life in a motor vehicle collision that occurred between a Suzuki Alto motor car, driven by him and a Toyota Tacoma motor truck, driven by the respondent, along the Mosquito Cove main road in the parish of Hanover.

[5] Ms Geraldine Bradford, in her affidavit filed in support of the application, deposed that the deceased's death was reported to the applicant on 13 February 2020, which was after the limitation period under the FAA had expired. Upon receipt of the report, the applicant commenced investigations regarding the deceased's affairs and the circumstances surrounding his death. During those investigations, the applicant discovered that the deceased was survived by a minor child. It is the applicant's position that as a result of the deceased's death, which she alleges has resulted from the respondent's negligence, the deceased's estate, dependents and near relatives suffered loss, damage and incurred expenses.

[6] Based on the results of the investigation, the applicant filed a claim against the respondent under the Law Reform (Miscellaneous Provisions) Act ('LRMPA'). However, the time for filing a claim under the FAA had already expired. On 15 June 2020, the applicant filed a notice of application for court orders in the Supreme Court seeking, among other things, the following orders:

"1. A Declaration that Section 56 of the Limitation of Actions Act (as amended by the Administrator-General's (Amendment) Act, 2015) is applicable to the matter.

2. That the Applicant be permitted to make a claim against the Defendant under the [FAA] for damages for

> negligence for the benefit of the dependents and near relations of the deceased."

[7] After several adjournments, the application was heard on 18 January 2022 by the learned Master. On 28 January 2022, she refused to grant the extension of time and permission to appeal.

[8] On 11 February 2022, the applicant filed the application in this court for permission to appeal on the following proposed grounds of appeal:

> "**Ground 1**: The learned Master erred in finding that the Respondent would have been prejudiced where the extension sought by the [applicant] to file a claim under the Fatal Accident Act was granted. The learned Master did not have due regard to the fact that a claim under the Law Reform Miscellaneous Provisions Act still subsists against the Defendant.
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> **Ground 2**: The learned Master erred in fact and in law in concluding that the reason for the delay between the deceased's death in 2015 and when it was reported to the Administrator-General's Department in 2020 is inadequate.
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> **Ground 3**: The learned Master injudiciously exercised her discretion in refusing to grant the [applicant] an extension of time to file a claim under the Fatal Accident Act by failing to consider or to sufficiently consider the merits of the [applicant's] application in respect of each of the factors for consideration advanced.
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> **Ground 4**: The learned Master erroneously exercised her discretion in refusing to grant the [applicant] an extension of time to file a Claim under the Fatal Accident Act by failing to correctly consider and determine the length of and reason for the delay, the possibility of prejudice to the Respondent; and Prejudice to the Applicant and the interest of justice.
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> **Ground 5**: The learned Master erred in law by injudiciously making a cost order in this case.
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> **Ground 6**: The Applicant has a real prospect of success on the appeal." (Emphasis as in the original)

[9] As counsel on both sides have acknowledged, the general rule is that permission to appeal will only be given if the court considers that an appeal will have a real chance of success (see rule 1.8(7) of the Court of Appeal Rules). It is now well-settled that, the words "real chance of success" means that the applicant must show that there is a 'realistic' as opposed to a 'fanciful' prospect of success (see, for example, **Duke St John-Paul Foote v University of Technology of Jamaica and another** [2015] JMCA App 27A, para. [21]).

[10] Additionally, the orders the applicant sought leave to appeal were those made by the learned Master in exercising her discretion. Accordingly, the court, in considering whether the applicant's proposed appeal had a "real chance of success", was also tasked to consider whether the applicant had a real chance of demonstrating at the substantive appeal that the learned Master misunderstood the law or the evidence before her; misconceived the facts before her; or that her decision was one that no judge having regard to her duty to act judicially could have arrived at (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042).

[11] The parties agreed that the learned Master had the discretion to extend the time within which the applicant could bring a claim under the FAA, if she saw it fit to do so. Both parties also agreed that although the FAA does not set out the factors the court should consider in exercising this discretion, the provisions of section 33(3) of the Limitation Act (UK) are helpful in guiding the court. Section 33 of the Limitation Act (UK) gives the court in the UK the discretion to extend the time limit for actions in respect of personal injuries or death. Section 33(3) provides that the court acting in the exercise of that discretion shall have regard to all the circumstances of the case and, in particular, to:

> "(a) the length and the reasons for the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less

cogent than if the action had been brought within the time allowed…;

(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(d) the duration of any disability of the plaintiff arising after the date of accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

[12] This provision was considered and applied in the case of **Shaun Baker v O'Brian Brown and Angella Scott-Smith** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 5631, judgment delivered 3 May 2010 ('**Shaun Baker**'), on which both parties relied.

The applicant's submissions

[13] In seeking to convince the court that the proposed appeal had a real chance of success, counsel for the applicant, Miss Lawrence, contended that the learned Master erred when she found that the respondent would be prejudiced if she extended time for the applicant to file a claim under the FAA. Relying on the case of **Donovan v Gwentoys Limited** [1990] 1 WLR 472, counsel submitted that the primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim. She argued that, in the instant case, the respondent would not be faced with a stale claim as a claim was still pending against the respondent under the LRMPA. On this

premise, she submitted that the learned Master disregarded the prejudice that would befall the dependents and near relatives of the deceased and that the deceased's minor child stands to be most prejudiced as claims under the LRMPA and the FAA are separate with different beneficiaries.

[14] Miss Lawrence challenged the learned Master's finding on the issue of delay. She argued that the sole reason for the applicant's delay was that the deceased's death was reported to the applicant after the limitation period had already expired, and the applicant could only have acted after receiving this report. Counsel contended that the applicant's delay in bringing a claim under the FAA was, therefore, not deliberate and ought not to have been treated by the learned Master as fatal to the applicant's application for an extension of time. She argued that the learned Master should have "moved on from the issue of delay" and directed her mind to the factors of prejudice and the interests of justice which, counsel submitted, were the relevant factors to be taken into account.

[15] Additionally, Ms Lawrence contended that the facts and matters concerning how the accident occurred are stated in the Police Traffic Accident Report, dated 8 May 2017, obtained from the Jamaica Constabulary Force ('the police report'). This information, she submitted, was stated by Ms Geraldine Bradford in her affidavit as being true to her information and belief. Counsel argued that this is an issue that a tribunal of fact would have had to give weight to.

The respondent's submissions

[16] In response, counsel for the respondent, Mr Palmer, contended that the applicant had failed to show that she had a realistic chance of success on appeal. He argued that the evidence relied on by the applicant in the court below was insufficient to move the learned Master to exercise her discretion in favour of the applicant. Counsel submitted that some paragraphs of the affidavit sworn to by Ms Geraldine Bradford on 8 June 2020 were inadmissible and unfairly prejudicial to the respondent. He argued that those paragraphs contained hearsay evidence as to the circumstances of the accident or

referred to hearsay documents without any explanation by Ms Bradford as to how she came by the information.

[17] Mr Palmer further maintained that Ms Bradford's affidavit failed to properly establish a cause of action, did not include mention of any third-party witness to the accident or indicated any concrete evidence on which the applicant could rely with regard to the allegations against the respondent. As such, Ms Bradford's affidavit could not be considered an affidavit of merit.

[18] In support of these submissions, counsel relied on the cases of **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited (trading as FLOW)** [2017] JMCA Civ 2, and **Somerset Enterprises Limited and anor v National Export Import Bank of Jamaica Limited** [2021] JMCA Civ 12.

[19] With regard to the issue of delay, Mr Palmer cited the case of **Jenetta Johnson-Stewart v Attorney-General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 4385, judgment delivered 17 December 2009, in arguing that the court must be furnished with identifiable and cogent reasons for the applicant's delay. He argued that the applicant's application for an extension of time to file a claim under the FAA was filed approximately four months after the applicant had received a report of the deceased's death. Counsel maintained that considering the limitation period under the FAA had already expired, the delay of four months by the applicant was inordinate and, if excused, would result in real prejudice to the respondent as the respondent would be denied his right to a limitation defence.

[20] Counsel further argued that the issue concerning delay should not be limited to the inaction of the applicant but should extend to the delay occasioned by the potential dependents and/or the deceased's estate. This, counsel said, is important in circumstances where dependents and near relations are "of age" and had ample opportunity to make a claim within the time prescribed by the FAA. Any other

interpretation would result in the dependents and near relations being allowed to file a claim any time after the expiration date and the applicant "being used as a shield for facilitating unexplained delinquency".

Discussion

[21] Having considered the submissions of both counsel in conjunction with the relevant law, the submissions of counsel for the respondent found favour with the court, especially with regard to the quality of the evidence on which the applicant was asking the learned Master to exercise her discretion.

[22] In **Jenetta Johnson-Stewart v Attorney-General of Jamaica**, the case cited by the respondent, Jones J at para. [12] of his judgment correctly observed:

> "[12] Undoubtedly, this court has a discretion to extend the time under the Fatal Accidents Act beyond the three years. However, …**there must be a good reason or explanation for the delay together with evidence on which the court can rely to exercise its discretion. In addition, this evidence should be relevant and admissible**." (Emphasis added)

[23] The court also bore in mind that the overarching consideration in these types of matters is that justice is done. It was on this premise that Edwards J (Ag) (as she then was) stated in **Shaun Baker** that:

> "58. Justice must be considered both for the applicant and for the respondents. It is only fair and just for a potential claimant, who has a good claim, not to be shut out from the courts to which he has turned for redress. It is however, also justice for a potential defendant to, at some point, be able to rest with the full knowledge that he will not be asked to answer to the merits of a claim, which due to the passage of time, he can no longer adequately respond to.
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> 59. This would mean that the court in balancing the scales of justice as between both parties, would necessarily have regard to several factors not least of which is the question of

> delay, the reasons for it and any possible prejudice resulting therefrom…
>
> 60. The primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face…"

[24] The sole reason relied on by the applicant in explaining the delay in bringing a claim under the FAA was that the matter was reported to the applicant after the limitation period under the FAA had expired. However, time with respect to the limitation period under the FAA would not have been suspended in abeyance pending a report being made to the applicant. Time would have started to run for the initiation of proceedings from the date of the alleged incident. Counsel for the respondent was, therefore, on good ground when he argued that the issue of delay should not be limited to the actions of the applicant but should be extended to the delay occasioned by the persons who would have reported the matter to the applicant after the period had elapsed. The applicant did not provide any evidence before the learned Master to explain the reason for this delay.

[25] Accordingly, with respect to the issue of delay, the court concluded that the applicant did not have a real chance of success in satisfying the court on appeal that the learned Master would have been wrong to have concluded that the evidence before her was inadequate and ineffectual in explaining the delay.

[26] It is, however, accepted that the length of the delay or the absence of a good reason for the delay is not determinative of the matter, given that the overarching consideration is what is required to be done in the interests of justice. In determining what would be in the interests of justice, other relevant factors were considered pertinent. This court, in addressing the considerations for granting an extension of time within which to file a notice of appeal, in **Leymon Strachan v Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 (‘**Leymon Strachan’**), established that the court must consider the following pertinent factors: the length of the delay; the reasons for the delay; whether there is an arguable case; and the degree of prejudice to the other party if time

is extended. The court, however, declared that the ultimate consideration is that justice is done. Therefore, the principles laid down in **Leymon Strachan** were also brought to bear on the consideration of this case as they were found to be somewhat compatible with the statutory principles adopted in **Shaun Baker**.

[27] This propelled the court to examine the question whether the applicant had demonstrated that she had an arguable claim against the respondent under the FAA. This consideration is loosely aligned to the statutory prescription under section 33 of the English Limitations Act, which would treat with the question of the cogency of the evidence likely to be adduced by the applicant, having regard to the delay (see **Shaun Baker** para. 57.(b)). In trying to establish before the learned Master that the proposed claim under the FAA was meritorious, Ms Geraldine Bradford, on behalf of the applicant, deposed:

> "3. …the claim herein arises out of an incident which occurred on or about the 20th day of November 2015 wherein, as a result of the negligence in the conduct of the [respondent], [the deceased]… suffered injury as a result of which he died….
>
> 7. In the course of said investigations, it was brought to the attention of the [applicant] that the deceased's death was a result of a motor vehicle collision caused by the negligence of the [respondent], as a result of which the deceased sustained injuries and died causing his estate, dependents and near relations to suffer loss, damages and incur expenses…
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> 9. It was discovered that the [respondent] so negligently and recklessly drove, managed and/or controlled his Toyota Tacoma motor truck with registration number 5217GA by losing control of his vehicle thereby colliding in the Suzuki Alto motor car with registration number 2675GX, which was being driven by the deceased along the Mosquito Cove main road, in the parish of Hanover, which resulted in the deceased's death. A copy of the Post Mortem Examination and the Police report dated May 8, 2017 issued in the estate of [the deceased] is exhibited hereto…"

[28] The police report upon which the applicant relied contained, in part, the following information:

> "**From information received and observation made**, Drivers of both vehicles were travelling in the opposite direction along the Mosquito Cove main road, Hanover. The driver of the Toyota Tacoma motor truck was heading towards Montego Bay and the driver of the Suzuki motor car towards Lucea direction. On reaching a section along the road, whilst negotiating a right hand corner, driver of the Toyota Tacoma motor truck registered 5217-GA skidded on the wet road surface, lost control of the vehicle, which spun around onto the right side of the road and collided with the Suzuki Alto moto car registered 2675-GX. This resulted in extensive damage to both vehicles. The driver of the Suzuki Alto motor car, sustained injuries and died whilst the passenger sustained injuries. Driver of the Toyota Tacoma motor truck was warned for prosecution." (Emphasis added)

[29] Missing from the police report was the name of the maker of the report. Only a signature with the letters, "DSP", at the end, which appeared above the words "Superintendent of Police Hanover Division", was apparent. It is clear that the person to whom the signature belonged was only signing off on the report as he stated that "I give below extracts from the Police on the subject" and named the police investigator of the accident as "Sergeant Devon Fuller of the Lucea Police Station". Sergeant Fuller, from all indications, did not sign the report. In any event, the name of the person who signed the report was not provided. The report also failed to state the source of the "information received" by the police and the circumstances under which, and by whom, the stated "observation" was made.

[30] Additionally, the applicant relied solely on the information in the police report to support her contention that she had an arguable claim. She did not provide affidavit evidence from any person who may have witnessed the accident. This was despite the police report making reference to a "passenger" who was aboard the motor car driven by the deceased. The police report stated the name of the passenger, which seemed to have

been the deceased's minor child. However, the applicant did not mention the passenger or anyone else as a potential witness.

[31] In **Ann Marie Sinclair and Winston Jackson v Glenroy Mason and Merle Dunkley** (unreported), Supreme Court, Jamaica, Claim No CL 1995/S - 188, judgment delivered 5 August 2009, Sykes J (as he then was) helpfully outlined the following:

> "24. As stated earlier, Miss Wolfe appeared to be relying on the entire police report. She had a number of difficulties, none of which was successfully overcome. First, there was no identification of the maker of the statement in the police report, a fundamental prerequisite to admissibility. The court cannot assume that the maker of the document is also the maker of the statement. Second, there was no evidence that the statements in the documents sought to be adduced would have been admissible had the maker of the statement been called to give evidence because there was the real possibility, in the context of this case, that he was told by third parties what he included in his statement which was eventually captured in the document. If this is so, then he would not be able to give the evidence contained in the statement because had he come to court he could not repeat what he was told by third parties unless one of the exceptions to the hearsay rule could be invoked…"

[32] As can be seen, the difficulties highlighted by Sykes J, in that case, are no different from those that would have been faced by the applicant in the instant case. The applicant was clearly relying on hearsay evidence contained in the police report to ground the application for extension of time, and from all indications, to ground the claim under the FAA. There was no reference to any other source or likely source of information. The police report, itself, would be second-hand hearsay as there is nothing to indicate that the maker personally witnessed the accident. The applicant's affidavit evidence was, therefore, not compliant with rule 30.3(1) and (2) of the Supreme Court Civil Procedure Rules, 2002 ('CPR'), which provides:

> "30.3 (1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) However an affidavit may contain statements of information and belief –

(a) where any of these Rules so allows; and

(b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates –

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

(ii) the source for any matters of information or belief."

[33] The applicant could not overcome the hurdle presented by the lack of admissible and cogent evidence before the learned Master. For the court to permit a claim to proceed, which is not demonstrated on evidence to be a viable one, would not be in keeping with the interests of justice. The learned Master would have been justified to find that the evidence did not disclose a proposed claim with some prospect of success. Therefore, she could not be faulted for refusing the applicant's application for an extension of time to file a claim under the FAA in those circumstances, even if the delay could have been excused.

[34] There is also no denying that the respondent would have been prejudiced if time were extended for the applicant to file a claim under the FAA with such evidential deficiencies. Therefore, the court could not agree with counsel for the applicant that the learned Master should have granted permission for the applicant to pursue the claim under the FAA in light of the pending claim against the respondent under the LRMPA.

[35] Having regard to all the circumstances, especially the absence of cogent evidence pointing to, at least, an arguable claim, this court could not fault the learned Master for denying the extension of time for the applicant to pursue a claim under the FAA.

[36] The applicant also had no prospect of succeeding in her proposed challenge of the award of costs in favour of the respondent. The respondent, as the successful party on the application, would have been entitled to costs in keeping with the general rule that costs follow the event. In any event, he would also have been so entitled by virtue of the special provisions of rule 65.8(2) of the CPR, which embraces the general rule in procedural applications by stipulating that, "in deciding what party, if any, should pay the costs of the application, the general rule is that the unsuccessful party must pay the costs of the successful party". However, the court must take account of all the circumstances, including all the factors set out in rule 64.6(4) (see rule 65.8(3) of the CPR). The applicant has pointed to nothing in the circumstances of the case, and nothing is otherwise apparent, that would justify a departure from the general rule that the respondent is the party entitled to the costs of the application. In my view, an appeal against the learned Master's costs order was not likely to succeed.

[37] Accordingly, for all the foregoing reasons, I agreed with the decision of the court as expressed in the orders stated at para. [2] of this judgment.

D FRASER JA

[38] I have read the draft reasons for judgment of McDonald-Bishop JA and agree with her reasoning. There is nothing that I wish to add.

LAING JA (AG)

[39] I, too, have read the draft reasons for judgment of McDonald-Bishop JA with which I agree and I have nothing to add.