JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 223 OF 2009

BEFORE: THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.
THE HON. MRS. JUSTICE MCINTOSH, J.A. (Ag.)

BETWEEN	**PATRICK DOUGLAS**	**APPLICANT**
AND	**CABLE AND WIRELESS JA. LIMITED**	**1st RESPONDENT**
AND	**JEPTEL ENTERPRISES LIMITED**	**2nd RESPONDENT**
AND	**LLOYD MILLS**	**3rd RESPONDENT**
AND	**EUANA MILLS**	**4th RESPONDENT**

Ainsworth Campbell for the Applicant

Kirk Anderson, instructed by DunnCox for the 1st Respondent

March 15, 16 and 26, 2010

HARRISON, J.A.

The Application

[1] The applicant by Notice of Application for Court Orders, filed 23 December 2009, sought the permission of the court to appeal a decision made by Rattray, J. on 15 December 2009 granting the 1st respondent summary judgment. The application was

refused and we promised then to put our reasons for doing so in writing. This is a fulfillment of that promise.

[2] This application was supported by an affidavit sworn to by Mr. Ainsworth Campbell, Attorney at Law setting out the following grounds:

(i) The facts found by the trial judge were unwarranted.

(ii) The Claimant for all practical purposes was driven from the judgment bar.

(iii) The Order will do irreparable damage to claimant.

[3] The applicant sought and obtained from this court permission to argue as ground iv the following:

> "The Court was in error in hearing the Amended Application although fourteen (14) days had not elapsed between the date of service of the Amended application and the hearing hereof."

[4] The grounds of the proposed appeal, a requirement prescribed by rule 1.8(3) of the Court of Appeal Rules 2002 (the COAR), were also set out in the application seeking court orders.

The Pleadings

[5] The Claim filed in the court below is for negligence and/or breach of statutory duty by the defendants, their servants and/or agents whereby the applicant sustained personal injuries, suffered loss and was put to expense.

[6] The pleadings have been summarized in the respondent's written submissions at paragraphs 7 - 12 and are reproduced hereunder. They are:

> "7. Paragraphs 1-4 of the Particulars of Claim, specify that the Claimant was, at all material times, a Contractor and Maintenance worker. The 1st Defendant was, at all material times, effecting repairs to its communications system at St. Johns Road, Saint Catherine. The 2nd Defendant was contracted by the 1st Defendant, to do these repairs. The 3rd and 4th Defendants were the joint owners of motor truck licensed CB 9268 and the servants or agents of the 2nd Defendant.
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> 8. It is contended in paragraph 5 of the Particulars of Claim, that, on or about September 24th, 2003, the Defendants had directed the Claimant to effect repairs to damaged telephone wires on St. Johns Road in the parish of Saint Catherine, when, due to the negligence of the Defendants, their servants and/ or agents, a pole slid and got out of control and fell and injured the Claimant, causing him to sustain bodily injuries.
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> 9. In paragraph 2 of the 1st Defendant's Defence, it is denied, that it was the 1st Defendant effecting repairs, albeit that it is admitted that repairs were being effected at the aforementioned location.
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> 10. In paragraph 3 of its Defence, the 1st defendant states, that the 2nd Defendant is an experienced telephone contractor which has done specialized technical services for the 1st Defendant for several years in the capacity of an, "**independent contractor**".
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> 11. In paragraph 4 of the 2nd Defendant's Defence, it is averred that the 3rd and 4th Defendants are directors of the 2nd Defendant and in that capacity, contracted with the Claimant as an independent sub-contractor to install new telephone cables and poles and to maintain poles and cables as required.

12. In the Claimants Reply to the Defence of the 2nd Defendant, the Claimant has contended that he was not hired as an independent contractor."

The Law

[7] Rule 1.8 of the (COAR) sets out how one seeks permission to appeal. Subparagraph 9 is pertinent to this application and it provides as follows:

> "(9) The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

The Issues Arising in this Application

[8] Two issues were raised, viz:

(i) the short service of the application seeking summary judgment; and

(ii) the "real chance of success" if the applicant were to be granted permission to appeal.

The Submissions

[9] Mr. Campbell for the applicant submitted with respect to the first issue, that the applicant was short served with the application for summary judgment and in the circumstances there was insufficient time within which he was allowed to make the kind of submissions which would have given the learned judge the assistance necessary in determining the matter before him. An affidavit was filed on 10 December 2009

complaining about the short service. It also sets out particulars of the pleadings and alleged that there were issues of facts that could only be determined at trial. The records also indicate that the notice of application was served on 3 December 2009 and the matter heard 15 December 2009. This meant that the application would have been short served under the Rules.

[10] Rule 26.1(2) (c) of the CPR provides as follows:

> "26.1(2) - Except where these Rules provide otherwise, the court may-
>
> (c) extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension of time is made after the time for compliance has passed."

Mr. Anderson therefore submitted that the court has power to shorten time for compliance, after hearing both sides. He argued that this was done by the learned judge in the instant matter.

[11] We were of the view that the learned judge had acted correctly under the Rules and in particular rule 26.1(2) (c). We therefore felt constrained not to interfere with the discretion exercised by the learned judge. In our judgment there was really no merit in the submissions made by Mr. Campbell with regard to the first issue.

[12] We now turn our attention to the second issue which was crucial in the determination of the application. Had the applicant shown by virtue of the provisions of rule 1.8 (9) that there was a real chance of success if he were granted leave to appeal?

[13] Mr. Campbell submitted that the learned judge's decision was faulted because he did not carry out a proper review of the pleadings at the time of the hearing of the application for summary judgment. He submitted that the work on which the respondent was injured, belonged to the 1st respondent/defendant and that in the circumstances, the learned judge ought to have allowed the matter to proceed to trial in order to determine liability and the question of damages. He submitted that based on the law, the duty of care "stretches" from the owner to servants, agents and/or contractors and that by granting judgment in favour of the 1st respondent at this stage, a trial court would have been deprived of considering the averments as to ownership and breach of duty on the part of the 1st respondent. He further argued that by granting the 1st respondent's application for summary judgment the learned judge would have at this stage broken the line of "communication stretching through the defendants." He submitted that this was an area of law that is progressing and that the point of law which is to be decided if a trial should take place, is the responsibility of owners to persons who are injured whilst work is being done on the property belonging to the owner who in this case is the 1st respondent. He referred to and relied on the well-known cases of **Donoghue v Stephenson** [1932] A.C. 562, **Davie v New Merton Board Mills Ltd.** [1959] 2 WLR 331 and **Wilsons & Clyde Coal Co. Ltd. v English** [1938] AC 57.

[14] In his written submissions Mr. Anderson made the following points at paragraphs 29 and 30:

"29. The Applicant/Claimant failed to overcome the insurmountable hurdle of satisfying the Court below that he had a real prospect of succeeding on the claim in respect of the 1st Respondent/ Defendant and therefore summary judgment was granted in favour of the 1st Respondent/Defendant. As such it is impossible to see how, having failed that test, that it is conceivable for him to succeed in meeting what is substantially the same test in seeking the permission of this Honourable Court to appeal the decision of the Court below. There has been no demonstration of a "real chance of success" by the Applicant /Claimant.

30. The Applicant/Claimant has failed to establish the grounds set out in the Application for permission to Appeal. The Applicant/Claimant has failed to demonstrate how the judge's findings were unwarranted, that he was driven from the judgment bar as well as how the Summary Judgment Order would cause him irreparable damage. The learned judge below indeed gave consideration to the averments of the Claimant, as well as the Particulars of Negligence and Particulars of Breach of Statutory Duty pleaded and correctly concluded that the Applicant/Claimant failed to establish his case as against the 1st Respondent/Defendant."

[15] Mr. Anderson submitted orally that the applicant needed to show the court that he had a real chance of success in the proposed appeal. Regrettably the affidavit evidence, he said, was not supportive of any of these three grounds relied upon. He submitted quite forcefully along these lines:

(a) The work in question was being done on property of the 1st respondent but the 2nd defendant was hired to do that work;

(b) The 2nd defendant was an independent contractor;

(c) The applicant was employed by the 2nd defendant.

(d) The cases show that where you are an employer of a person your duties at common law and by statute to provide a safe system of work, cannot be contracted out to anyone else such as to enable the employer to avoid liability arising from the employer's negligence in failing to ensure that a proper system of work was adequately safe. See **McDermid v Nash Dredging and Reclamation Co. Ltd.** [1987] 1AC 906.

(e) The case of **Donoghue v Stephenson** relied upon by the applicant cannot apply to the present situation.

[16] Mr. Anderson concluded by submitting that, based upon the above facts pleaded, the principle of law derived from the **McDermid** case referred to at (d) supra, and other authorities, this court should refuse the application seeking permission to appeal.

The Decision

[17] It was quite apparent from the pleadings filed that the applicant was never employed by the 1st respondent in any capacity - whether as employee or sub-contractor. It would also appear from the pleadings that the only dispute in the matter below was as regards whether the applicant was hired by the 2nd or 3rd and 4th defendants. It was therefore our view that the pleadings had failed to demonstrate that a duty of care could be said to be owed by the 1st respondent to the applicant.

[18] Mr. Anderson had also relied on an article entitled "**Liability for the Negligence of Independent Contractors**" (The Law Quarterly Review No CXCVII, P. 71) by Stephen Chapman which we found quite helpful. The learned author in the course of outlining the point on liability where contractors are concerned states inter alia:

> "3. If I am under no duty, but an independent person with whom I have made a contract is under a duty to a person or any class of persons, and he fails to perform that duty, whereby damage results, his liability is not transferred to me."

[19] It was for these reasons that the application seeking permission to appeal was refused with costs both here and in the court below to the 1st respondent to be taxed if not agreed.