JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO.99 OF 2008

IN CHAMBERS

BETWEEN	HUGH C. HYMAN & CO.	1ST APPELLANT
	(a Firm)	
AND	HUGH C. HYMAN	2ND APPELLANT
AND	DAVE BLAIR	RESPONDENT

PROCEDURAL APPEAL

Ransford Braham instructed by Livingston, Alexander and Levy for the Appellants.

Kevin Williams instructed by Grant, Stewart, Phillips & Co. for the Respondent.

March 26, 2009

HARRISON, J.A.

Introduction

1. This is a procedural appeal against an order made by Brooks J., on May 16, 2008 whereby he refused to set aside a default judgment and to extend time for filing and service of the Defence. The learned judge also ordered that the Claimant was at liberty to apply for his damages to be assessed. Written submissions have been filed and served.

The Factual Background

2. On December 19, 1991 Dave Blair (the Respondent) was seriously injured while on the job and in the employment of Alumina Partners of Jamaica (ALPART). He brought an action against ALPART and sought damages in respect of the burns and other injuries he had sustained. He was represented by Dunn, Cox and Orrett, Attorneys at Law, between 1991 and 1995. Discussions had commenced between the Attorneys and ALPART with a view to settle the matter but a settlement was not achieved. In 1995, there was merger of the firms Dunn, Cox and Orrett and Millholland, Ashenheim and Stone. The latter were Attorneys for ALPART so Dunn Cox and Orrett were unable to continue representing the Respondent. His files were handed over to Hugh C. Hyman & Co. (the Appellants) in or about October 1995.

3. The Appellants resumed discussions with ALPART in order to settle the matter but it was clear by December 1996 that ALPART was not prepared to settle on the Appellants' terms. The latter were claiming in excess of $4.5 million whereas ALPART was offering $650,000.00.

4. On December 27, 1996 the Appellants issued a Writ of Summons but no Statement of Claim was filed. It was not until February 10, 1999 that the Appellants settled and filed the Statement of Claim. The Writ that was filed on December 27, 1996 had not been served on ALPART and had expired on December 26, 1997. No application was made by the Appellants prior to the expiry of the Writ to extend its life.

5. On December 24, 1998 the Appellants filed an ex-parte application to have the Writ renewed. Leave was also sought to file the Statement of Claim and to the serve both Statement of Claim and Writ.

6. On January 11, 1999 an order was made by Orr J., on the ex-parte application renewing the Writ of Summons. The learned judge granted leave to file the Statement of Claim. He also extended time for service of the Writ and Statement of Claim on ALPART within 30 days of the 11th January 1999. This meant that service should be effected on February 10, 1999. The Statement of Claim was not filed until February 10, 1999 and the Writ was not sent for service on ALPART by registered post until February 10, 1999.

7. On March 25, 1999 ALPART filed an application to set aside service of the Writ on the basis that the document was not served within the time stipulated by the rules or the Order of the Court. ALPART further contended that the Writ had been served outside the limitation period. The Postmaster General had deposed that the ordinary course of post is deemed to be two (2) days and that in fact a letter posted from Kingston to Manchester (the parish in which ALPART carries on business) on the 10th February 1999, would not have reached its destination on the same day.

8. In view of the fact that the Appellants had served the Writ of Summons outside the limitation period and to avoid the matter being struck out, the Respondent accepted $850,000.00 from ALPART in settlement of the claim filed in 1996. He has contended that he was forced to compromise his claim against ALPART and had only recovered a portion of what he would have obtained in the suit. He therefore filed a claim against the

Appellants seeking damages for negligence. The Respondent contended that because of the Appellants' negligence he had lost the opportunity to pursue his claim against ALPART.

9. The Appellants failed to file an acknowledgement of service of the Claim and statement of defence within the stipulated time so judgment in default was eventually entered against them. Thereafter, they filed an application to have the default judgment set aside but as I have said before that application was refused.

The Issues

11. The crucial issue in this procedural appeal is whether or not Brooks J, had properly exercised his discretion when he refused to set aside a regularly entered judgment. In the well known judgment of **Evans v Bartlam** [1937] 2 All ER 646, Lord Wright sitting in the House of Lords said at page 654 of the judgment:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle".

The present application fell for consideration under Part 13.3 of the Civil Procedure Rules 2002 (the CPR). No issue was joined on the question of whether the application was made promptly or whether the Appellants had given sufficient reasons explaining the circumstances within which judgment came to be entered. The sole issue therefore

for decision by the learned judge was whether or not the Appellants had a real prospect of successfully defending the claim brought against them.

12. I have borne in mind the grounds of appeal filed, and the following issues therefore arise for consideration:

(a) Whether the Respondent had suffered any loss?

(b) Whether the Respondent had lost something of value?

(c) Whether the Respondent's loss or damage was a triable issue which entitled the Appellants to a hearing?

(d) Whether the judge's order giving the Respondent the liberty to proceed to assessment of damages was prejudicial to the Appellants?

(e) Whether the learned judge was wrong by not considering the prospect of success of the Respondent's claim if he had not lost the opportunity to pursue the claim?

Issues (a), (b) and (e)

- **(a) Whether the Respondent had suffered any loss?**
- **(b) Whether the Respondent had lost something of value?**
- **(e) Whether the learned judge was wrong by not considering the prospect of success of the Respondent's claim if he had not lost the opportunity to pursue the claim?**

13. For convenience, I will deal with these three issues together.

14. The guiding principles that are generally applicable where the claimant asserts that he has lost the opportunity to pursue his claim, is set out by Simon Brown LJ, in

Mount v Barker Austin (a firm) [1998] PNLR 493 at 510, 511. There is a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial hurdle, the court must then make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out.

15. These approaches are largely taken from the leading cases of **Kitchen v Royal Air Forces Association and Others** [1958] 2 All ER 241, and **Allied Maples Group Ltd v Simmons and Simmons (a firm)** [1995] 4 All ER 907, and have been applied in a number of cases. However, there seems to be no authority which gives any guidance as to how the court should approach its task in a case where the original claim has been struck out or was likely to be struck out because a fair trial of the issue or issues in question was no longer possible.

16. **Mount v Barker Austin (a firm)** (supra) makes it quite clear that an evidential burden rests on the negligent attorney to show that the earlier litigation had been of no value to the client, so he had lost nothing by their negligence. It has been stated in **Armory v Delamirie** (1722) 1 Stra 505, [1558–1774] All ER Rep 121, that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

17. In **Kitchen v Royal Air Forces Association** (supra) Lord Evershed MR said:

> "If, in this kind of case, it is plain that an action could have been brought, and, that if it had been brought, it must have

> succeeded, the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that she can get nothing save nominal damages for the solicitor's negligence. In my judgment, assuming that the plaintiff has established negligence, what the court has to do in such a case is to determine what the plaintiff has loss by the negligence... Has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."

18. Brooks J., in his written judgment, stated that there were very few issues of fact that were joined between the parties and that the issue of liability turned on questions of law. He then posed five (5) questions and having analyzed them he concluded that it was his view that the Respondent's claim against Alpart was "doomed". He stated that the Respondent had managed to salvage an agreement for an ex-gratia payment, but he had no viable claim in law or equity and that this was as a result of the Appellants' failures in acting promptly for him.

19. The learned judge had to consider whether the Writ of Summons was served before the expiration of its extended life and he stated at pages 9-10 of his judgment:

> "If it were accepted that the writ was properly renewed, that renewal would have been valid to 10th February, 1999. It would therefore have had to have been served on Alpart on or before the 10th. It was not. It was posted on the 10th but not deemed served until two days thereafter.
>
> Section 370 of the 1967 Companies Act, which was applicable in 1999, provided for the service of documents on a company by post. Section 52 of the Interpretation Act stipulates that service by post, unless the contrary is proved,

> shall be deemed "to have been effected at the time at which the letter would be delivered in the ordinary course of post".
>
> There is uncontradicted evidence that the Postmaster General, by letter of 20th May 1999 stated that the ordinary course of post for the letter that Hyman posted to Alpart was seventy-two hours. In fact the letter was delivered to Alpart's bearer on the 12th February, 1999. This would have been within the time allowed for the ordinary course of postal business, but clearly outside of the time of the extended validity of the writ and outside of the limitation period. It may possibly be argued that this is an issue which should be placed in evidence before a trial judge, but in my view, any submission that the writ would be deemed served on the 10th February would be untenable. The claim should not be sent to occupy the trial resources of this court for that reason".

20. The learned judge concluded that service of the Writ would clearly be outside of the extended time to serve it and also outside of the limitation period. He said at page 14:

> "Hyman have (sic) failed to show that they have a real prospect of success if they should be allowed to proceed to trial in this matter. There are very few facts in dispute concerning the issue of liability. The issues involved are all issues of law and an examination of those issues demonstrate that Hyman were negligent in their handling of Mr. Blair's case. It would not be in the best interest of the parties or the best use of the court's limited resources to have allowed this matter to proceed to trial, though the issues of law have required some close consideration. Hyman have (sic) no defence to Mr. Blair's claim..."

22. Mr. Ransford Braham for the Appellants submitted that it is for the Respondent to prove that he has lost something of value since the prospects of the claim in each case has to be carefully examined in order to determine if he had lost something of value. He submitted that the learned judge did not undertake any examination as to the likelihood

of success of the Respondent's case against ALPART if the case had not been struck out. The Judge he said had limited himself to the consideration that the Appellants were negligent to allow the claim to be struck out in the first place. He submitted that this was a fatal error on the part of the learned judge. He referred to **Mount v Barker Austin** (1998) PNLR 493 and **Dixon v Clement Jones Solicitors (a firm)** (2004) EWCA 1005.

23. Mr. Kevin Williams, for the Respondent, submitted that once the Respondent lost his right to pursue the claim against ALPART as a result of the failure to serve the Writ of Summons within the prescribed limitation period, the Respondent could not then demand or insist that he should be compensated by ALPART. He submitted that no court, properly directed, could make a finding that ALPART's right to rely on the limitation defence, was to be disregarded and that ALPART was to compensate the Respondent. He therefore submitted that the Respondent would have lost a thing of value, a chose in action, a right to pursue a claim and to seek compensation from ALPART.

24. Mr. Williams further submitted that once the court makes a finding that there was negligence on the part of the Appellants in their handling of the 1996 suit which resulted in losses to the Respondent, the learned judge was correct to dismiss the Application and to allow the matter to proceed to assessment of damages in order for the Court to determine what value should be placed on the Respondent's losses.

25. The learned judge had concluded that the Respondent would have lost something of value and deserved to have that loss quantified. He said:

> "The process of assessment of damages is to quantify the loss which is attributable to the defendant's wrong. In my view if Mr. Blair seeks to have his loss assessed then he will have the burden of proving his loss and how it has been affected, if at all, by the compromise". (page 13)

26. The **Patricia Dixon** (case) clearly evaluates the "loss of something of value" principle. Rix L.J said at paragraph 24 in the course of that judgment:

> "24. The law regarding the evaluation of the loss of a chance when a solicitor by his negligence has lost for his client a claim being litigated against some third party is set out in what are by now some well- known cases. I will, as briefly as I can, make reference to them. The leading case in modern times is usually said to be Kitchen v Royal Air Force Association [1958] 1 WLR 563. In his judgment in that case Lord Evershed MR analysed the matter in a much cited passage at 574/5 as follows:
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> > "I come last to what may be the most difficult point of all; namely, assuming that she has established negligence, has the plaintiff proved anything other than nominal damages? It is necessary to say something of the nature of the problem which (as I understand the law) the court has to solve in determining the measure of damages in such a case as this. Mr. O'Connor's point is that we have now to consider the question of liability as between the plaintiff and the electricity company (or their successors) as though it were a distinct proceeding within the present action; and Mr. O'Connor says that, if we find on balance against the plaintiff, that is to say, that she fails in her claim against the electricity board (considered as if it were a separate and existing proceeding), then it follows that her damage is no more than nominal. If that is the right approach, it must follow that in any case such as the present the result expressed in terms of money is always all for the plaintiff or

> nothing. I cannot, for my part, accept that as the right formulation of the problem.'

If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the plaintiff never had a cause of action, that there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitors' negligence. I would add, as was conceded by Mr. Neil Lawson, that in such a case it is not enough for the plaintiff to say:

> 'Though I had no claim in law, still, I had a nuisance value which I could have so utilized as to extract something from the other side and they would have had to pay something to me in order to persuade me to go away.'

But the present case falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try 'the action within the action' as Mr. O'Connor asks. It may be that for one reason or another the action for negligence is not brought till, say, twenty years after the event and in the process of time the material witnesses or many of them may have died or become quite out of reach for the purpose of being called to give evidence.

In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can."

Issues (c) and (d)

- **(b) Whether the Respondent's loss or damage was a triable issue which entitled the Appellants to a hearing?**

- **(c) Whether the judge's order giving the Respondent the liberty to proceed to assessment of damages was prejudicial to the Appellants?**

27. The learned judge having decided that the claim should not be allowed to proceed to the trial stage said in relation to the assessment of damages:

> "There is one other aspect to be considered in respect of Hyman's position. It is whether Mr. Blair having compromised with Alpart, his claim nonetheless hopelessly prejudiced any claim that he had against Hyman? Miss Davis argued that that was "not merely a question relating to assessment" of damages, but was "a question of liability as to whether there was any loss held to be attributable to the negligence of the defendant, if proved". I confess that I cannot appreciate the distinction which Miss Davis seeks to draw. The process of assessment of damages is to quantify the loss which is attributable to the defendant's wrong. In my view if Mr. Blair seeks to have his loss assessed then he will have the burden of proving his loss and how it has been affected, if at all, by the compromise".

28. Brooks J. readily recognized the resulting impact that the default judgment would have on the assessment of damages issue. He said:

> "The unfortunate result of the default judgment is that Hyman will not be permitted to actively participate in the proceedings for the assessment of damages. Rule 12.13 prevents his (sic) participation, except to a very limited degree..." (page 13)

29. Mr. Braham submitted that unless the Appellants applied for and obtained an Order for the judgment to be set aside, the only matters on which a Defendant against whom a default judgment has been entered may be heard are: - (a) costs; (b) the time of payment of any judgment debt; (c) enforcement of the judgment; and (d) an application under Rule 12.10(2) of the Civil Procedure Rules 2002. He submitted that Rule 12.13 was unfairly harsh in the present proceedings since participation was so limited. He argued that the Appellants would be given no chance to discharge their evidential burden. The learned trial judge, he said, had failed to appreciate that liability (which includes proof of damages) had to be established before the assessment of damages could be conducted. He further submitted that the Appellants should be given the opportunity to illustrate that the original claim was of no value. Finally, he submitted that a trial was appropriate in the circumstances, because the Respondent would still have the opportunity to prove his damages, if any, and the Appellants would have the opportunity to disprove liability.

30. Mr. Williams submitted and I agree with him that the learned judge having found that there was failure to serve the Writ of Summons in accordance with the Order of January 10, 1999 that this has rendered the Respondent's claim against ALPART worthless "in law and/or in equity". The Appellants would in my view, have great difficulty challenging the issue of liability. In my judgment, the next stage in the proceedings would be the assessment of damages and it would be for the judge making that assessment to say what value should be placed on the loss suffered by the Respondent as a result of the Appellants' negligence.

Conclusion

31. In my opinion, there is merit in the submissions made by Mr. Williams. The learned judge in my view, had adopted a proper approach in dealing with the application which was before him. I am in total agreement with the learned judge that the issue as to the service of the Writ of Summons outside of the limitation period was one that did not need to await a trial judge to determine this. The learned judge quite properly stated: "...in my view, any submission that the writ would be deemed served on the 10th February would be untenable". Clearly, the Appellants have not satisfactorily demonstrated that there is some likely prospect of success on their part should the matter proceed to trial.

32. For these reasons, the procedural appeal is hereby dismissed with costs to the Respondent to be taxed if not agreed.