[2023] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR GREEN JA (AG)

SUPREME COURT CIVIL APPEAL NO 48/2018

BETWEEN	**LARKLAND LATOUCHE**	**APPELLANT**
AND	**JUNE CHUNG**	**1ST RESPONDENT**
AND	**ORVILLE POLLOCK**	**2ND RESPONDENT**
AND	**ALBERT TROWERS**	**3RD RESPONDENT**

Ainsworth Campbell and Andrew Campbell for the appellant

Miss Kimberley Facey instructed by Robinson Phillips & Whitehorne for the 1st respondent

3 May 2021 and 28 April 2023

Civil Law - Negligence - Whether pleadings of defendant were sufficient- natural justice - Apparent bias - Actual bias - Whether right was waived by refusal to object - Recusal by judge

F WILLIAMS JA

Introduction

[1] By this appeal, the appellant challenges the judgment of Wiltshire J (Ag, as she then was, and hereafter referred to as 'the learned trial judge') delivered on 4 May 2018. By that written judgment, the learned trial judge dismissed the appellant's claim for damages and awarded judgment and costs to the first respondent against the appellant. The analysis of the appeal will be preceded by the following summary of the background facts and averments giving rise to the claim and this appeal.

Background facts

[2] On 17 February 2004, the appellant was riding his pedal cycle along the Annotto Bay to Rosemount Main Road, in the parish of Saint Mary, when a motor vehicle licensed 0633 DQ collided with him, causing him severe injury, and resulting in an amputation of his right forearm. The appellant alleged that, at the material time, the motor vehicle in question (a 1991 Toyota Corolla motor car: 'the motor car') was owned jointly or severally by the first and/or second respondents and was being driven by their servant and/or agent, the third respondent. The appellant filed a claim form and particulars of claim on 21 December 2004, alleging negligence on the part of the third respondent and claiming special and general damages. He served the claim on the first respondent, who filed an acknowledgement of service and defence on 31 March 2005. The second and third respondents were not served.

[3] Due to the first respondent's non-attendance at two case management conferences, her statement of case was struck out on 26 May 2016 on the appellant's application. Judgment was also entered in the appellant's favour. The first respondent's subsequent application to have the judgment set aside was granted on 14 July 2017. Thereafter, she filed an amended defence on 9 October 2017.

[4] The amended defence made no admission to such matters, among others, as the appellant's age and occupation; whether the third respondent was the driver of the said motor vehicle; or whether, on 17 February 2004, the appellant was injured when the third respondent allegedly drove the motor car negligently, causing it to collide with him. The first respondent also made no admission to the particulars of negligence, injuries or damages as set out in the particulars of claim.

[5] In addition, and more importantly for this appeal, the first respondent specifically denied that she was ever the principal of the third respondent or that he was ever her servant or agent. She also denied liability to the appellant in all the circumstances of the case.

[6] She stated in her defence that, on the morning of 17 February 2004, before the accident, she had sold her motor car, licensed 1889 AR, to the second respondent, who paid her the sum of $100,000.00. She gave him a receipt for the sum he paid in

the transaction and thereafter went to the office of the Collector of Taxes, where she signed the transfer to the second respondent on the title for the motor vehicle. It was upon her return to her office to hand over the transfer documents to the second respondent that she learned he had already taken possession of the motor car and left.

[7] At a case management conference, on 2 November 2017, orders were made for standard disclosure, and for the filing and serving of witness statements, pre-trial memoranda and skeleton arguments. Of particular note is para. 4 of the first respondent's pre-trial memorandum. In that paragraph, for the first time, the first respondent averred that, after going to the tax office on 17 February 2004, she also attended upon her insurance agency and there cancelled the policy of insurance for the motor car, to the second respondent's knowledge.

[8] The notes of evidence reveal that, before the commencement of the trial, and before any evidence was taken, the learned trial judge disclosed that a letter concerning the accident from the Claims Department of NEM Insurance Company Limited ('NEM'), sent shortly after the accident in 2004, was sent during her tenure there as manager of that department. Upon this disclosure being made, both counsel indicated they had no issue with the matter proceeding before the learned trial judge.

[9] With that out of the way, counsel for the appellant made a query as to whether the first respondent had adequately responded to the averments in the appellant's claim so that a trial could fairly be embarked on in the circumstances. In response, the first respondent submitted to the court that, as the case involved a question of liability, it was for the appellant to lead evidence to prove the allegations in the pleadings, which were all answered in the defence. The learned trial judge indicated that she was satisfied that the matter could proceed on the pleadings as they stood, and so the trial began.

[10] The witness statements of the appellant, Donald Shaw, Leon Pryce, Jacqueline Latouche and Keresha King-Williams were admitted into evidence as their evidence in chief, and they were respectively cross-examined on them. At the close of the appellant's case, the witness statements of the first respondent and Robert Chung

were similarly admitted into evidence as their examination in chief, and they were, respectively, cross-examined on them. (Robert Chung, the first respondent's son, gave evidence supporting his mother's case in all material particulars).

[11] In his closing arguments, counsel for the appellant submitted, among other things, that the first respondent did not file an adequate defence and made no admission regarding her ownership of motor car licensed 0633 DQ (as opposed to licence number 1889 AR). He also submitted that it was only in the first respondent's affidavit in support of her application to set aside the default judgment that she admitted owning the said motor car up to the morning of 17 February 2004. The appellant submitted that there was a presumption that the third respondent was driving the vehicle as the servant and/or agent of the first respondent, as the integrity and reliability of the defence witness, Leon Pryce, were not questioned. In summary, Leon Pryce testified to being familiar with the motor car because he, himself was allowed to drive it at times with the permission of the first respondent. It was also his evidence that he did not see the motor car for about one month in the early part of 2004. When he saw the car again, it was in the first respondent's possession, refurbished, and it was not until the latter part of 2004 that the vehicle was sold, as all vehicles owned by the first respondent were in her possession in September 2004. Finally, it was submitted, as the first respondent was not frank with the court, the argument of agency should be concluded in favour of the appellant.

[12] In the closing arguments for the first respondent, it was submitted that, as the case concerned vicarious liability, the mere fact of ownership of the motor car did not establish liability. The court had first to make a finding of agency, and if there was no agency, then there could be no vicarious liability.

Findings of the learned trial judge

[13] On the totality of the evidence, the learned trial judge found that the third respondent was not the servant and/or agent of the first respondent and that the first respondent was not vicariously liable for the actions of the third respondent. In coming to this finding, of note was the learned trial judge's indication that she did not find

Leon Pryce, the appellant's witness, to be credible. Judgment was therefore entered in favour of the first respondent.

The appeal

[14] The appellant has now appealed this decision. His grounds of appeal and the remedies sought are set out as follows:

> "The Grounds of Appeal are: -
>
> I. The Learned Trial Judge failed to uphold the submissions of the Claimant/Appellant which submissions showed that the First Defendant/Respondent had not pleaded to the averments made in the Particulars of Claim; and that the condition of the pleadings had remained unchanged between March 31, 2005 and March 12, 2018 at which latter date the trial began. By her Defence filed March 31, 2005 the First Defendant/Respondent had said in the Defence executed March 30, 2005 that the First Defendant/Respondent made no admission that the First Defendant/Respondent was ever the owner, joint or several of any motor vehicle with licence No. 0633 DQ and specifically denies that the Third Defendant/Respondent was ever the First Defendant/Respondent's servant and or agent and made no admissions that the Second Defendant/Respondent was ever the driver of the said motor vehicle licensed 0633 DQ alleged in the Claimant/Appellant's Particulars of Claim.
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> II. The Learned Trial Judge failed to recuse herself from the trial of the issues involved in the claim when she was apprised of too many primary facts to do justice in the matter involved in the claim.
>
> **The Appellant seeks the following Orders: -**
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> (i) That there be Judgment for the Claimant/Appellant against the First Defendant/Respondent.
>
> (ii) That the Costs of the trial below and of this Appeal be to the Claimant/Appellant to be agreed and or taxed.
>
> (iii) Such Further and/or relief as this Honourable Court deems fit."

Supplemental grounds of appeal

Although supplemental grounds of appeal were filed, no application was made or granted for the appellant to argue them. Neither did Miss Facey, for the first respondent, respond to them. As a result, they cannot be considered.

Summary of submissions

For the appellant

[15] The appellant submits, in relation to the first ground of appeal, that the learned trial judge failed to uphold the submission that the first respondent did not plead to the averments in the particulars of claim, which was required for a fair hearing of the matter. He also submits that the judgment went against the weight of the evidence and that the learned trial judge erred when she failed to properly assess the unchallenged evidence of Leon Pryce and wrongly placed the burden on the appellant to displace the presumption of agency. The appellant further submits, in relation to the second ground of appeal, that the learned trial judge should have recused herself from hearing the matter because she was apprised of too many primary facts to do justice in the matter and would therefore not have been able to objectively assess the evidence. (It will be recalled that the contention that the learned judge knew of "too many primary facts" to do justice in the trial was the essence of the second ground of appeal).

For the first respondent

[16] In relation to the first ground of appeal, the first respondent maintains that the learned trial judge correctly accepted as a fact the evidence and contention that the second respondent bought the motor car from the first respondent on the morning of 17 February 2004, before the accident, with a receipt being issued for the transaction. In relation to the second ground of appeal, she also maintains that the learned trial judge disclosed to the parties her involvement in the matter when she was the claims manager at NEM, and they had no objection to her presiding over the trial. Therefore, the appellant had no reasonable basis to advance the view that the learned trial judge would not have been able to conduct an unbiased hearing of the matter or that there would be any injustice to the appellant.

Further submissions

[17] After all the arguments were heard, the court requested counsel for both parties to file additional submissions on the question of whether the appellant might fairly be regarded as having waived any possible objection on the question of bias due to the learned trial judge's prior involvement in the matter as the claims manager of NEM. The first respondent complied with this request and, in her submissions, continued along the line that the appellant had waived his right to object, not having objected when the learned trial judge made her disclosure before the trial started.

[18] The appellant, having first been served with the first respondent's submissions, filed submissions in which not just apparent bias was advanced; but it was also contended that the learned trial judge was affected by actual bias. For example, in his written submissions filed 19 May 2021, the appellant makes the following submissions:

> "i. No controversy, is raised about the learned trial judge adverting to her prior employment with the relevant insurance company. However, the status or tenure of that employment was never expanded upon or even enquired of by any party. The controversy lies in the details of such disclosure. (page 4)
>
> ii. It is not apparent but, actual and transparent bias that is made out. If not a far more grievous and worrisome state of affairs. (page 8)"

[19] These submissions give rise to several issues to be resolved by this court. They have been summarized as follows:

Issues

i. Whether the learned trial judge erred when she failed to recuse herself from the trial of the issues due to her prior involvement in the matter.

ii. Whether the appellant waived his right to challenge the tribunal as constituted by his failure to object to the learned trial judge proceeding in the matter, having learned of her prior involvement.

iii. Whether the learned trial judge erred in failing to uphold the submissions of the appellant, which showed that the first respondent had not pleaded to the averments made in the particulars of claim, thereby rendering the trial unfair.

Law and discussion

[20] I will first address the first two issues, which deal with the matters of recusal and waiver.

Recusal and waiver (Ground 2, issues i and ii)

[21] The appellant contends that the learned trial judge ought to have recused herself from the matter because she was apprised of too many primary facts to be able to do justice in the trial. In effect, he is making an allegation of bias against the learned trial judge. It is well known that the law recognizes a distinction between actual bias, on the one hand, and apparent bias, on the other. The appellant's contention seemed at first to have been based, not on actual bias or a demonstrated lack of objectivity or integrity or honesty on the part of the learned trial judge, but on what he contends to be apparent bias as would have been perceived through the lens of the informed observer.

[22] It is convenient to discuss the issue of apparent bias before discussing actual bias, put forward in later submissions.

Apparent bias

[23] An appropriate way to start the discussion of the legal principles that are applicable to the issue of apparent bias, is by a consideration of a fairly-recent authority from this court. The case is **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47. With regard to the test for apparent bias, the dictum of Phillips JA at para. [36] is instructive. In that paragraph of the case, the learned judge of appeal set out the law as follows:

> "The law is well settled with regard to the test for apparent bias…The current test is found in the well-known statement of the Lord Hope of Craighead in **Porter v Magil** [2002] 1 All ER 465, where he stated that the

> reference to 'real danger' should be deleted as it no longer served any useful purpose, and that the question should now be 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'." (Emphasis added)

[24] In **Magill v Porter** [2001] UKHL 67 (the same case as that referred to in the quotation immediately above), Lord Hope of Craighead conducted a review of a number of cases in which different tests had been used and came to the following view in paras. 101 to 103 of the judgment:

> "101. The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in *R v Gough.* In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A-C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F-G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the 'real danger' test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.
>
> 102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were

> required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726H-727C:
>
> > '85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
>
> 103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. <u>The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased</u>." (Emphasis added)

[25] That, therefore, is the test for apparent bias. It is used in Jamaica, the United Kingdom, and several other countries.

Actual bias

[26] There are several authorities dealing with the concept of actual bias and bias generally. For example, the case of **Locabail (UK) Ltd v Bayfield Properties Ltd & Anor** [1999] EWCA Civ 3004 (17 November 1999) is most helpful, as it succinctly sets out some of the more important principles that are applicable to the issues in this

case. Of particular relevance are some general statements of principle set out at paras. 2 to 4 and 7 to 8 of that case, which read as follows:

> "2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.
>
> 3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.
>
> 4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in

> Dimes v. The Proprietors of the Grand Junction Canal (1852) 3 HL Cas 759 at 793…
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> …
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> 7. The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice (see Dimes above, in the passage quoted, and R. v. Gough [1993] AC 646 at 661, per Lord Goff of Chieveley).
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> 8. In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest." (Emphasis added)

[27] The overarching thinking governing considerations of the principles relating to bias may be seen in the words of McLaughlin CJ in the case of **Wewaykum Indian Band v Canada** [2004] 2 LRC 692, where, at paras. [57] to [59] she opined as follows:

> "[57] The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.
>
> [58] The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as
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> '… a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and

> renders a judicial officer unable to exercise his or her functions impartially in a particular case.' (*R v Bertram* [1989] OJ No 2133 (QL), quoted by Cory J in *R v S* (*RD*) [1997] 3 SCR 484 at para 106.)
>
> [59] Viewed in this light, '[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary' (Canadian Judicial Council *Ethical Principles for Judges* (1998), p 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J and McLachlin J (as she then was) in *R v S* (*RD*) [1997] 3 SCR 484 at [32], the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, <u>while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified</u>." (Emphasis added)

[28] In relation to this appeal, the last statement in the foregoing quotation is among the most important parts of the dicta. It bears repeating that it is the party alleging bias on whom lies the burden of proving that allegation, so that the burden falls squarely on the appellant in this appeal.

[29] It should be noted as well, however, that even where proceedings may appear to be or may have been conducted in breach of the rule against bias, the right to challenge such proceedings may be lost by waiver, either express or implied (**Halsbury's Laws of England** Volume 61A). In the case of **Finzi & Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2015] JMCA App 32, Morrison JA (as he then was) discussed the matter of waiver at paras. [16] to [18] of that judgment as follows:

> "[16] In **Millar v Dickson (Procurator Fiscal, Elgin) and other appeals** ([2002] 3 All ER 1041) (a decision of the Privy Council on appeal from the Scottish High Court of Justiciary), Lord Bingham of Cornhill said that "[i]n most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise'. And further, that 'the more obvious and notorious it is that a point is available to

be taken, the more readily may it be inferred that failure to take it represented a deliberate intention not to take it'.

[17] Further afield, in **Auckland Casino Ltd v Casino Control Authority** ([1995] 1 NZLR 142, 151), Cooke P observed that:

> 'There is much authority that a party who, in the course of a hearing, has become aware of facts which may constitute disqualification for bias or otherwise, will be held to have waived the objection, or refused discretionary relief, if he allows the hearing to continue without protest. This is sometimes stigmatised as keeping an objection up a party's sleeve, but the description may be harsh if a party through no fault of its own has been confronted with an agonising choice.'

[18] To these two clear judicial pronouncements on the question of waiver, I would add two textbook statements. First, the extra-judicial comment by Sir Grant Hammond [In Judicial Recusal, Principles, Process and Problems (Hart Publishing Ltd, 2009), page 93], a Judge of the Court of Appeal of New Zealand, that '[i]t is clear on the recusal law authorities, both in the British Commonwealth and in the United States, that a litigant can, either expressly or by their conduct, validly waive an objection that the court is not independent and impartial, or an objection grounded in apparent bias'. And second[4], under the rubric 'Where no objection is raised at time of disclosure', there is the following statement by the late Sir Fred Phillips [In The Modern Judiciary, Challenges, Stresses and Strains (Wildy, Simmons & Hill Publishing, 2010), page 159]: 'When in a hearing a judge makes a disclosure to which no objection is then raised, a party cannot later be heard to complain as to whether the judge should hear or continue to hear the case. The party would be deemed to have granted a waiver to any charge of bias…'." (Emphasis added)

[30] Against this background, it is important to consider a number of matters that arose in the evidence and from the submissions. For one, it is clear, from the circumstances, that the letter in question from NEM was, at all material times, in the possession of the appellant before the commencement of the trial. The letter was written in 2004, and the judgment was delivered in 2018 (some 14 years after). The learned trial judge made her disclosure, with a view to ascertaining from the parties if

they took any issue with the fact of her previous involvement in the matter. To this, both indicated they had no issue. Further, the appellant has not explained to this court exactly what the "too many facts" were that he alleges that the learned trial judge had in relation to this matter, on the basis of which apparent (or even actual) bias is being contended. For these reasons, it is apparent that the appellant, through his counsel, voluntarily waived his right to object to the learned trial judge continuing in the matter. He, therefore, cannot now fairly be allowed to complain and attempt to raise the question of bias *ex post facto* because the case was decided against him.

[31] So far as the contended existence of actual bias necessitating automatic disqualification is concerned, no logical or reasonable basis has been advanced to support the contention.

[32] Ground two of the grounds of appeal (issues i and ii) must, therefore, be resolved in favour of the first respondent.

Ground i (issue iii)

Pleadings and evidence

[33] The appellant contends that the trial was unfair, given especially the state of the pleadings, as the first respondent had failed to plead to the averments in his particulars of claim. On the other hand, the first respondent contends that the pleadings were adequate.

The applicable rules

[34] Rule 10.5 of the Civil Procedure Rules 2002 ('the CPR') speaks to a defendant's duty to set out his or her case. It provides that:

> "(1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable.
>
> (3) In the defence the defendant must say –
>
> > (a) which (if any) of the allegations in the claim form or particulars of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted or denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim-

(a) the defendant must state the reasons for doing so; and

(b) If the defendant intends to prove a different version of events from that given by the claimant, the defendant's own version must be set out in the defence.

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –

(a) admit it; or

(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document which the defendant considers to be necessary to the defence.

(7) A defendant who defends in a representative capacity must say-

(a) what that capacity is; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.12."

[35] In the instant case, while the defence and amended defence might have seemed skeletal in nature, given the limited issues in the case, there was no need for extensive pleadings, as the witness statements of the first respondent and her witness had sufficiently set out her case. Support for this approach and conclusion can be found in the dictum of Lord Woolf in **McPhilemy v Times Newspaper** [1999] 3 All

ER 775 (a case which has been approved by this court). There, Lord Woolf stated, at pages 792-793, that:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."

[36] He also added at page 793:

> "Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged."

[37] Against the background of these dicta, it must also be accepted that the learned trial judge correctly found that, although there was an inconsistency in the first respondent's evidence concerning licence plates 0633 DQ and 1889 AR, it was of no moment, as it was not disputed that the relevant motor car was the 1991 Toyota Corolla. The first respondent also stated in her cross examination that both plates were for the same car. In these circumstances, the sufficiency or otherwise of the pleadings in relation to the original ownership of the motor car cannot fairly be given the pre-eminence for which the appellant contends. Therefore, the learned trial judge's decision to proceed with the trial on the pleadings as they stood cannot be faulted, and the appellant's case on this issue is without merit.

[38] I will say in passing that I am aware of another decision of this court that discusses rule 10.5 of the CPR. That case is **Rasheed Wilks v Donovan Williams** [2022] JMCA Civ 15, in which this court considered the application and effect of rule 10.5 of the CPR. It was held, on the facts of that case, that there had been a breach

of that rule. However, that case is distinguishable from the instant case, given the facts and circumstances of each. For example, in that appeal, the respondent had advanced in a witness statement filed late in the day, the averment that his wife had not been acting as his servant or agent at the time of a motor vehicle accident involving a motor car registered in his name, when no mention whatsoever of that contention had been made in the defence. On the contrary, in the instant case, an issue was being raised concerning pleading to ownership of a motor car with a particular licence number, when not much turned on the actual licence number at the end of the day, it being clear that the parties were talking about one and the same vehicle. That decision, therefore, was made based on its own facts, which are quite different from those in this appeal.

Conclusion

[39] Based on the totality of the evidence, there was more than a sufficient basis for the learned trial judge to have made the findings that she did. Her evaluation of the evidence discloses no error or mistake. Inevitably, therefore, the appeal ought to be dismissed, with costs to the first respondent, both here and below, to be agreed or taxed.

HARRIS JA

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

DUNBAR-GREEN JA (AG)

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

F WILLIAMS JA

ORDER

(i) The appeal is dismissed, and the judgment of Wiltshire J is affirmed.

(ii) Costs of the appeal to the first respondent against the appellant, to be agreed or taxed.