[2015] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 121/2014

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

BETWEEN	**MECHANICAL SERVICES COMPANY LIMITED**	**APPLICANT**
AND	**CLINTON ELLIS**	**RESPONDENT**

Hadrian Christie instructed by Georgia Hamilton & Company for the applicant

Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright & Company for the respondent

9, 10 March and 15 May 2015

DUKHARAN JA

[1] I have read in draft the judgment of my learned sister Phillips JA. I agree with her reasoning and conclusion. There is nothing that I can usefully add.

PHILLIPS JA

[2] Mechanical Services Limited, with registered office situated at Shop 125 Princeville Commercial Centre, 95A Constant Spring Road, Kingston 10, St Andrew (the applicant), sought permission to appeal the decision of Master Harris (Ag) made on 2

July 2014 whereby its application to set aside a default judgment and to extend time for filing its defence was refused.

Background

[3] Sometime in 2008, the respondent Clinton Ellis went to the Turks and Caicos Islands to work on contract service. Mr Patrick Pottinger, a former employee of TC Mechanical Services Limited, Salt Mills Plaza, Grace Bay Providenciales, Turks and Caicos Islands, offered him a ride in a Dodge pick-up truck owned by Mr Russell Garland and registered and insured in the Turks and Caicos Islands. The respondent fell from the pick-up truck and sustained serious personal injury in the Turks and Caicos Islands. There are variations as to how the accident occurred. On one hand, the applicant contends that the accident occurred as a result of Mr Pottinger's attempt to avoid the impending danger of a speeding back-hoe that was coming towards the pick-up truck (see paragraph 16 of the affidavit of Neville Glanville, managing director of the applicant, in support of notice of application to set aside default judgment). On the other hand, the respondent, in the medical report of Dr Micas Campbell filed with the particulars of claim, contends that while he was attempting to get into the pick-up truck it drove off causing him to fall backwards resulting in the injury.

[4] On 1 June 2009, the respondent filed a claim against the applicant. In his particulars of claim he alleged that: (i) he was at all material times employed to the applicant; (ii) he fell from the pick-up truck and sustained injury and loss while he was in the execution of his duties; (iii) his fall occurred as a result of the applicant's

negligence (by failing to provide a safe system and place of work, competent and sufficient staff of men, and failing to provide the requisite warning notices and special instructions); and (iv) that the applicant breached either an express or implied term of the respondent's contract to take all reasonable care to execute its operations in the course of its trade in such a manner as not to subject the respondent to a reasonably foreseeable risk of injury.

[5] The claim form, particulars of claim and a letter addressed to the applicant were sent by registered post on 10 June 2009. Pursuant to Fitzroy Cameron's affidavit filed 16 October 2009, the applicant was deemed to have been served by 1 July 2009. The applicant would have then been required to acknowledge service by 15 July 2009 and to file its defence by 13 August 2009. None of this having been done, a default judgment was entered against the applicant on 15 October 2009.

[6] However, the applicant contended that it did not receive these documents until 9 October 2009, after which it filed an acknowledgment of service on 20 October 2009 and a defence on 29 October 2009. On 24 November 2010, an application was filed to strike out the respondent's claim on the grounds that: (i) the claim form and the particulars of claim, for and on behalf of the claimant, failed to comply with the Civil Procedure Rules (CPR), in that, the nature of the claim and the specific remedy being sought was not set out therein; (ii) the particulars of claim were confusing; and (iii) that the court had no jurisdiction to hear the matter because the accident occurred in the Turks and Caicos Islands.

[7] A hearing date for the application to strike out the claim was set for 26 March 2012 and went before Lindo J for determination but was adjourned to a date to be fixed by the registrar as neither counsel nor the parties were present. The applicant claimed that it was never advised of this date by its previous attorney-at-law, Mr Lynden Wellesley. The applicant contended that it only discovered that a default judgment had been entered against it on 27 May 2011, and that at all material times, having provided full instructions to Mr Wellesley, it thought that its interests were being protected.

[8] The applicant thereafter changed its attorney-at-law who, on 31 October 2012, made an application to set aside the default judgment and sought an extension of time within which to file its defence. This application was made on the grounds that: (i) the applicant had a real prospect of successfully defending the claim; (ii) the application was made as soon as was reasonably practicable after knowledge of the entry of the default judgment; and (iii) the applicant had a good reason for the delay.

Application to set aside default judgment and to extend time to file defence

[9] This application was heard by learned Master Harris on 12 May 2014. The applicant in its proposed defence and in the affidavit of Neville Glanville in support of the application to set aside the default judgment set out the following material facts.

1. The original documents were not served on it until 9 October 2009 and thereafter it acknowledged service and filed its defence within the times stipulated in the CPR.

2. It was not told of the hearing date for the application to strike out the claim.
3. The respondent was not employed to the applicant at the material time.
4. The accident was caused by the negligence of a back-hoe driver and not the applicant.
5. There was no nexus between the medical report of Dr Micas Campbell and the accident.

[10] The respondent's affidavit, filed in response to the application, challenged the application on the following grounds.

1. The respondent was prejudiced by having to wait from 2009 to 2013 to benefit from the judgment.
2. It is highly unlikely that registered mail would take four months to be delivered inland.
3. It is not true that the applicant did not receive its file until 29 October 2012 since Mr Wellesley in his affidavit contended that the applicant had severed ties with him in October 2011.
4. Since October 2009, the applicant failed to seek permission to file its defence out of time and this was only done on 31 October 2012.
5. The applicant had been sent to work with TC Mechanical Services by Neville Glanville who is the chief executive officer of that company.

[11] Master Harris denied the application to set aside the default judgment, refused to grant permission to file the defence out of time, and also refused an oral application for permission to appeal. The applicant now seeks permission to appeal relying on the grounds summarized below.

1. An oral application for leave to appeal was made pursuant to rule 1.8(3) of the Court of Appeal Rules, to Master Harris on 2 July 2014 and was refused.
2. Permission to appeal was sought pursuant to rule 1.8(3) of the CAR.
3. Pursuant to rule 1.8(9) of the CAR, the applicant has a real chance of success on the appeal because Master Harris failed to acknowledge certain evidence placed before her as follows:
    a) Lack of regard to the employer of Mr Pottinger, the driver of the pick-up.
    b) The accident occurred in an effort to avoid the danger caused by a speeding back-hoe and not as a result of anyone employed to the applicant.
    c) Lack of medical proof that the injuries were caused directly by the accident.
    d) There are issues surrounding the jurisdiction of the court.
    e) Failure to give effect to the overriding objective under the CPR.

4. The applicant also has a real prospect of succeeding in the claim because Master Harris erred in making the following findings.

    a) There were no substantial issues of law and fact from which the court could find that the proposed defence had a real prospect of success since the proposed defence lacks merit.

    b) The defence proffered was frivolous and vexatious.

    c) The failure of the applicant's previous attorney-at-law to properly represent it and to inform the applicant of court dates and judgments entered against it was not a good reason for the applicant's failure to file its defence and acknowledgment of service in time.

    d) The applicant filed an application to set aside its default judgment three years after finding out that a default judgment was entered against it.

    e) The respondent was employed to the applicant at the material time.

    f) The applicant was liable for the respondent's injury (without regard to the principles of vicarious liability and the need to establish the duty of care that the applicant owed to the respondent).

Applicant's submissions

[12] The applicant's attorney-at-law, Mr Hadrian Christie submitted that the requirement in rule 1.8(9) of CAR, which grants permission to appeal where the appeal has a "real chance of success", simply means that the chance of success must be realistic and not fanciful. He contended that the applicant has surpassed this standard by virtue of the following:

1. The accident did not occur on the system or place of work in which the respondent was employed and the vehicle in which the respondent was injured was not owned by the applicant nor was it being operated by the applicant's servant or agent.
2. There was no evidence or pleading to say that the system of work employed by the applicant was unsafe and further there was no duty or obligation to provide the respondent with safety equipment, warnings, notices or special instructions.
3. The most important issue is the fact that the respondent was not employed to the applicant but to TC Mechanical Services. The payment of the respondent's final salary in Jamaica and the signing of the contract of employment were done to facilitate the grant of the respondent's work permit and cannot prove that he was employed to the applicant.

[13] Mr Christie further submitted that Master Harris failed to give sufficient regard to the fact that the applicant satisfied the relevant test stated in rule 13.3 (1) of the CPR which provides that:

> "The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim."

[14] With regard to the matters which the court must consider, he cited rule 13.3 (2) of the CPR which states:

> "In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.
>
> b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."

[15] Pursuant to rule 13.3(2)(a) of the CPR, Mr Christie invited the court to consider the fact that the applicant only learned that the default judgment had been entered against it on or about 27 May 2011. Six days later, the relationship between the applicant and its then attorney-at-law broke down and the files were not handed over to the applicant until 29 October 2012, despite repeated requests. On 20 July 2012, upon learning that this claim was set for an assessment of damages hearing, the applicant instructed new counsel who obtained full instructions. An application to set aside the default judgment was filed on 31 October 2012. These assertions remained without the benefit of cross-examination and remain unchallenged. In light of the

foregoing circumstances, Mr Christie therefore submitted that the application was made as soon as was reasonably practicable and that the applicant's chance of success on appeal is a realistic one.

[16] Mr Christie also urged the court to consider that the applicant had a good explanation for the delay pursuant to rule 13.3(2)(b) of the CPR for two main reasons. The first is that, in applying the authorities of **Shirley Beecham v Fontana Montego Bay Ltd t/a Fontana Pharmacy** [2014] JMSC Civ 119 and **Linton Watson v Gilon Sewell and Others** [2013] JMCA Civ 10, the applicant's unchallenged evidence that it received the registered parcel on 9 October 2009 would render that said date the true date of service despite there being an earlier deemed date of service. If the true date of service was 9 October 2009, then the filing of the acknowledgment of service and the defence on 20 October 2009 and 29 October 2009 respectively were done in time, and there would have been no need to apply for an extension of time to serve the documents. The conundrum of the deemed date of service should be resolved in the applicant's favour, he submitted, since the respondent himself could have served the documents personally on the applicant or employed a courier service to do so and consequently, the applicant should not suffer as a result of the method of service chosen by the respondent. Secondly, the applicant had the mistaken view that its previous attorney-at-law was handling the matters with due care and attention and was not aware that he had not done so until 2011.

[17] The issue of prejudice due to the inordinate delay was raised by the respondent but Mr Christie submitted that it would be far more prejudicial to allow the claim to go unchallenged as the respondent had occasioned half the delay by waiting two years and six months to file the judgment. Further, it was the respondent's delay in serving the judgment that made the applicant unaware that the default judgment had been entered against it.

Respondent's submissions

[18] Mrs Marvalyn Taylor-Wright, attorney-at-law for the respondent, submitted that the proposed appeal has no real chance of success since the applicant did not allege any error of law or misapplication of facts in its grounds of appeal. Mrs Taylor-Wright also contended that the existence of the employment contract, the payment of the respondent's salary in Jamaica, the fact that the applicant's managing director is also the managing director of TC Mechanical Services, and the payment of the respondent's air travel and accommodation while in the Turks and Caicos Islands was strong evidence that the employer/employee relationship existed between the parties.

[19] On the issue of the timing of the filing of the application, Mrs Taylor-Wright submitted that there was no good reason for the delay in the filing of the application, since the applicant had been served with the default judgment on 30 July 2012 and had waited until one day before the assessment of damages hearing in 2014, to seek permission to set aside the default judgment and file its defence out of time. The CPR requires the filing of a defence within 42 days and doing so after three years was an

inordinate delay for which no explanation had been given. Counsel relied on **Attorney General of Jamaica v Roshane Dixon and Sheldon Dockery** [2013] JMCA Civ 23 to show that in the case at bar the delay was of such a nature as to have fostered or procreated injustice to the respondent's claim. Further, any delay would increase the risk of prejudice to the respondent who had been waiting for six years to benefit from the judgment.

[20] Mrs Taylor-Wright submitted that the applicant's entire defence amounted to a sham. She invited the court to compare the applicant's defence filed on 29 October 2009 which failed to substantially challenge the claim, and the proposed defence blaming the negligence of a back-hoe driver for the injury sustained. She submitted that no application had been made to allow the most current defence to stand, and serious questions surround the issue of the reasons this exculpatory averment was omitted from the first defence. Counsel submitted further that the fact that no reasons had been advanced as to the inconsistencies found in the defences filed, the court should treat the proposed defence as an entirely new document that should not be allowed to stand.

[21] It was Mrs Taylor-Wright's contention that the central point in the proceedings is whether the applicant is vicariously liable for the acts of the driver of the pick-up. The applicant's deliberate omission of the fact that Mr Glanville, the managing director of the applicant, is also the chief executive officer of TC Mechanical Services was an area of concern. She also invited the court to consider the fact that the respondent was sent

to work for TC Mechanical Services by the applicant. Any attempt by the applicant to disassociate himself from TC Mechanical Services ought to be seen by the court as a sham.

[22] Mrs Taylor-Wright further submitted that the applicant had also failed to challenge the court's jurisdiction when it appeared before Master Harris and as a result this issue had not been addressed by the respondent or considered by Master Harris.

Permission to appeal

[23] Section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act prescribes that:

> "No appeal shall lie---
>
> ...
>
> (f) without the leave of the Judge or of the Court of Appeal from any **interlocutory** judgment or any interlocutory order given or made by a Judge except..."

[24] An order on an application to set aside a default judgment is an interlocutory order for the purposes of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act and consequently the jurisdiction of this court cannot be invoked without the leave of the court below or leave from this court itself. The applicant was denied leave to appeal by Master Harris in the court below and thus permission must be sought and granted for the applicant to pursue an appeal in this court.

[25] It is accepted that where rule 1.8(9) of CAR provides that permission to appeal will only be given if the court considers that an appeal will have a "real chance of success", this means that the prospects of success should be realistic as opposed to

fanciful (**Swain v Hillman** [2001] 1 All ER 91). Morrison JA endorsed this formulation in **Donovan Foote v Capital and Credit Merchant Bank Limited and Anor** [2012] JMCA App 14 at paragraph [41] that as a precondition for the grant of permission to appeal -

> "…the applicant must show that he has a real and not a fanciful or unrealistic chance of success in the proposed appeal."

Vicarious Liability

[26] The respondent's particulars of claim raises issues of vicarious liability. The Privy Council in **Clinton Bernard v The Attorney General of Jamaica** [2004] UKPC 47 has stated that the relevant consideration where a wrong is committed in the course of employment is whether the wrongful conduct is so closely connected with acts the employee is authorized to do that, for the purposes of the liability to third parties, the wrongful conduct may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment. This authority has more recently been cited with approval by Brooks JA in **Debbie Powell v Bulk Liquid Carriers Ltd et al** [2013] JMCA Civ 38.

[27] The particulars of claim in the case at bar does not state whether the respondent was in the course of his employment during the ride or whether he was authorized to accept gratuitous rides during the course of his employment. There are questions as to whether this ride was necessary for him to perform the duties he was employed to do or whether it was outside the bounds of his employment.

[28] There are further questions of fact with regard to the issue of liability. The applicant has said that it is not the respondent's employer and the respondent has refuted this claim and claimed the contrary. The applicant has also denied being negligent and blames the accident on the negligence of a back-hoe driver while the respondent has blamed the accident solely on the applicant who was Mr Pottinger's employer. In my view, there are many material facts not pleaded and unknown. If the respondent was not employed to the applicant, then the applicant would not be liable for the respondent's injury. If Mr Pottinger was not employed to the applicant, then the applicant would equally not be vicariously liable for his alleged negligent acts resulting in the injury suffered by the respondent. These are matters which it appears need to be resolved by the trial judge. In all the circumstances, I find, the absence of resolution of these issues positively influences the applicant's prospects of success on appeal.

Timing of filing documents

[29] Rule 6.6(1) of the CPR states that the deemed date of service by registered post is 21 days after posting and rule 5.19(1) of the CPR provides that a claim form that has been served by registered post is deemed to be served unless the contrary is shown. The applicant's position is that the contrary has been shown, since it has deponed to the fact that it did not receive the claim form until 9 October 2009 and thereafter it filed an acknowledgement of service and defence within the specified times. The respondent's response to this contention is that it is highly unlikely that registered post could have taken four months to be delivered inland. In the absence of cross-examination and *viva voce* evidence, no determination was properly made as to

whether the applicant had succeeded in displacing this presumption. It will therefore be a matter for this court to decide whether in all the circumstances, Master Harris ought to have set aside the default judgment *ex debito justitiae* as the judgment given would have been irregularly obtained, or she could have removed "the legal fiction of deemed service" (**Watson v Sewell and Others** [at paragraph 41]) and proceeded to exercise her discretion to set aside the default judgment, in any event, so that all the matters in contention between the parties could be determined by the trial judge.

Explanation for delay

[30] There are significant differences between the cases for the applicant and the respondent and the explanations offered to support or refute delay. The applicant has said that the mystery as to the true date of service of the claim, the respondent's request for the judgment three years after it was given, the need to gather evidence about the back-hoe driver and the issues with his previous attorney-at-law are all valid explanations for the delay in filing its various documents. The respondent has said that the court should ignore these excuses since they seem to be recent concoctions and were not raised when the proposed defence was filed. The court would have to decide whether these competing contentions would be sufficient to raise a realistic chance of success in defending the claim so as to conclude whether Master Harris erred in refusing to set aside the default judgment.

Prejudice

[31] The respondent has submitted that no reasons have been given for the applicant's inordinate delay in filing its defence even after being notified of the judgment and consequently the respondent should not be prejudiced by its neglect. None of the parties has set out with any detail or clarity any specific prejudice suffered by them as a result of the delay in prosecuting the matter. As indicated, the different positions adopted by the parties would have to be examined by the court to ascertain whether Master Harris erred in the exercise of her discretion when she refused to set aside the default judgment. Suffice it to say, in my view, the applicant has reached the threshold in respect of permission to appeal and I would so order.

Conclusion

[32] The several questions surrounding the applicant's liability, the deemed date of service and its numerous explanations for delay render the applicant's chances of success on appeal realistic. As a consequence, the application for permission to appeal should be granted with costs in the appeal.

SINCLAIR-HAYNES JA

[33] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.

DUKHARAN JA

ORDER

The application for permission to appeal is granted. Costs to be costs in the appeal.