[2018] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 36/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**DAVE SCOTT**	**APPELLANT**
AND	**PARAMOUNT TRADING JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**ANTHONY WALLACE**	**2ND RESPONDENT**

19, 20 March and 13 April 2018

Mrs Martina Edwards-Shelton and Matthew Ricketts instructed by Shelards for the appellant

Mrs Kerry-Ann Sewell for the respondents

MORRISON P

[1] I have read, in draft, my learned brother's reasons for judgment. I agree that they accurately reflect our reasons for the orders made at the hearing of the appeal.

BROOKS JA

[2] We heard oral submissions from counsel in this matter on 19 and 20 March 2018 and at the completion of the submissions, we made the following orders:

1. the application for leave to appeal is granted;
2. by consent, the hearing of the application is treated as the hearing of the appeal;
3. the appeal is allowed;
4. the decision of Brown-Beckford J made on 2 February 2018, refusing the application to amend the particulars of claim is set aside;
5. the appellant's application for leave to amend his schedule of special damages to include the items set out in paragraphs 23-28 of the witness statement of the appellant filed on 29 June 2016 is granted;
6. the appellant shall file and serve on or before 27 March 2018 the amended particulars of claim;
7. the respondents are at liberty to file and serve on or before 3 April 2018 an amended defence; and
8. no order made as to costs.

[3] At that time, we promised to provide written reasons for our decision. We now fulfil that promise.

[4] Mr Dave Scott is the appellant referred to in the order set out above. He was injured on 12 April 2013 when his motor cycle collided with a truck owned by Paramount Trading Jamaica Limited and driven by its employee, Mr Anthony Wallace

(together referred to hereafter as the respondents). Later that year, Mr Scott sued the respondents to recover compensation for his loss.

[5] An application was made in the court below to amend his particulars of claim, to include further items of special damages such as receipts for medical reports, wrecker fees and the cost of repairing his motor cycle which was damaged in the collision.

[6] Although some of those matters were set out in a written application prepared in advance of the pre-trial conference for the case (the application is at pages 187-192 of the record), that aspect of the application, it would appear, was not dealt with at the pre-trial conference. The learned master, before whom the pre-trial review was conducted, did not treat with it in her pre-trial review orders.

[7] On the first day of the trial of the claim, Mr Scott's counsel attempted to raise the matter. The learned trial judge, however, ruled that the application should be made at the relevant time, during the course of the trial. The case was adjourned and the application, in a more specific form, was renewed on 1 February 2018, for Mr Scott to amend his schedule of special damages to include the items set out in paragraphs 23-28 of his witness statement filed on 29 June 2016. The learned trial judge refused the application.

[8] The learned trial judge also refused leave to appeal. That refusal has resulted in the present proceedings so as to set aside the learned trial judge's order and to grant the amendments which had been sought in the court below.

[9] Two factors militate against the present application. Firstly, it seeks leave to appeal against a decision made during the course of a trial. The issue raised is one of jurisdiction.

[10] Secondly, it is an appeal against the exercise of a discretion given to the learned trial judge. This issue may be described as "the discretion issue".

The jurisdiction issue

[11] Counsel for the respondents, Mrs Sewell, submitted that this court had no jurisdiction to hear the application because it sought leave to appeal from a ruling, rather than from a judgment or an order, and a ruling is not amenable to appeal. Learned counsel pointed to section 10 of the Judicature (Appellate Jurisdiction) Act and rules 1.1(8) of the Court of Appeal Rules (CAR). She submitted that these provisions preclude an appeal against a decision made during the course of a trial. Mrs Sewell also relied on the cases of **Wilmot Perkins v Noel B Irving** (1997) 34 JLR 396, page 421A and **Garth Dyche v Juliet Richards and Michael Banbury** [2014] JMCA Civ 23.

[12] She also submitted that the case of **Jade Hollis v The Disciplinary Committee of the General Legal Council** [2017] JMCA Civ 11 is distinguishable from the instant case. She argued that this court found in that case that the Disciplinary Committee's decision refusing an adjournment sought during the course of the hearing was appealable because the refusal was determinative of a fundamental issue and there is no such issue in the present case.

[13] Mrs Edwards-Shelton argued, for Mr Scott, that the decision of the learned trial judge is appealable. Learned counsel relied on **Jade Hollis v The Disciplinary Committee of the General Legal Council**, which made reference to **American Jewellery Company Limited and another v Commercial Corporation Jamaica Limited and others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2004, judgment delivered on 17 May 2005.

[14] In order to resolve the question of jurisdiction, it is necessary to examine the provisions of the Judicature (Appellate Jurisdiction) Act and the CAR which vest this court with jurisdiction to hear and determine appeals arising from certain decisions made in civil proceedings in the Supreme Court.

[15] Section 10 of the Judicature (Appellate Jurisdiction) Act is important in this regard. It states:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals **from any judgment or order of the Supreme Court in all civil proceedings**, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958." (Emphasis supplied)

As the final decision has still not been made in the Supreme Court, it is necessary to next consider the relevant rules of the CAR.

[16] Rule 2.4 is a convenient starting point. It gives the court the power to consider and determine procedural appeals on paper. A procedural appeal is defined under rule 1.1(8) as:

> "an appeal from a decision of the court below which does not directly decide the substantive issues in a claim **but excludes** -
>
> (a) **any such decision made during the course of the trial** or final hearing of the proceeding;
>
> (b) ..." (Emphasis supplied)

In the light of the interpretation given as to what constitutes a procedural appeal, the decision in the instant case would not be one that would be the subject of a procedural appeal; the decision having been given during the course of the trial of the claim.

[17] That, however, may not be the end of the matter.

[18] McDonald-Bishop JA, on behalf of this court, in **Jade Hollis v The Disciplinary Committee of the General Legal Council**, at paragraph [40] of that judgment, opined that "the mere stage at which the proceedings have reached cannot, in and of itself, be determinative of the matter [of whether a decision is appealable]". In that case, this court had to determine whether the Disciplinary Committee's decision, made during the course of a disciplinary hearing of a complaint against Ms Hollis, was appealable. The decision was to refuse to grant her an adjournment. The learned judge of appeal found that the decision was appealable on the ground that the refusal of an application for an adjournment was determinative of a fundamental question or issue

(which was whether the hearing ought to continue in Ms Hollis' absence), which would be final, and which did not concern the trial process or the admissibility of evidence.

[19] In the instant case, the learned trial judge's refusal of Mr Scott's application for leave to amend his schedule of special damages was not a determination of any fundamental question or issue, as Mrs Sewell rightly submitted. It was a determination of a matter that concerned the management of the trial process.

[20] Rule 20.4(2) of the Civil Procedure Rules (CPR) provides that statements of case may only be amended after case management conference with the leave of the court. The rule vests the court with the power to exercise its discretion as to whether or not to allow an amendment after the case management conference. This is done as a way of ensuring that cases are properly managed in a manner that would see them being "dealt with expeditiously and fairly" and in keeping with the overriding objective.

[21] That having been said, in the determination of whether a decision is amenable to appeal, "the bottom line must be what is in the interests of justice". That is the ultimate question. That was the view of McDonald-Bishop JA in **Jade Hollis v The Disciplinary Committee of the General Legal Council**, at paragraph [40] of that judgment.

[22] It is important to note that the case was adjourned from February to a date in April of this year. The adjournment allowed sufficient time for the hearing of the present application and the resolution of the issues before the resumption of the trial. It is the interests of justice, we found, which formed the compelling basis for having

concluded, in the light of the unique circumstances of this case, that the decision of the learned trial judge was one that was amenable to an appeal.

[23] Consequently, the discretion issue fell to be considered.

The discretion issue

[24] This court has made a number of decisions in which it has stated that it will not lightly disturb a judge's judicial exercise of discretion unless it was based on a misunderstanding of the law or the evidence adduced or an inference that particular facts existed or not, and can be shown to be plainly wrong. Among them is **Attorney General of Jamaica v John MacKa**y [2012] JMCA App 1, at paragraph [20].

[25] In order to determine whether this court ought to interfere with the decision of the learned trial judge, it is necessary to examine the sequence of the events that transpired prior to the hearing of the application for leave to amend. The events, according to the record of appeal and the evidence of Mr Matthew Ricketts (as contained in his affidavit filed on 16 February 2018 in support of application for leave to appeal), were as follows:

1. On 18 October 2013, Mr Scott filed his claim form, particulars of claim and schedule of special damages. In the schedule of special damages, Mr Scott specified the figure being claimed at the time of the filing and indicated that the same figure was not final

with regard to the special damages being claimed by the use of the words "and continuing".

2. On 14 October 2015, a case management conference (CMC) was held, and on 22 April 2016, in compliance with the orders of the CMC, Mr Scott filed a list of documents stating the documents on which he wished to rely to prove his claim for special damages. The list of documents disclosed copies of all, but for two, of the receipts which were detailed in paragraphs 23-28 of his witness statement, which was filed in compliance with the CMC order.

3. That witness statement was filed on 29 June 2016 and served on the respondents on 30 June 2016. Also, on 29 June 2016, Mr Scott filed an amended list of documents (that included one of the two receipts that had not been disclosed as mentioned above), which was served on the respondents on 30 June 2016.

4. Mr Scott filed a notice and further notice of intention to tender in evidence hearsay statements made in documents (which included copies of the receipts which were detailed in paragraphs 23-28 of his

witness statement) on 22 and 29 June 2016, respectively. On 8 September 2016, the respondents filed an objection to Mr Scott's further notice of intention to tender in evidence hearsay statements.

5. On 16 September 2016, Mr Scott filed a notice of application for court orders seeking, among other things, at paragraph 1, leave to amend his claim form, particulars of claim and schedule of special damages and to include further details as to his loss.

6. The application was heard at the pre-trial review and on 19 October 2016, the learned master who heard the application, made an order which did not demonstrate that the issue of the leave to amend was considered and determined. The perfected formal order makes no reference to paragraph 1 of Mr Scott's application.

7. At the start of the trial on 24 October 2016, in the light of the situation described at paragraph 6 above, counsel for Mr Scott raised the preliminary point that the master had not addressed the issue of leave to amend his schedule of special damages and thus sought to have the same dealt with by the learned

trial judge. The issue dragged on until, 1 February 2018, when Mr Scott's counsel made an oral application to amend his schedule of special damages to reconcile with his evidence as contained in paragraphs 23-28 of his witness statement (which had been placed in evidence) and on 2 April 2018, the learned judge refused the application.

8. At paragraph 35 of his affidavit, Mr Ricketts asserted that the learned trial judge's refusal of the application to amend the schedule of special damages was that a grant of leave would have allowed Mr Scott to introduce new facts and cause the respondents to suffer prejudice (in that they would have lost their tactical advantage and would not have been able to properly investigate and defend the proposed amendments even if an adjournment were to have been granted).

[26] In the light of the foregoing, it is apparent that whereas the prejudice to Mr Scott would have been significant (over $1,000,000.00 worth of damages was involved), there would have been minimal, if any, prejudice to the respondents. The above chronology of events amply demonstrates that they would not have been taken by surprise by the application. Had the proposed amendments been granted, the

respondents would not have been confronted by anything that was wholly new. There was disclosure of the relevant items of claim long before the trial date. The fact that the respondents may, possibly, be liable to Mr Scott for this loss would not be prejudice caused by the application. He would properly be entitled to recover any loss reasonably incurred as a result of any negligence ascribed to the respondents.

[27] It does appear, therefore, that the learned trial judge, in failing to give sufficient weight to those matters mentioned in the chronology and to the issue of prejudice to either side, erred in principle. The following factors are also relevant:

1. The proposed amendment sought by Mr Scott before the learned trial judge was merely a further instance of the loss that he was claiming to have suffered as a result of the collision. The respondents therefore could not properly say, and the learned trial judge ought properly not to have found, that they would have been so prejudiced by the granting of the amendment, that they could not have been compensated by an award of costs or an adjournment.

2. The complaint by the respondents that they would have suffered injustice as a result of the amendment, at the particular stage in the proceedings, or that they

> would have been prejudiced by the introduction of an addition of new facts, would properly have been the basis of a ground of appeal from the decision at the end of the trial (see **Attorney General v Maurice Francis** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/1995, judgment delivered 26 March 1999 and **Berezovsky v Abramovich** [2011] EWCA CIV 153, at paragraph 64).

[28] Consequently, it does appear that the learned trial judge erred in principle in refusing to allow the amendment, which would not have caused irreparable prejudice to the respondents, while it would have caused irreparable prejudice to the Mr Scott (see **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2015, judgment delivered 16 February 2006, at paragraph 29).

[29] The trial having been adjourned in any event, it would not have prejudiced the administration of justice to grant the amendment. Accordingly, the orders were made as were set out at the beginning of this judgment.

[30] It must be reiterated that appeals against rulings during a trial are not ordinarily properly allowable. Such rulings are properly the subject of a ground of appeal at the

end of the trial. The facts of this case, as has been repeatedly stated throughout this judgment, are unique in this regard.

MCDONALD-BISHOP JA

[31] I have read the draft reasons for judgment of Brooks JA and I endorse the reasons that he has given for the decision of the court. I have nothing useful to add.