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 BROWN BECKFORD JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00048

BETWEEN	**ENOCK SMITH**	**APPELLANT**
AND	**KEVIN WILSON**	**RESPONDENT**

Written submissions filed by Messrs Reitzin & Hernandez for the appellant

Written submissions filed by Messrs Nunes, Scholefield, DeLeon & Company for the respondent

20 September and 19 November 2021

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

F WILLIAMS JA

[1] On 2 June 2021, the appellant filed a procedural appeal seeking to set aside the order of Henry-McKenzie J ('the learned judge') (dated 21 May 2021), refusing to strike out the respondent's defence in the claim below and to grant summary judgment. The orders of the learned judge were:

> "i. The Amended Notice of Application to strike out defence and for summary judgment filed on October 25, 2019 is dismissed.
>
> ii. Cost[s] to the Defendant to be taxed if not agreed.
>
> iii. Leave to appeal is granted."

[2] The background to this appeal is that on 9 March 2018, the appellant filed a claim in the Supreme Court against the respondent for injuries received in a motor vehicle collision. In his particulars of claim, the appellant averred that on 23 December 2013, at all material times, he was driving a motor car on Marcus Garvey Drive, Kingston, when he slowed and then stopped to allow two pedestrians to cross the road. He stated that about five seconds thereafter, the respondent's motor vehicle, travelling behind him, collided into the rear of his motor car.

[3] On 30 May 2018, the respondent filed his defence. He denied the appellant's account of the accident and averred that at approximately 8:20 am, he was driving a motor vehicle with registration number 1811 GH in an easterly direction on Marcus Garvey Drive in the far right lane (of three lanes). He stated that a Honda Inspire that was travelling in the middle lane switched lanes, almost immediately coming to a sudden stop after positioning itself between his motor vehicle and the motor vehicle travelling ahead of him. He stated that he applied his brakes but could not avoid colliding into the rear of the motor vehicle with registration number 2939 FF, driven by the appellant.

[4] On 15 May 2019, the appellant filed his application to strike out the respondent's defence and/or obtain summary judgment in the matter. The application was supported by an affidavit sworn by the appellant. Exhibited to the appellant's affidavit was a copy of the respondent's statement given to the police dated 4 May 2014, concerning the said motor vehicle accident. That police statement offered a different account of the accident to that which was contained in the respondent's defence.

[5] The application was made pursuant to rules 26.3(1)(b) and 15.2(b) of the Civil Procedure Rules ('the CPR'). In relation to the rules, it was contended respectively, that: (i) the court has power to strike out a part or whole of a statement of case where it amounts to an abuse of process or is likely to obstruct the just disposal of the proceedings (rule 26.3(1)(b); and (ii) the court can give summary judgment where the respondent has no real prospect of successfully defending the claim (rule 15.2(b)).

[6] The main premise put forward to support these contentions was that the respondent's defence to the claim contains untruthful allegations that contradicted his earlier statement to the police as to how the accident occurred. The appellant also argued that the respondent's failure to respond by affidavit was decisive of the application in the appellant's favour.

[7] On the other hand, counsel for the respondent contended that striking out and/or entering summary judgment were inappropriate to the circumstances of the case. He argued that the respondent has a real prospect of successfully defending the claim. He further contended that this case was "fit for trial" as the factual disputes necessitated that the witnesses be tested under cross-examination. Counsel for the respondent also submitted that the absence of affidavit evidence in reply to the appellant's application for striking out/summary judgment is not detrimental to the respondent's case, as the burden of proof rests on the appellant to demonstrate his entitlement to the orders sought.

[8] On 3 February 2020, when the learned judge heard the application, she adjourned it for written submissions to be filed by the parties. Judgment was subsequently given in the respondent's favour, dismissing the application.

[9] Having received permission to appeal, the appellant presented as his ground of appeal that the learned judge inappropriately exercised her discretion in that she failed to appreciate: (i) that the appellant's affidavit demonstrated that the respondent had made a previous inconsistent statement which rendered his defence false; (ii) that the evidence against the respondent was strong; (iii) that the respondent's case amounted to an abuse of process; (iv) that the respondent had failed to file an affidavit which demonstrated that he had a real prospect of successfully defending the claim; and (v) that improper weight was attributed to the respondent's defence.

Procedural issues

[10] When this matter came before us, the court observed that, on 15 September 2021, the respondent had filed a notice of objection. He contended thereby that the notes of oral judgment attached to the notice of appeal filed by the appellant have neither been certified by the learned judge nor agreed between the parties, pursuant

to rule 2.5(2) of the Court of Appeal Rules ('the CAR'). We further noted that, otherwise, there is no written judgment from Henry-McKenzie J. Neither is there evidence before us as to whether efforts were made to have the notes of oral judgment certified or agreed. The appellant has presented, in response, an "Answer to Notice of Objection to Note of Oral Judgment", dated 28 October 2021. It is also apparent that the respondent's submissions were filed after more than 14 days of receipt of the notice of appeal (8 June 2021). This would have contravened rule 2.4(2) of the CAR.

[11] While the court was at first minded to direct that steps be taken by the parties to have the notes of oral judgment agreed or certified, we took the view that fairness could have been achieved without taking such a course. We could also have directed that the respondent apply for an extension of time for the filing of submissions; but, again, we believed that fairness could have been achieved without proceeding in that way. Both sides appeared, therefore, *prima facie*, to have been in breach of procedural rules.

[12] It occurred to us that this procedural appeal concerns primarily issues of law: that is, whether the learned judge correctly applied rules 26.3(1)(b) and 15.2(b) of the CPR to the circumstances of this case. Accordingly, we believed that it would have been a more efficient use of the court's time to consider this appeal strictly in the light of those rules on which the application was made in the court below. The court took the view that such a course will result in no injustice or prejudice, in the absence of the certified or agreed notes of judgment and despite the respondent's submissions being out of time. In light of this, we sought and obtained the agreement of counsel on both sides to proceed to deal with the substantive appeal itself.

The appeal

[13] The regimes of rules 15.2(b) and 26.3(1)(b) of the CPR, under which the court may respectively grant summary judgment or strike out a defence, are free from ambiguity. They provide that:

Rule 15.2

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) …
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

Rule 26.3(1)

> "In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> (a) …
>
> (b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings".

[14] The test for the appropriateness or otherwise of entering summary judgment that is set out in **Swain v Hillman** [2001] 1 All ER 91 directs the court to consider whether there is a real as opposed to a fanciful prospect of success. Lord Woolf MR, at page 92 of the judgment, in addressing rule 24.2 of the English CPR (which is similar to the Jamaican rule 15.2) opined that:

> "'Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

[15] However, critically, Lord Woolf MR further noted that summary judgment is unsuitable for cases in which there are issues that should be investigated at trial, as the determination of an application for summary judgment should not involve the conduct of a mini-trial.

[16] Accordingly, the learned judge, in the exercise of her discretion in deciding whether to grant or refuse summary judgment would be constrained to consider the respondent's prospects of succeeding in his defence in conjunction with the appropriateness of summary judgment, in view of the issues which arise in the case.

[17] It has also been recognized that striking out is a draconian order which must be used sparingly, as it deprives parties of the benefits of a trial (see, for example, **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934, per Lord Woolf MR, page 940). On the other hand, striking out protects the proceedings of the court from abuse (similarly to what obtains when summary judgment is granted), and it prevents plainly hopeless cases from continuing.

[18] In this case, central to the appellant's application to strike out or for summary judgment, is the respondent's alleged factual inconsistency of how the accident occurred, as set out in his defence, vis-à-vis the police statement. The appellant argues that the inconsistency demonstrates that the defence is false. That contention is also highlighted by the nature of the issues which the appellant set out for consideration before the learned judge in the application below. Ultimately, the resolution of the apparent factual inconsistency and discrepancies is contingent on the determination of credibility. However, credibility is best tested through the rigours of cross-examination, where the trial judge is positioned to observe the demeanour of witnesses to determine what evidence to reject and/or accept.

[19] Further, the defence that was put forward could not be viewed *prima facie* as hopeless, as it amounts to more than a mere denial and presents an alternative version, to that of the appellant's, of how the accident occurred. Accordingly, the matter of the truth or falsity of the respondent's defence is best left for determination at trial (see **Three Rivers District Council and others v Bank of England (No 3)** [2001] 2 All ER 513).

[20] In relation to the contention that the respondent's failure to file an affidavit in response to the application below was determinative of the application against him, the court considered the case of **ED&F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472. It is settled that the burden of proof on an application

for summary judgment rests on the applicant to prove that the respondent has no real prospect of success. If the applicant *prima facie* discharges that duty, thereafter, a respondent contesting such an application is required to show that his case crosses the merely-arguable threshold. In our finding, the appellant has failed to establish that the respondent has no real prospect of success. In that regard, Lord Justice Potter, at paragraph 9 of the judgment stated:

> "the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success."

[21] In the result, the procedural appeal is dismissed. In relation to how the court has treated with the appeal and the procedural issues on both sides, the court is of the view that no order as to costs would be the appropriate costs order to make in all the circumstances. The court also notes that there is no basis on which it could make the orders requested by the appellant for wasted costs against the respondent's attorneys-at-law below, in relation to the conduct of the case.

V HARRIS JA

[22] I have read in draft the judgment of F Williams JA and agree with his reasoning and conclusion.

BROWN BECKFORD JA (AG)

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

F WILLIAMS JA

ORDER

(i) Appeal dismissed.

(ii) No order as to costs.