[2024] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2022CV00106

APPLICATION COA2023APP00139

BETWEEN THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR OF THE ESTATE OF WESTON WILSON, DECEASED) APPLICANT

AND AIRLIFT HANDLERS LIMITED 1ST RESPONDENT

AND MICHAEL ANGELO DALEY 2ND RESPONDENT

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the applicant

Mark-Paul Cowan instructed by Nunes Scholefield Deleon & Co for the 1st respondent

2nd respondent not appearing or represented

1 July and 4 October 2024

Civil procedure – Security for costs in appeal proceedings – Order of a single judge of appeal for the appellant to pay security for costs – Failure of the appellant to comply with the order for security for costs due to impecuniosity – Application to vary or discharge order for security for costs

MCDONALD-BISHOP JA

[1] On 15 June 2023, Simmons JA ('the single judge'), in a written judgment cited as **Airlift Handlers Limited and Michael Angelo Daley v The Administrator General for Jamaica** [2023] JMCA App 20, granted an application for security for costs by the 1st respondent, Airlift Handlers Limited ('Airlift Handlers'), against the appellant, the

Administrator General for Jamaica (Administrator of the Estate of Weston Wilson, deceased) ('the Administrator General').

[2] By a re-listed notice of application (originally filed on 29 June 2023), the Administrator General now seeks to discharge or vary the single judge's order, contending that she wrongly exercised her discretion to order security for costs.

[3] The relevant factual and procedural background to the Administrator General's re-listed application is as follows.

The relevant background

[4] On 5 October 2005, Weston Wilson ('the deceased') suffered fatal injuries when a bus on which he was travelling collided with another vehicle. The bus was owned by Airlift Handlers and admittedly driven by Mr Daley as Airlift Handlers' servant or agent.

[5] The deceased died intestate, leaving no assets. It is, therefore, uncontroversial that the deceased's estate was impecunious. Letters of Administration were granted to the Administrator General in 2008. In 2009, the Administrator General filed a claim in the Supreme Court against Airlift Handlers and the 2nd respondent, Michael Angelo Daley (together 'the respondents'), under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act, for the benefit of the deceased's four children. In 2011, the Administrator General also filed a claim against Merrick Myrie and Nicole Dwyer, the owner and driver, respectively, of the other vehicle involved in the collision. These claims by the Administrator General were consolidated in 2012.

[6] The respondents agreed, among other things, that the collision occurred and that Mr Daley drove the bus in which the deceased was travelling as Airlift Handlers' agent or servant. The respondents also agreed to several documents relating to the costs of funeral expenses, the death of the deceased and the deceased's income, as well as photographs of the vehicles involved in the collision. However, the respondents denied that Mr Daley was negligent and asserted that the collision was caused by the negligence of the driver of the other vehicle involved in the collision. The respondents also filed a

witness statement by Leon Stephenson, a passenger on Airlift Handlers' bus. Mr Stephenson's evidence was the only evidence of how the accident occurred and was supportive of Airlift Handlers' assertions that Mr Daley was not negligent and that the driver of the other vehicle solely caused the collision.

[7] The owner and driver of the other vehicle failed to file a defence, and, consequently, a default judgment was entered against them.

[8] At the trial before Wint-Blair J ('the trial judge'), the only witnesses who gave evidence on behalf of the Administrator General were children of the deceased who were not present at the accident. Their evidence exclusively addressed the impact of the deceased's death on them as his children. Therefore, the Administrator General led no direct evidence as to how the accident occurred.

[9] The Administrator General's approach to the claim was encapsulated in the affidavit of Ms Geraldine Bradford, attorney-at-law in the office of the Administrator General, filed in this court in response to the application for security for costs. Ms Bradford explained the approach adopted by the Administrator General in this way:

> "12. The [Administrator General] called no witnesses as to how the collision occurred but relied on the doctrine of res ipsa loquitor where that once there are two vehicles and the Claimant died as a result of a collision between the two vehicles if there is no evidence to show which vehicle it is to blame then both vehicles are equally liable for the accident."

[10] At the end of the Administrator General's case at trial, the respondents made a no-case submission on the basis that no evidence was adduced to support a finding of negligence on the part of the respondents. In response, the Administrator General submitted that the doctrine of *res ipsa loquitur* applied, notwithstanding it was not pleaded in the claim.

[11] In resisting the no-case submission, the Administrator General argued that, in the absence of an explanation, the proper inference to be drawn was that Airlift Handlers'

staff bus was not driven with the standard of care required by law and, therefore, Mr Daley as the driver of the bus was negligent.

[12] In a written judgment (bearing neutral citation [2022] JMSC Civ 177), the trial judge held that the doctrine of *res ipsa loquitur* did not apply. She stated at para. [47] of the judgment that, "[i]n the case at bar, there is no evidence from the [Administrator General], save that the deceased was a passenger in a vehicle, and a collision occurred". At para. [48] of the judgment, the trial judge continued:

> "There is agreed evidence exhibited in this trial. These are photographs of the damaged vehicles. The photographs show, that there was no damage to the front of the Airlift Handler's vehicle. Instead, the damage was to the right side of its vehicle. The damage was confined to the front of the vehicle operated by Nicole Dwyer. There is no evidence led by the claimant to support an inference, that both drivers encroached, or that the accident occurred in the centre of the road, or that both drivers must be negligent."

[13] The trial judge noted at para. [57] of the judgment that Airlift Handlers defended the claim, laying blame for the collision at the feet of Nicole Dwyer and that, in keeping with each authority cited by the Administrator General in support of her argument, "…the [Administrator General] was required to lead evidence, amounting to a *prima facie* case in negligence, before the [respondents] were called to answer the [Administrator General's] case" (para. [58]). The Administrator General failed to do so; therefore, the claim against the respondents could not succeed.

[14] In arriving at her conclusion, the trial judge considered the witness statement of Leon Stephenson, the respondents' eyewitness. Given that a no-case submission was made, Mr Stephenson was not called as a witness in the trial. Despite that, the trial judge examined Mr Stephenson's witness statement and concluded that the respondents had discharged their evidential burden to rebut any *prima facie* case of negligence made out by the Administrator General against them.

[15] In the circumstances, the trial judge refused to enter judgment for the Administrator General against the respondents. However, the trial judge awarded general

and special damages and costs in favour of the Administrator General against Merrick Myrie and Nicole Dwyer, the owner and driver of the other vehicle involved in the collision. The trial judge also awarded costs to the respondents.

The proceedings in the Court of Appeal

[16] The Administrator General filed a notice and grounds of appeal seeking to have judgment entered for her against the respondents and an award of damages made against them. Among the challenges made were that the trial judge erred when she relied on Leon Stephenson's witness statement, in circumstances where he had not given evidence in the trial, and in her conclusion that the doctrine of *res ipsa loquitur* did not apply.

[17] Following the filing of the appeal, Airlift Handlers filed an application in this court for security for its costs.

[18] In her written judgment, the single judge gave comprehensive reasons for granting the application for security for costs, which, in summary, are as follows:

> (1) It appeared from the affidavit evidence of the Administrator General that the deceased's estate is impecunious and is, therefore, likely to be deterred from pursuing the appeal if the order for security for costs is made. Impecuniosity, however, is not an automatic bar to making an order for security for costs. In considering whether granting the order would result in the denial of justice to the Administrator General, a relevant factor was the appeal's prospect of success.
>
> (2) In circumstances where a defendant adduces evidence, that evidence must be evaluated to see if it is reasonable for the court to draw an inference of negligence from the mere fact that the accident occurred, and, therefore, the doctrine of *res ipsa loquitur* applies. The Administrator General, in the present case,

relied on the evidence of three witnesses who were not witnesses as to fact and, as such, could not speak to the circumstances in which the collision occurred. Therefore, the doctrine of *res ipsa loquitur* does not apply to give rise to an inference of negligence on the part of the respondents. As a result, the appeal against the judge's finding that the doctrine of *res ipsa loquitur* does not apply is devoid of merit.

(3) The parties agree that Mr Stephenson did not give evidence at the trial. Whilst it could be said that the trial judge erred in considering Mr Stephenson's evidence, that error is unlikely to affect the outcome of the appeal as the Administrator General failed to present any evidence pertaining to liability. Therefore, the trial judge did not err in upholding the no-case submission, and the appeal has no prospect of success.

(4) While there was evidence from the Administrator General that the deceased's estate was impecunious, the order for security for costs would not stifle a genuine claim because the appeal has no likelihood of success.

(5) Because the Administrator General's appeal is unlikely to succeed, the interests of justice favoured the grant of an order for security for costs. Further, given that the deceased's estate is, from all indications, impecunious, it would be unfair to the respondents if the costs incurred in defending the appeal could not be recovered in a timely fashion or at all. Therefore, in all the circumstances, the interests of justice favoured the grant of the application for security for costs.

[19] In these premises, the single judge ordered the Administrator General to pay security for Airlift Handlers' costs of the appeal in the sum of $1,500,000.00 into an interest-bearing account in the joint names of the parties' attorneys-at-law within 90 days. The single judge also ordered that the appeal would stand dismissed with costs if the security was not paid in accordance with the terms of the order.

[20] Within the 14 days prescribed by rule 2.10 of the Court of Appeal Rules, 2002 ('CAR') for the filing of such an application, the Administrator General filed the application to vary or discharge the single judge's order. The main grounds of the application are that the single judge:

> (1) imposed onerous conditions which the appellant is unable to comply with within the time ordered for doing so or at all due to the appellant's impecuniosity;
>
> (2) failed to consider the appellant's peculiar circumstances and that more time would have been needed to put together the funds to comply with such orders by any beneficiaries of the estate;
>
> (3) relied on matters that were not in evidence before her in exercising her discretion and coming to her decision;
>
> (4) failed to consider that the appellant is likely to succeed on this appeal; and
>
> (5) failed to consider that the Administrator General is likely to suffer hardship, and irredeemable prejudice and be prevented from pursuing a meritorious appeal if the order is not set aside.

[21] Consistent with the grounds of the application, counsel for the Administrator General, Ms Jacqueline Cummings, contended that the single judge failed to consider relevant factors and considered irrelevant factors, and that the order for security for costs was not just in all the circumstances. Therefore, in keeping with the established

jurisprudence regarding the threshold to be reached if this court is to interfere with the exercise of a single judge's discretion, the single judge's orders should be set aside (see **Advantage General Insurance Company Ltd (formerly United General Insurance Company) v Marilyn Hamilton** [2021] JMCA App 25 at para. [14])

[22] The single judge's finding that the appeal is devoid of merit is of particular concern to the Administrator General. On her behalf, Ms Cummings argued that the trial judge was wrong as a matter of law in finding that the doctrine of *res ipsa loquitur* does not apply and, accordingly, the Administrator General has a meritorious appeal against that finding. Therefore, it would have been in the interests of justice to refuse the application for security for costs, as the order for security for costs amounted to a denial of justice to the deceased's impecunious estate.

[23] In considering the terms of the application, it is observed that although the Administrator General's application seeks, in the alternative, that the order for security for costs be varied, the specific terms of the variation being sought have not been indicated in the application itself or by way of submissions before this court.

[24] Airlift Handlers, the sole beneficiary of the order for security for costs, strenuously resisted the application and sought to have it dismissed with costs. Through its counsel, Mr Mark-Paul Cowan, Airlift Handlers submitted that there is no dispute that the deceased's estate is impecunious. Furthermore, the single judge was correct in finding that the appeal lacked merit. Given the impecuniosity of the deceased's estate and the unmeritorious appeal, the general rule in **Speedways Jamaica Ltd v Shell Company (WI) Limited and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004, applies, which is that the court will grant an order for security for costs in such circumstances.

[25] Mr Cowan also drew the court’s attention to the fact that, to date, the Administrator General has not complied with the single judge's order. Therefore, he contended that given that the period fixed for compliance with the single judge's order

has elapsed, the sanction imposed by the single judge (that the appeal would be dismissed with costs if the Administrator General failed to comply with its terms) had taken effect. For all these reasons, counsel urged the court to refuse the application.

Analysis and conclusions

[26] As a starting point, I have noted the single judge's order that the Administrator General's appeal would be dismissed with costs if the security for costs was not paid according to the terms of the order, as Mr Cowan helpfully highlighted. Up until the hearing of this application, over a year after the single judge made the order, the Administrator General had not given security for costs in keeping with the order.

[27] Although the application to vary or discharge the order was filed within the time prescribed by the CAR, the application did not operate as a stay of the order. Therefore, the Administrator General should have applied to stay the single judge's order, pending the determination of the application, to stop the time for compliance from running. However, no application for a stay was made. Given that failing, the Administrator General would have had to apply for an extension of time to comply with the single judge's order, pending the determination of the application. Inexplicably, this course was also not pursued. The upshot of all this is that the Administrator General's failure to comply with the single judge's order within the time specified has resulted in the automatic dismissal of the appeal with costs to the respondents, regardless of the reasons for the non-compliance.

[28] As Mr Cowan correctly submitted, the appeal having been automatically dismissed 90 days after the single judge's order (on or about 17 September 2023), the Administrator General would have had to seek and obtain an order for relief from sanctions under rule 26.8 of the Civil Procedure Rules (which applies to proceedings in this court by virtue of rule 2.19(4) of the CAR), as a pre-requisite to the application to vary or discharge the single judge's order. The Administrator General's failure to do so operates as a conclusive reason to refuse the present application because pursuing the application without relief from sanction is an exercise in futility.

[29] In any event, and even more importantly, having heard and considered the oral and written arguments of counsel on the substantive application to vary or discharge the single judge's order, I am satisfied that even if the Administrator General were granted relief from sanction, and there were no other barriers to the consideration of the application, there would be no basis upon which to disturb the exercise of the single judge's discretion to grant the order for security for costs. The single judge's decision to grant the application for security for costs was obviously hinged on her view that the deceased's estate was impecunious and that the Administrator General's appeal was without merit. Therefore, it would have been in the interests of justice to permit the Administrator General to pursue the appeal only if security for costs was provided as stipulated by her order.

[30] I agree with the reasoning and conclusions of the single judge in this regard. In the first place, it is uncontroversial that the deceased's estate was impecunious. Therefore, this is a case in which the court will ordinarily grant security for costs (see **Speedways Jamaica Ltd v Shell Company (WI) Limited and Another** at page 6). Secondly, the appeal lacks merit and, therefore, has no real prospect of success. Both the single judge and the trial judge pointed out that the doctrine of *res ipsa loquitur* permits a claimant to invite the court to draw an inference that, on a balance of probabilities, the claimant's injuries could not have occurred but for the negligence of the defendant. The doctrine, however, does not absolve a claimant of the duty to adduce sufficient evidence from which the inference of negligence can be drawn.

[31] As the trial judge stated, the Administrator General did not include a plea of *res ipsa loquitur* in her statement of case. The Administrator General's position was, however, that the fact of the collision alone, without any evidence as to the events leading up to the collision, was sufficient to establish a *prima facie* case of negligence against the respondents. In other words, the position taken was that the agreed fact that the accident occurred obviated the need for the Administrator General to adduce any evidence at all and was sufficient to discharge the burden of establishing a *prima facie* case of negligence against the respondents. Regrettably, however, the Administrator General’s position runs

contrary to the general principles expressed in **Lloyde v West Midlands Gas Board** [1971] 2 All ER 1246, where Megaw LJ discussed the meaning of and requirements for the invocation of *res ipsa loquitur*, as follows:

> "[*Res ipsa loquitur*] means that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) **on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible**, which act or omission constitutes a failure to take proper care for the plaintiff's safety." (Emphasis added)

[32] These statements by Megaw LJ are demonstrative of the well-settled principle of law that a *prima facie* case of negligence cannot be established with recourse to *res ipsa loquitur*, without some evidence to support an inference of negligence on the part of a defendant.

[33] There was no evidence at all on the Administrator General's case to suggest negligence on the part of the respondents, as the Administrator General called no witnesses of fact to give evidence of the circumstances surrounding the collision or how it occurred. All there was on the Administrator General's case were the admissions by the respondents that the collision took place, that the deceased suffered fatal injuries and photographs of the collision. There could, therefore, be no basis upon which the trial judge could have made an inference of negligence on the part of the respondents.

[34] In an attempt to resist this conclusion, Ms Cummings relied on the cases of **Jeffrey Johnson v Ryan Reid** [2012] JMSC Civ 7, **Baker v Market Harborough Industrial Co-operative Society Ltd** [1953] WLR 1472, **Ng Chun Pui et al v Lee Chuen Tat** [1988] RTR 298 **and Igol Coke v Nigel Rhooms** [2014] JMCA Civ 54. Ms Cummings contended that these cases establish that a passenger is entitled to rely on the fact of a collision, without more, to prove its case of negligence against drivers of the motor vehicles involved in the collision.

[35] These authorities were cited before the trial judge and the single judge and discussed at some length by them in their judgments. I, therefore, do not consider it necessary to discuss the authorities in detail. It suffices to state that on the strength of those authorities, I agree with the arguments advanced by Mr Cowan that none of the authorities cited by Ms Cummings support the conclusion that the fact that there was a collision, without any evidence on the Administrator General's case as to the circumstances surrounding the accident, is enough to give rise to a *prima facie* case of negligence on the part of the respondents. As Mr Cowan submitted, in each of the cases cited, there was some evidence regarding the circumstances of the accident from which it was reasonable to draw an inference of negligence.

[36] Having failed to plead *res ipsa loquitur* or to adduce any evidence of the circumstances of the collision, the Administrator General would be hard-pressed on appeal to demonstrate that the trial judge was wrong to uphold the no-case submission. In my view, the appeal against the trial judge's judgment is bound to fail, as it ultimately seeks to have this court enter judgment against the respondents for negligence. I am accordingly satisfied that the single judge was correct in concluding that the Administrator General's appeal is without merit. That conclusion, in addition to the impecuniosity of the deceased's estate, served as a sufficient basis for the single judge to grant the order for security for costs.

[37] Accordingly, this court cannot justifiably conclude that the single judge erred in holding that, in the interests of justice, the Administrator General should not proceed with the appeal without first giving security for Airlift Handlers' costs of the appeal.

Conclusion

[38] In conclusion, I would hold that the appeal has been automatically dismissed due to the Administrator General’s non-compliance with the single judge's order within the specified time limit, and with there being no stay of execution, an extension of time within which to comply with the single judge’s order or relief from sanctions. Accordingly, the

application to vary or discharge the single judge's order is an exercise in futility and ought to be dismissed for this reason alone.

[39] In any event, there is an even more compelling reason for the refusal of the Administrator General's application to disturb the single judge's order, and it is this: given the impecuniosity of the deceased's estate and the incontestable finding of the single judge that the appeal is unmeritorious and, therefore, with no prospect of success, there is no error in the exercise of her discretion to grant the application for security for costs. Accordingly, there is no justifiable basis which would entitle this court to interfere with the single judge's decision even if the appeal had not been automatically dismissed for non-compliance with her order. The Administrator General has, therefore, failed to satisfy the court that the interference with the single judge's decision is warranted.

[40] For all the preceding reasons, I would refuse the Administrator General's application to vary or discharge the single judge's order with costs to Airlift Handlers, the 1st respondent.

[41] Lastly, and for the avoidance of doubt, I would also formally declare that the appeal is dismissed with costs to the respondents by operation of the order of the single judge made on 15 June 2023.

D FRASER JA

[42] I have read, in draft, the judgment of McDonald-Bishop JA and agree with her reasoning and conclusions.

DUNBAR-GREEN JA

[43] I, too, have read the draft judgment of McDonald-Bishop JA and agree.

MCDONALD-BISHOP JA

ORDER

1. The re-listed notice of application to vary or discharge the orders of Simmons JA dated 15 June 2023 is refused.

2. Pursuant to the order of Simmons JA made on 15 June 2023 on Airlift Handlers' application for security for costs of the appeal, the appeal is dismissed with costs to the respondents for non-compliance with the said order of Simmons JA.

3 Costs of the application to the respondents to be agreed or taxed.