[2013] JMCA App 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 104/2007

APPLICATION NO 178/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN	**PETE DRUMMOND**	**1ST APPLICANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LTD**	**2ND APPLICANT**
AND	**CARL MCFARLANE**	**RESPONDENT**

Maurice Manning and Miss Stephanie Forte, instructed by Nunes, Scholefield Deleon and Company for the applicants

Roderick Gordon instructed by Don Foote for the respondent

19 & 22 February 2013

ORAL JUDGMENT

MORRISON JA

[1] This is an application to strike out an appeal from the judgment of M McIntosh J given on 18 September 2007. The judgment was given for the respondent in a personal

injury claim, but the judge found him 70% contributorily negligent, resulting in an award to him of 30% of the damages assessed.

[2] By notice of appeal filed on 4 October 2007, the respondent challenges the judge's findings of contributory negligence and the quantum of damages assessed. The notice of appeal also challenges the admission in evidence of a statement on which the judge had relied for her findings. On 26 February 2009 the respondent filed the record of appeal, which did not include either the notes of evidence or the judgment appealed from.

[3] At a case management conference held on 26 May 2009 Dukharan JA ordered that the respondent file a supplemental record of appeal to include the notes of evidence and fixed the appeal for hearing on 28 September 2009. On that date, the appeal was taken out of the list as a result of the unavailability of the notes of evidence and the court directed that the matter should not be relisted until the parties indicated their readiness. On that occasion Panton P also recommended to the parties that efforts be made to agree the notes of evidence in the absence of the learned judge's notes.

[4] By letters dated 29 September 2009, 24 March 2010 and 19 September 2011, the applicants' attorneys-at-law wrote to the respondent's attorney-at-law seeking to follow up on the orders and the suggestions made by the court when the matter was before it on 28 September 2009. In the earliest letter, the applicants' attorneys-at-law wrote enquiring whether the notes of evidence were available and whether the attorney

for the respondent would be agreeable to adopting the president's suggestion. No response was forthcoming. By letter dated 24 March 2010 the applicants' attorneys-at law again wrote to the respondent's attorney-at-law requesting a response again, no response was forthcoming. A year and a half later, by letter dated 19 September 2011, by which time the learned trial judge had already retired almost a year before, the applicants' attorneys-at-law again wrote to the respondent's attorney-at-law, referring to the two year time period over which they had been seeking to agree the notes of evidence if available. By that letter, the respondent's attorney-at-law was notified of the applicants' intention to apply to the court to strike out the appeal if a response was not provided within 21 days.

[5] There was no response to that last letter, hence this application to strike out the matter, which was actually filed on 16 August 2012. It is clear that the viability of this appeal depends on the court being able to consider the evidence given at trial, as the grounds, in the main, challenge the judge's assessment of that evidence. Nevertheless, the respondent's attorney-at-law did nothing.

[6] When the matter came on for hearing on Monday, 18 February 2013, Mr Roderick Gordon appeared for the respondent instructed by the attorney on the record. The matter was at his request adjourned to the following day, Tuesday, 19 February, to permit the filing of an affidavit. That affidavit, which was filed on the morning of 19 February at 9:20am, was sworn to by a Miss Marva Bowen who described herself as the secretary to Mr Don Foote, the attorney-at-law on the record for the respondent, who is

the appellant in the appeal. It spoke to the steps taken to obtain the judge's notes of evidence and, it referred to the fact that the judge had retired at the beginning of December 2010. However, the affidavit was completely silent as to the letters written by the applicants, as to why no responses has been made and why no steps had been taken to seek agreement of the notes of evidence, as the court had recommended more than three years before.

[7] The affidavit then stated that, on 12 February 2013, Miss Bowen was informed by Mrs Cooke, the office manager for the respondent's attorney-at-law, that she made contact with the learned retired judge who advised that she was no longer at the Supreme Court and had to rely on someone there to look for the records. Further, Miss Bowen said, on 18 February, that is, the morning on which the application to strike out was first called on before this court, Mr Foote himself spoke to the retired judge. We have to say that this is a wholly unusual manoeuvre in our experience and that the proper channel for such communications is through the Registrar of the court. Mr Foote was told by the judge that she had located the notes and was trying to have them prepared. Miss Bowen ended by saying she was informed by Mr Foote that he had spoken to the judge again on Tuesday, 19 February, the very morning on which the affidavit was being sworn to, about the notes and the judge told him that she had someone working on preparing the notes and they should be ready in two to three weeks.

[8] Mr Manning for the applicants drew attention to the sorry history which I have just described and pointed out, that unlike the respondent, the applicants had done all that they had been required to do by the case management orders which had been made over three years ago. He observed further that the affidavit sworn to by Miss Bowen on 19 February offered no explanation for the lapse of time since then and that the respondent had to date made no application to the court for extension of time to do anything which he was required to do by the case management orders.

[9] Mr Gordon for the respondent resisted the application on the ground that the notes of evidence were critical to the appeal and the provision of the notes of evidence was not a matter within the respondent's control. Therefore, having regard to the overriding objective, he submitted, striking out the appeal in these circumstances would be premature and harsh. Mr Gordon therefore urged us to make an unless order.

[10] There can be no question that the delays in prosecuting this appeal and the level of inaction by the respondent's attorney-at-law have been extraordinary. It is typical that the only response made on the respondent's behalf was made at the last moment and even then, by the respondent's attorney's secretary and not by the attorney himself. Bearing in mind that the action in this case relates to a 1990 accident, we consider this a case in which the court is fully justified in making an order for immediate striking out of the appeal.

[11] In doing so, we are very conscious of the fact that this is a case in which it is the client himself who will suffer from the failure of his attorney-at-law to conform to

any kind of acceptable standard of professional practice, nevertheless this is a case in which the spirit of the rules requires us at this stage to strike out for want of prosecution and we accordingly make an order in terms of the notice of application which was filed on 16 August 2012.

[12] So, the appeal filed herein on 4 October 2007 is struck out and there will be costs to the applicants to be taxed if not sooner agreed.