[2013] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 99/2008

APPLICATION NO 149/2009

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**HUGH C HYMAN & CO (A Firm)**	**1ST APPLICANT**
	HUGH C HYMAN	**2ND APPLICANT**
AND	**DAVE BLAIR**	**RESPONDENT**

Allan Wood QC and Miguel Williams, instructed by Livingston, Alexander & Levy for the applicants

Kevin Williams, instructed by Grant, Stewart, Phillips & Co for the respondent

23 January 2012 and 21 June 2013

HARRIS JA

[1] I have read in draft the judgment of my brother Dukharan JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] This is an application to discharge an order made by Harrison JA (as he then was) in chambers on 26 March 2009, dismissing a procedural appeal. The applicants also seek an order that leave be granted to file and serve their defence within 14 days from the date of the hearing of this application.

The factual background

[3] On 19 December 1991, the respondent was seriously injured while on the job and in the employment of Alumina Partners of Jamaica (ALPART). He brought an action against ALPART and sought damages in respect of burns and other injuries he sustained. Between 1991 and 1995, the respondent was represented by Mr Lance Cowan, who was then an associate at Dunn Cox & Orrett. In 1995, Dunn Cox & Orrett merged with Milholland, Ashenheim and Stone to form the firm Dunn, Cox, Orrett & Ashenheim. It then became clear that the new firm had a conflict of interest in representing the respondent as ALPART was a client of the old firm of Milholland, Ashenheim and Stone. As a result of the merger, Mr Cowan handed over the respondent's file to Mr Hugh Hyman and his firm (the applicants) in October 1995. At this point, approximately four years had already expired with regard to the cause of action in negligence that had arisen against ALPART on 19 December 1991.

[4] The applicants resumed discussions with ALPART with a view to settling the matter. By December 1996, it became clear that ALPART was not prepared to settle on

the applicants' terms. The applicants were claiming in excess of $4,500,000.00 whereas ALPART was offering $650,000.00.

[5] On 27 December 1996, the applicants issued a writ of summons but no statement of claim was filed. It was not until 10 February 1999 that the applicants settled and filed the statement of claim. The writ that was filed on 27 December 1996 had not been served on ALPART and had expired on 26 December 1997. No application was made by the applicants prior to the expiry of the writ to extend its life.

[6] It was not until one year after, that the applicants on 24 December 1998, filed an ex-parte application to renew the writ and for leave to file the statement of claim and to serve both the writ of summons and the statement of claim.

[7] An order was made by Orr J on 11 January 1999, on an ex-parte application, renewing the writ of summons. Orr J extended time for service of the writ of summons and statement of claim on ALPART to within 30 days of 11 January 1999. This meant that service should have been effected on or before 10 February 1999. The writ was not sent for service on ALPART by registered post until 10 February 1999.

[8] On 25 March 1999, ALPART filed an application to set aside the service of the writ on the basis that it was served outside the limitation period. In a bid to avoid the matter being struck out, the respondent accepted $850,000.00 from ALPART in settlement of the claim filed in 1996. The respondent has contended that due to the applicants' negligence he had lost the opportunity to pursue his claim against ALPART

and that he was forced to compromise his claim against ALPART and had only recovered a portion of what he would have obtained in the suit. It is against this background that he filed a claim against the applicants seeking damages for negligence.

[9] The applicants failed to file an acknowledgment of service of the claim and statement of defence within the stipulated time. Judgment in default was entered against them. They filed an application to have the default judgment set aside. The matter came before Brooks J (as he then was), who refused to set aside a regularly entered judgment.

[10] The order of Brooks J was appealed and it came before Harrison JA on 26 March 2009 as a procedural appeal. Harrison JA agreed with Brooks J and said at para 30 of his judgment:

> "The Appellants would in my view, have great difficulty challenging the issue of liability. In my judgment, the next stage in the proceedings would be the assessment of damages and it would be for the judge making that assessment to say what value should be placed on the loss suffered by the Respondent as a result of the Appellants' negligence."

At para 31 he concluded:

> "Clearly the Appellants have not satisfactorily demonstrated that there is some likely prospect of success on their part should the matter proceed to trial."

The appeal was dismissed with costs to the respondent to be taxed, if not agreed.

[11] It is against this background that the applicants have sought orders to discharge the judgment of Harrison JA and that they be granted leave to file and serve their defence within 14 days from the date of the hearing of this application.

[12] The grounds on which the applicants are seeking the orders are as follows:

> "1. The learned Justice of Appeal was wrong by holding that the Appellants had no real prospect of success since the Respondent had suffered no loss, which was occasioned by the Appellants' alleged negligence;
>
> 2. The finding that the Respondent had lost something of value was contrary to the weight of evidence;
>
> 3. The learned Justice of Appeal in coming to his conclusion failed to consider or appreciate:
>
> (a) That in order for the Respondent to establish his cause of action he would have been obliged to show that he suffered loss or damage and that this issue having been raised on the application to set aside judgment was a triable issue which entitled the Appellants to a hearing.
>
> (b) An assessment of damages to determine the amount of damages to be paid to the Respondent is not equivalent to a trial on the merits because even if nominal damages or no damages were awarded on the assessment there would have still been a judgment entered against the Appellants (a set of professional persons). Where [sic] if the Appellants had succeeded at trial they would have been completely exonerated.
>
> (c) Further, on an assessment the Appellants would have been obliged to bear the costs of the judgment and the costs of assessment. While if the Appellants were successful at trial,

it would be for the Respondent to pay the costs.

(d) At a trial the Respondent would still have an opportunity to prove its [sic] damages if any. While allowing the Appellant a similar opportunity to disprove liability.

4. The learned Justice of Appeal failed to appreciate that if there was no loss to the Respondent, the Appellants would not be liable for damages to the Respondent.

5. The learned Justice of Appeal was wrong by not considering the prospect of success of the Respondent's claim if he had not lost the opportunity to pursue the claim.

6. The learned trial judge was wrong in not considering whether the amount for settlement was adequate compensation and therefore the Respondent would not have suffered any loss."

[13] Mr Wood QC, for the applicants, argued the grounds of the application together for convenience. He was critical of rule 12.13 of the Civil Procedure Rules (CPR), in that, by that rule, the applicants role would be that they could not actively participate at the assessment of damages except in relation to costs. He submitted that that result is so startling and so repugnant to any principles of natural justice that he would ask this court to review the matter. He however conceded that there was an element of negligence on the part of the applicants. He urged the court to set aside the default judgment. However, he added that if that order is to stand, then alternatively the applicants could be allowed to fully participate at the assessment.

[14] Learned Queen's Counsel further submitted that the applicants had a constitutional right to participate, as the Constitution guarantees the right to a fair hearing. He argued that any rule in the CPR must be read subject to the constitutional guarantee. He said rule 12.13 would be an absurdity if one could not participate.

[15] Learned Queen's Counsel expressed concern that the sum of $850,000.00 was not disclosed in the respondent's particulars of claim, as this sum was categorized by Brooks J as an ex-gratia payment. He submitted that this should be allowed to be brought out at the assessment of damages. Counsel further submitted that the issue of damages is a part of the cause of action of negligence. If the respondent failed to prove damages, he would have lost his case against the applicants. This was an issue of liability and should have been sent to trial. He further submitted that if the applicants were correct that $850,000.00 was adequate compensation, the respondent would not be able to establish that "he lost something of value" and as a consequence the applicants would have succeeded in proving that the 1996 suit was of no value to the respondent.

[16] Counsel submitted that the court had a wide discretion to set aside a default judgment and that under rule 16.3 the applicants should be allowed to be heard on the assessment. Counsel cited **Mills v Lawson and Skyers** (1990) 27 JLR 196, **Blagrove v Metropolitan Management Transport Holdings Limited and Lloyd Hutchinson** SCCA No 111/2005 delivered on 10 January 2006 and **Strachan v The Gleaner Co Ltd** [2005] 1 WLR 3204.

[17] Mr Williams, for the respondent, submitted that the applicants had no prospect of successfully defending the claim. He said once the applicants failed to have the default judgment set aside, they would only have a limited window for them to participate in the matter as set out in rule 12.13 of the CPR. He submitted that Harrison JA was correct when he found that the applicants' failure to serve the writ of summons in accordance with the order of 1 January 1999 rendered the respondent's claim against ALPART worthless in law and/or in equity. The respondent's loss was occasioned by the applicants' negligence.

[18] On ground two, counsel submitted that the applicants never raised a challenge that there was merit in the respondent's claim against ALPART. That claim, having been rendered worthless by the applicants' negligence, Harrison JA was correct when he said, in holding that Brooks J was correct in his approach to the application that was before him, that the respondent had indeed lost something of value and that it was for an assessment court to determine what was the exact value of that loss.

[19] On ground three, counsel submitted that the question of loss, if such a question arose on the application to set aside the default judgment, was not such as to warrant a trial as the process of assessment of damages would quantify that loss attributable to the applicants' negligence. Counsel further submitted that despite the enactment of the CPR, an assessment of damages is a trial and there is no rule or provision in part 13 of the CPR which mandates a judge, who is considering an application to set aside a default judgment, to give consideration as to where the costs ought to lie in an

assessment as against a trial. It was counsel's submission that the judge below made a clear finding of negligence against the applicants with regard to the failure to serve the writ of summons in accordance with the order of 11 January 1999.

[20] On ground four, it was submitted by counsel that the applicants having been found negligent, it was for an assessment court to say what value was to be placed on the loss suffered by the respondent as a result of the applicants' negligence.

[21] On grounds five and six, it was submitted by counsel that since there was no challenge to the respondent's prospect of success against ALPART, it was proper to leave the matter of quantification or valuation of that prospect to the assessment court. It was further submitted that both Brooks J and Harrison JA found that the respondent should have his damages assessed, and at the assessment, the court should take into consideration how those damages have been affected by the ex gratia payment. This, counsel submitted, was the correct approach.

Analysis

Ground one

[22] "The learned Justice of Appeal was wrong by holding that the Appellants had no real prospect of success since the Respondent had suffered no loss, which was occasioned by the appellants' alleged negligence."

The crucial issue in this application, as Harrison JA found, is whether or not Brooks J had properly exercised his discretion when he refused to set aside a regularly entered judgment. In **Evans v Bartlam** [1937] 2 All ER 646, Lord Wright said at page 654:

> "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that, if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle."

Part 13.3 of the CPR states:

> "13.3 (1) 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."

There was no challenge as to whether the application before the judge below was made promptly, or whether the applicants had given sufficient reasons explaining the circumstances within which judgment came to be entered. The sole issue before Brooks J was whether or not the applicants had a real prospect of successfully defending the claim brought against them.

[23] The failure to serve the writ of summons by the applicants, in accordance with the order of 11 January 1999 is in my view fatal. As Harrison JA stated, the claim against ALPART was rendered worthless in law and/or in equity by the actions or omissions of the applicants. I agree with Harrison JA that the next stage in the proceedings would be the assessment of damages and it would be for the judge making that assessment to say what value should be placed on the loss suffered by the respondent as a result of the applicants' negligence. This ground fails, in my view.

Grounds two, three and four

[24] These grounds can be dealt with together for convenience:

> "The finding that the Respondent had lost something of value was contrary to the weight of the evidence before him."

It is clear that the applicants never raised a challenge in respect of the respondent's claim against ALPART. Once the court made a finding that there was negligence on the part of the applicants in their handling of the 1996 suit, which resulted in losses to the respondent, the learned judge below was correct to allow the matter to proceed to assessment of damages, in order for the court to determine what value should be placed on the respondent's losses.

[25] When a person brings an action against his former attorney for negligence in the conduct of proceedings which has led to his action being struck out, his loss is normally measured by reference to his prospects of success in the primary litigation - see **Kitchen v RAF Association** [1958] 1 WLR 563. **Mount v Barker Austin (a firm)** (1998) PNLR 493 makes it clear that an evidential burden rests on the negligent attorney to show that the earlier litigation had been of no value to the client, so he had lost nothing by the attorney's negligence.

[26] Brooks J had concluded that the respondent would have lost something of value and deserved to have that loss quantified. He said at page 13 of his judgment:

> "The process of assessment of damages is to quantify the loss which is attributable to the defendant's wrong. In my view if Mr Blair seeks to have his loss assessed then he will

> have the burden of proving his loss and how it has been affected, if at all, by the compromise."

[27] Harrison JA agreed with Brooks J that the respondent will have the burden of proving his loss and how it has been affected, if at all, by the compromise, and in my judgment, he was correct in doing so.

[28] On ground six, counsel for the applicants was concerned that the ex gratia payment made to the respondent would not be taken into account as no mention of it was made in the particulars of claim. I agree with Harrison JA that Brooks J was correct in finding that the court should take into consideration how those damages have been affected by the ex gratia payment.

Conclusion

[29] It is clear that rule 12.13 of the CPR applies. It is subject to and in conformity with the dictates of the Constitution - see **Blagrove v Metropolitan Management Transport Holdings Limited**. The applicants having failed to have the judgment set aside will only have limited participation at the assessment. I agree with Harrison JA that the applicants have not satisfactorily demonstrated that there is some likely prospect of success on their part should the matter proceed to trial.

[30] For the foregoing reasons, the application to discharge the order of Harrison JA is refused with costs to the respondent to be taxed, if not agreed.

HIBBERT JA (Ag)

[31] I too have read in draft the judgment of Dukharan JA and agree with his reasoning and conclusion.

HARRIS JA

ORDER

The application to discharge the order of Harrison JA is refused. Costs to the respondent to be taxed if not agreed.