[2024] JMCA App 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE BROWN JA

APPLICATION NO COA2023APP00158

BETWEEN	**DWAYNE JACOBS**	**APPLICANT**
AND	**PROGRESSIVE GROCERS OF JAMAICA LIMITED**	**RESPONDENT**

Richard Reitzin instructed by Messrs Reitzin & Hernandez for the applicant

Ms Ashley Mair instructed by Mayhew Law for the respondent

18 March and 12 April 2024

Civil Procedure — Application for leave to appeal – Master of the Supreme Court granting an extension of time within which to file a statement of defence – Whether affidavit evidence on which Master relied admissible – Reliance on hearsay as to the incident in issue – Whether draft defence indicated a real chance of defending against the claim – Civil Procedure Rules rr 30.3 and 30.5

BROOKS P

[1] Mr Dwayne Jacobs has applied for permission to appeal from a judgment of a Master of the Supreme Court. The learned Master delivered her decision on 29 June 2023 but refused permission to appeal. In her judgment, the learned Master granted the respondent to this application, Progressive Grocers of Jamaica Limited ('Progressive'), an extension of time in which to file and serve a defence to Mr Jacobs' claim against it. Mr Jacobs' claim was for damages for property damage and personal injury arising from a collision between his motor vehicle and one owned by Progressive, being driven at the time by its driver, Mr William Reid.

[2] Mr Jacobs asserts that the learned Master failed to appreciate that Progressive's affidavit, filed in support of its application for an extension of time in which to file its defence, was incurably flawed in that it relied on a document that it did not exhibit and that the draft defence that it exhibited did not disclose a real prospect of success.

The background to the application

[3] Mr Jacobs, having filed his claim against both Progressive and Mr Reid, served Progressive, a limited liability company, by registered post to its address. This constituted proper service and the claim documents were not returned unclaimed. Accordingly, Mr Jacobs had effected regular service. Progressive did not file an acknowledgement of service, and, on 22 October 2020, Mr Jacobs applied for judgment in default of an acknowledgement of service. The judgment in default had not yet been entered when Progressive's insurers brought the claim to its attention.

[4] On 22 December 2021, Progressive filed its application for an extension of time to file its defence. The affidavit in support of the application was sworn to by a director of Progressive, Mr Craig Chin. He deposed that Progressive had not received the claim form and that it was only in November 2021 that Progressive was made aware of the existence of the claim. He said that based on a report, it was Mr Jacobs who caused the crash. He exhibited a draft defence on behalf of Progressive averring the contents of the report.

[5] The learned Master accepted that Mr Jacobs was entitled to a regularly entered judgment in default, but that Mr Chin's affidavit satisfied the requirements for setting aside such a judgment in that:

a. the application was made within a reasonable time of Progressive becoming aware of the claim;

b. Progressive had a good explanation for not having filed its acknowledgement of service within the stipulated time; and

c. Progressive had demonstrated that it had a real prospect of mounting a successful defence to Mr Jacobs' claim.

Mr Jacobs' complaints

[6] Mr Jacobs proposes numerous grounds of appeal, some of which were submissions. In essence, however, they complained about the admission into evidence of portions of Mr Chin's affidavit insofar as they addressed the merits of Progressive's defence. The nub of the complaint is that Mr Chin could not properly rely on a, presumably written, report from Mr Reid that Progressive had received and that the draft defence is ineffective in disclosing a real prospect of success in that it is relying on that report.

[7] Mr Reitzin, on behalf of Mr Jacobs, submitted that the learned Master erred in failing to appreciate those defects. He submitted that Mr Jacobs ought to be allowed to demonstrate in an appeal, that the Civil Procedure Rules, 2002 ('CPR'), in rule 30.5, require that any document that is relied upon, should be exhibited. Mr Reitzin further submitted that the learned Master erred in finding that Mr Chin was relying on a report from Mr Reid, the driver of Progressive's vehicle. Learned counsel posited that the draft defence, in stating that Progressive has "received a report" setting out how the collision occurred, does not assert that there is a real prospect of mounting a successful defence.

[8] Learned counsel argued that any claim that the report was privileged, was not to be countenanced as, by disclosing the contents of the report, any privilege that might have attached to the document was waived.

The response

[9] Ms Mair defended the learned Master's reasoning and conclusion. Learned counsel submitted that rule 30.3(2)(b) of the CPR permits a deponent to depose as to his or her information and belief, where the source of the information is disclosed.

[10] She argued that Mr Chin stated that he was acting on information and belief and stated that he was relying on the report that he had received. Learned counsel submitted that Mr Chin's affidavit satisfied the requirements of an affidavit of merit and demonstrated a reasonable prospect of success.

[11] Learned counsel submitted that, for the purposes of rule 30.5 of the CPR, it could only be inferred that Mr Chin was relying on a document and even if he were doing so, such a document would be entitled to privilege.

Further information

[12] During oral submissions, counsel for both sides revealed that after the present application was filed, a judgment on admission of liability had been entered against Progressive and that the case had been scheduled for an assessment of damages.

[13] Ms Mair submitted that the proposed appeal, considering that development, was academic. She asked for costs on an indemnity basis. Although Mr Reitzin argued strenuously that the proposed appeal was not academic because there were serious issues to be resolved, it was apparent to the court, from correspondence disclosed by Mr Jacobs' attorneys-at-law, that the only driver was the issue of costs. Those attorneys-at-law indicated that the present application would only be withdrawn if, within seven days, Progressive paid Mr Jacobs' costs of the application that was before the learned Master.

The analysis of the application

[14] The learned Master exercised her discretion in extending the time within which Progressive should file and serve its defence. This court, as an appellate court, will only disturb a judicial officer's decision if he/she misunderstood the law or the evidence or erroneously drew an inference that certain facts existed or did not exist, or where his/her decision was demonstrably wrong or his/her decision is so aberrant that no judge having regard to his/her duty to act judicially could have reached it (see paras. [19] and [20] of **The Attorney General of Jamaica v John MacKay** [2012] JMCA

App 1). In assessing this matter, the court is also mindful that for Mr Jacobs to be successful in his application for leave to appeal, he must establish that his appeal has a real chance of success (see rule 1.8(7) of the Court of Appeal Rules).

[15] Mr Reitzin made heavy weather of the fact that Mr Chin did not specifically state that he believed the contents of the report, but the learned Master, in her written judgment (**Dwayne Jacobs v Progressive Grocers and Another** [2023] JMSC Civ 150) properly rejected the contention that it was insufficient for Mr Chin to have deposed that the "contents of [his] affidavit are true to the best of [his] knowledge, information and belief as gleaned from [Progressive's] records". That assertion was sufficient for that affidavit. This aspect of Mr Jacobs' complaint has no real chance of success.

[16] In conducting this analysis of the other aspects of Mr Jacobs' complaints, it is important to set out the relevant portions of Mr Chin's affidavit and the draft defence. Para. 7 of the affidavit states in part:

> "Based on the circumstances of the accident, [Progressive] has a real prospect of success in defending the claim. **Further to a report [sic] [Progressive's] driver, the incident occurred without any negligence or breach of duty on the part of [Mr Reid].** The circumstances of the incident, as reported, are that [describing the crash]…" (Emphasis supplied)

Para. 4 b. of Progressive's draft defence states, in part:

> "[Progressive denies Mr Jacobs'] version of events **and will say that it received a report** that [Mr Reid] was travelling [describing the crash]…" (Emphasis supplied)

[17] Curiously, para. 5 of the draft defence does not specifically answer or explain its failure to answer an assertion by Mr Jacobs that Mr Reid made certain assertions. The paragraph states:

> "In response to paragraph 10 [of Mr Jacobs' particulars of claim], [Progressive] neither admits nor denies that [Mr Reid] made the assertions made at 10(i) – (iii) to [Mr

> Jacobs] and police officer [sic] and puts [Mr Jacobs] to strict proof of same."

Whether Mr Chin's affidavit is an affidavit of merit

[18] It is well established that applications to set aside judgments in default, as the learned Master treated the application before her to be, must be supported by an affidavit showing that the applicant's proposed defence had a real prospect of success. That affidavit is referred to as an affidavit of merit (see **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73).

[19] It has also been well established that deponents may include hearsay in their affidavits in interlocutory proceedings such as applications to set aside a default judgment. The requirement is that the deponent must state the source of the information (see **Water and Sewerage Authority v Lillian Waithe** (1972) 21 WIR 498). Several cases have established that counsel may swear to an affidavit as to their instructions concerning the merits of a proposed defence (see **Clyde Graham v Attorney General and Donovan Mason** (unreported), Supreme Court, Jamaica, Suit No CL 1993/G110, judgment delivered 31 March 1995, **Paulette Rose v The Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Suit No CL 1999/R-048, judgment delivered 10 July 2001, and **Trevor McMillan and Others v Richard Khouri** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/2002, judgment delivered 29 July 2003 ('**McMillan**').

[20] Rule 30.3 of the CPR also permits affidavits used in this context to contain hearsay. The relevant portion states:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief -
>
> (a) where any of these Rules so allows; and

> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief."

[21] In **McMillan**, at page 9, Harrison P (Ag) as he then was, opined that rule 30.3(2) also permitted hearsay in interlocutory proceedings. In **Marcia Jarrett (Administratrix of the Estate of Dale Jarrett, deceased) v South East Regional Health Authority and Others** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 00816, judgment delivered 3 November 2006, McDonald Bishop J, as she then was, also allowed an affidavit from an attorney-at-law to stand as an affidavit of merit despite it containing hearsay as to the attorney-at-law's instructions as to matters of fact. The learned judge relied on several of the cases cited above on this point.

[22] This court recognises that Mr Chin is not an attorney-at-law, but the principle equally applies to him. In **Water and Sewerage Authority v Lillian Waithe**, a judge in chambers refused to set aside a default judgment entered against the appellant. The appellant's draft defence was exhibited to an affidavit filed by its secretary who obtained information regarding the draft defence from the appellant's sanitary engineer. The Court of Appeal of Trinidad and Tobago ruled that interlocutory proceedings may include statements of information and belief and indicate the sources and the grounds.

[23] Mr Chin's affidavit satisfied rule 30.3 of the CPR. He is a director of Progressive. He stated that he was relying on records at Progressive that he believed to be true. He said in para. 2 of that affidavit:

> "The contents of this affidavit are true to the best of my knowledge, information and belief as gleaned from [Progressive's] records."

[24] The contents of para. 7 of the affidavit indicate the source of his information concerning how the collision occurred.

[25] The grounds associated with this issue have no real chance of success.

[26] Mr Reitzin's submission about rule 30.5(1) of the CPR is that the report that Mr Chin relied upon should have been exhibited. He may well be correct that the report was in writing, since Mr Chin, at para. 2 of his affidavit, said that he was relying on Progressive's records. However, the point does not warrant an appeal. The issue of liability has now been settled and this is not a matter that requires any clarification by this court.

[27] It is noted that rule 30.5 of the CPR does not attach a sanction for non-compliance. It is not a basis for ordering the learned Master's ruling to be set aside; an order that would be now bereft of any significance.

Whether the draft statement of defence reveals a defence against the claim

[28] Mr Reitzin also complained that Progressive's draft statement of defence was deficient in that there was no positive assertion of an account from Progressive of the way it says the collision occurred. He is correct in this regard. However, there is no need to dilate on this point since a judgment on admission of liability has now been entered against Progressive and the matter remaining is the assessment of damages. There is nothing of great public importance in this point to justify the hearing of an appeal on whether Progressive has satisfied the requirements of the rules for setting aside a judgment in default.

The length and reason for the delay

[29] No complaint has been made about the learned Master's findings concerning the length of, and reason for, the delay. She found that the time that had elapsed between the time that Progressive learned about Mr Jacobs' claim and the time that it applied for the extension of time was not unreasonable.

Whether the proposed appeal has a real chance of success

[30] Based on all the above, Mr Jacobs' proposed appeal does not have a real chance of success. The application must therefore be refused.

Conclusion

[31] There is nothing in this case that warrants a hearing of an appeal. The learned Master exercised her discretion in granting an extension of time for Progressive to file a defence. The slim point as to whether she erred on the merits of the draft defence that was filed has been made academic by the fact that Progressive has now admitted liability. There is nothing of great public importance that would warrant permitting Mr Jacobs to appeal on that issue. His application must be refused.

Costs

[32] There is no basis to depart from the general rule that costs should go to the successful party.

F WILLIAMS JA

[33] I have read the draft judgment of Brooks P. I agree with his reasoning and conclusion and have nothing to add.

BROWN JA

[34] I too have read the draft judgment of Brooks and agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The application for permission to appeal is refused.
2. Costs of this application to the respondent to be agreed or taxed.