

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 163 OF 2009

BETWEEN	MARCIA JARRETT (Administratrix of the Estate of Dale Jarrett, deceased)	APPELLANT
AND	SOUTH EAST REGIONAL HEALTH AUTHORITY	
AND	DR. ROBERT WAN	
AND	THE ATTORNEY GENERAL OF JAMAICA	RESPONDENTS

PROCEDURAL APPEAL

26 March 2010

MORRISON JA

[1] The appellant is the widow and Administratrix of the estate of Dale Jarrett, who died on 10 March 2000. She is also the claimant in claim no. 2006 HCV00816. By Notice of Application for Court Orders dated 13 August 2009, she sought an order that the defence filed by the respondents (who are the defendants to the said claim) be struck out for

failure to comply with an order for discovery previously made at a Case Management Conference on 28 April 2007.

[2] By Notice of Application for Court Orders filed on 11 September 2009, the third named respondent ("the Attorney General") also sought orders granting relief from sanctions and that the respondents not be required to make specific disclosure of the medical records of the deceased in the possession of the second named respondent ("Dr Wan").

[3] On 2 December 2009, Beckford J refused the appellant's application to strike out the defence and ordered that the trial of the claim should take place on 11 and 12 October 2010 (thus vacating the trial dates which had been set at the Case Management Conference for 21 and 22 January 2010). The learned judge also dismissed the respondents' application for relief from sanctions. This is an appeal, pursuant to leave granted by the judge, from the order refusing to strike out the defence.

[4] The appellant brings the claim with which this litigation is concerned as administratrix of the estate of her late husband for damages under the Fatal Accidents Act and the Law Reform (Miscellaneous Pensions) Act. The respondents are respectively (a) the body established by statute to manage, control and administer public hospitals in Jamaica (including the Kingston Public Hospital) (b) a Consultant Urologist employed at the

material time at the Kingston Public Hospital and of whom the deceased was also a private patient, and (c) the Attorney General who is sued under and by virtue of the provisions of the Crown Proceedings Act.

[5] The appellant alleges in her particulars of claim filed on 7 March 2006 that the death of her late husband was caused by the negligence of the first named respondent and Dr Wan and/or their servants or agents. On 6 April 2006, the Director of State Proceedings filed an acknowledgement of service on behalf of all three respondents, which was in due course followed by a defence filed on 15 November 2006, again on behalf of the three respondents. The defence is essentially a denial of the negligence alleged and puts the appellants to proof of the allegation that any action by the respondents caused or contributed to the death of the deceased.

[6] At the Case Management Conference held on 26 April 2007, Cole-Smith J made an order for standard disclosure to be made by the parties on or before 31 October 2007 and for specific disclosure to be made by the respondents as follows:

"Specific Disclosure to be made by the Defendants of the medical records pertaining to Dale Jarrett, deceased and in the possession of Dr Robert Wan and the Kingston Public Hospital on or before October 31, 2007."

[7] The respondents' list of documents was in due course filed and served on 31 October 2007, but the appellant's list of documents was not filed and served until 11 and 13 February 2008 respectively. Nothing now turns on the late filing of the respondents' list.

[8] But what is in issue is whether the respondents have substantially complied with the order for specific disclosure. In part 1 of the Schedule to their List of Documents filed on 31 October 2007, the respondents listed a single document, as follows:

"Medical Report on the deceased from Dr
Robert Wan dated February 28, 2000."

[9] By letter dated 8 April 2009, the appellant's attorney-at-law wrote to the Attorney General questioning whether the respondents had in fact complied with the order for specific disclosure. This is how they voiced their complaint:

"The Defendant's List of Documents does not include the medical records of Dr. Wan pertaining to his treatment of Dale Jarrett deceased seen by Dr. Wan in his private practice.

Pursuant to the order for specific disclosure (Order No 2) which was made at the Case Management Conference on April 26, 2007, the Defendants were required to disclose Dr. Wan's medical records. We hereby request the Defendants compliance with that order."

[10] By letter dated 21 July 2009, the Attorney General parried the appellant's complaint as follows:

"As you are aware the Attorney General was joined in these proceedings owing to the treatment Dr Wan rendered to the deceased, as an employee of the Kingston Public Hospital (South Eastern Regional Health Authority).

The Attorney General has no authority to enter the private practice of Dr Wan, relative to a private contract between himself and the deceased."

[11] It is this difference of opinion which prompted the appellant's application for an order striking out the respondents' defence for an alleged failure to comply with the order for specific disclosure. Although there are no reasons in writing from the judge herself for the making of this order, the Attorney General has very helpfully incorporated a note of what the learned judge said in the written submission filed on behalf of the respondents in this court on 11 February 2010. It is clear from that note (the accuracy of which has not been challenged in any way by the appellant) that Beckford J accepted the respondents' contention that the Attorney General's representation of Dr Wan was in respect of his treatment of the deceased in his capacity as a servant or agent of the first named respondent, and not in his personal capacity. The learned judge went so far as to say that "nothing in this claim speaks to the 2nd Defendant in his private capacity" and accordingly declined to make the

order sought by the appellant. As a result of this conclusion, the judge also dismissed the respondents' application for relief from sanctions, observing only that, in the light of her ruling on the strike out application, this second application was "now otiose".

[12] The appellant filed six grounds of appeal, the effect of which may be (I hope without detracting) summarised as follows: the judge erred as a matter of fact and/or law and/or discretion in her determination that the order for specific discovery only required the respondents to disclose the medical records pertaining to the deceased which were in the possession of the Kingston Public Hospital relating to his care at that institution, and not to such records in the possession of Dr Wan relating to his care of the deceased in his private practice capacity. The appellant accordingly seeks an order setting aside the judge's order and striking out the defence for non-compliance with the order for specific discovery.

[13] The appellant submits that it is clear that what the respondents have disclosed are the medical records of the deceased which were in the possession of the Kingston Public Hospital. There has been no disclosure of either documents which have been, but are no longer, in the possession of the hospital, or of the deceased's medical records which are or have been in the possession of Dr Wan as a result of his having treated the deceased outside of the hospital as a private patient. In the

absence of any affidavit from Dr Wan explaining this gap, the appellant submits that there has clearly been a breach of the order for specific disclosure and that she was as a result entitled to an order striking out the statement of defence, pursuant to rule 28.14 (2) of the Civil Procedure Rules 2002 ("the CPR").

[14] The respondents for their part submit that the appellant's pleaded claim "is restricted to allegations of negligence about the treatment and care of [the deceased] under the aegis of the Crown, not when he consulted Dr Wan in his private practice." Their further submission is that the Attorney General's response is to the claim as it relates to Dr Wan in his capacity as agent or servant of the Crown and that the Attorney General has no control "of any document used or generated by Dr Wan in his private practice and therefore cannot disclose same". The respondents contend that because the appellant's allegations of negligence centre around the period March 1999 to March 2000, "it cannot be said that any document generated by or in Dr Wan's possession in respect of [the deceased] that existed before March 1999, can be said to adversely affect the Defendant's case or tends to support the Claimant's case", or that any such document would be directly relevant to matters in issue in the proceedings.

[15] The respondents also refer to the provisions of the Crown Proceedings Act, to make the point that the Crown can only be held liable for the acts or omissions of its servants or agents allegedly committed during the course of their duties. In those circumstances, so the submission goes, the acknowledgment of service of the claim form and particulars of claim on behalf of all the respondents "is in respect of [Dr Wan] as crown servant and not in his private capacity." As a result, "The Crown is therefore constrained by its unique statutory position to not disclose the private records of Dr Wan", and that, when the Director of State Proceedings acknowledges service of proceedings, "he does so on behalf of the Crown and in respect of any tort allegedly committed by a crown servant and/or agent."

[16] The respondents refer to and rely on Part 28 of the CPR, which deals with disclosure and inspection of documents. The scope of a party's basic duty of disclosure is stated in rule 28.2 as follows:

- "(1) A party's duty to disclosure documents is limited to documents which are or have been in the control of that party.
- (2) For this purpose a party has or has had control of a document if:
 - (a) it is or was in the physical possession of that party;
 - (b) that party has or has had a right to possession of it; or

- (c) that party has or has had a right to inspect or take copies of it."

[17] Rule 28.4(1) provides that, where a party is required by any direction of the court to give standard disclosure, "that party must disclose all documents which are directly relevant to the matters in question in the proceeding", while rule 28.6 provides for specific disclosure, as follows:

- "(1) An order for specific disclosure is an order that a party must do one or more of the following things-
 - (a) disclose documents or classes of documents specified in the order; or
 - (b) carry out a search for documents to the extent stated in the order and disclose any documents located as a result of that search.
- (2) An order for specific disclosure may be made on or without an application.
- (3) An application for specific disclosure may be made without notice at a case management conference.
- (4) An application for specific disclosure may identify documents-
 - (a) by describing the class to which they belong; or
 - (b) In any other manner.
- (5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings."

[18] The procedure for disclosure is provided for in rule 28.8 (by the making and serving by each party of a list of documents) and rule 28.9 obliges the attorney-at-law for each party to explain to the maker of a list of documents (and to certify that this has been done) the necessity for full disclosure and the possible consequences of failing to so. Rule 28.10 obliges the maker of the list similarly to certify that he understands the duty of disclosure and that to the best of his knowledge it has been carried out.

[19] The consequences of failure to disclose documents under an order for disclosure are set out in rule 28.14, as follows:

- "(1) A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial.
- (2) A party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.
- (3) An application under paragraph (2) relating to an order for specific disclosure may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.
- (4) The general rule is that the court will deal with such an application without attendance but the court may-
 - (a) require the applicant to attend to support the application; or

(b) direct that a hearing be fixed and that notice of the date, time and place of such hearing be given to the respondent.

(5) On an application under paragraph 920 the court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out."

[20] In this case, Cole-Smith J's order for specific disclosure required the respondents to disclose the deceased's medical records in their possession, without limitation or qualification. Each party, including Dr Wan, as a named party to the suit, is under an equal obligation to comply with order for disclosure. Even from the argument put forward in this court on behalf of respondents, it is clear that Dr Wan has not complied with the order for disclosure as it relates to his treatment of the deceased in his private practice. It appears to me to be the clear duty of the Director of State Proceedings, as the attorney-at-law on the record for all three respondents, including Dr Wan, to advise them of the need to comply with the order for specific disclosure.

[21] I am therefore not at all attracted to the argument put forward by the Director that "it is unreasonable and impractical in the circumstances for the Crown to be responsible for specific disclosure." In so far as the order relates to Dr Wan, it is not the Crown (or, indeed, the Director) who is

responsible for compliance, it is Dr Wan himself. It was fully open to Dr Wan to have privately engaged attorneys to represent him in this matter (indeed, this is a course that remains open to him), but his having appointed the Director to act for him does not in any way affect or reduce the scope of the duty of disclosure which the rules impose upon him.

[22] Nor am I any more taken by the submission that, the claim being restricted "to allegations of negligence about the treatment and care of [the deceased] under the aegis of the Crown, not when he consulted Dr Wan in his private practice", any documentary material in the possession or control of Dr Wan cannot therefore be "directly relevant" to any issue in the proceedings. Even under the basic rules of discovery as they existed before the CPR came into force in 2003, it was the law that, as Brett LJ stated the position in *Compagnie Financiere et Commercial de Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55, 63, "every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring [discovery] either to advance his own case or to damage the case of his adversary."

[23] This long established principle finds modern expression in rule 28.1(4) of the CPR which provides as follows:

"For the purpose of this Part a document is 'directly relevant' only if –

- (a) the party with control of the document intends to rely on it;
- (b) it tends to adversely affect that party's case; or
- (c) it tends to support another party's case."

[24] It seems to me therefore that it is not for Dr Wan or his legal advisors to determine degrees of relevance in the face of an order for disclosure as specific and as unqualified as that made by Cole Smith J in the instant case. To the contrary, it is their duty to comply by preparing and serving a list of documents, even if it is intended to claim a right to withhold disclosure or inspection of a particular document by use of the procedure set out in rule 28.15 of the CPR (save only for cases in which a party wishes to apply to the court for permission not to disclose the existence of a document on the ground that disclosure would damage the public interest, which does not arise in the instant case – see rule 28.15(2) – (8)).

[25] I have not lost sight of Lord Diplock's well known note of caution (in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191) that, on an appeal from the exercise by a judge of a discretion, it is no part of the court's function to seek to exercise an independent discretion of its own. Rather,

the court must defer to the judge's exercise of his discretion and must not interfere with it merely because it would have exercised the discretion differently:

"The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it is based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing [interim] injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of the reasons, that it becomes entitled to exercise an original discretion of its own."

[26] However, in the instant case I am clearly of the view that Beckford J fell into error when she declined to entertain the appellant's application under rule 28.14(2), and thereby rendered the respondents' application

for relief from sanctions otiose, as the judge described it. It seems to me that in accepting the respondents' argument that the order for specific disclosure made by Cole-Smith J "does not speak to specific disclosure or records in the possession of [Dr Wan] as a private practitioner from the period of December 1998 to March 1999", Beckford J clearly misunderstand the import of the order in the light of the rules, and that her order must therefore be set aside.

[27] Rule 28.14(4) provides that upon an application for a strike-out order for failure to comply with an order for disclosure the court may make an 'unless' order; that is, an order that unless the defaulting party complies with the order for disclosure by a specific date, that party's statement of case or some part of it may be struck out. On this basis, it therefore appears to me that the appropriate order to be made in these circumstances (and which I now make) is as follows:

- (a) The appeal is allowed and the order of Beckford J made on 4 December 2009 is set aside.
- (b) Unless the second named respondent (Dr Robert Wan) complies with the order for specific disclosure made by Cole-Smith J on 26 April 2007 by 16 April 2010, the Defence dated 14 November and filed on 15 December 2006 is struck out.

- (c) The costs of this appeal and in the court below are to be the appellant's to be taxed if not sooner agreed.