[2023] JMCA App 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

APPLICATION NO COA2023APP00102

BETWEEN	**RICHARD REITZIN**	**APPLICANT**
AND	**JAHKEEM THOMAS**	**RESPONDENT**

Richard Reitzin instructed by Messrs Reitzin & Hernandez for the applicant

Jerome Spencer for the respondent

28 September and 17 November 2023

Civil Procedure — Application for permission to appeal — Personal injury — Motor vehicle collision — Fresh evidence — Application to strike out affidavit— Summary judgment in a negligence claim — Admissibility of guilty pleas in criminal cases in a civil trial arising out of the same facts

BROOKS P

[1] Mr Richard Reitzin has sued Mr Jahkeem Thomas for damages for negligence arising from a collision between a motor vehicle being driven by Mr Thomas and a motorcycle being driven by Mr Reitzin. Mr Reitzin applied for summary judgment in his claim. He is dissatisfied with the decision of the learned Master in the court below, refusing his preliminary applications to:

a. strike out portions of Mr Jahkeem Thomas' affidavit filed to resist Mr Reitzin's application for summary judgment;

b. allow cross-examination of Mr Thomas on the affidavit; and

c. to issue a witness summons for the production of statements that Mr Thomas gave to the insurer of the vehicle that Mr Thomas was driving and to the police and.

Mr Reitzin seeks leave to appeal the learned Master's decision. He appeared as counsel at the hearing of this application.

[2] On 30 October 2015, Mr Reitzin was riding his motorcycle along Olivier Road in the parish of Saint Andrew. Mr Thomas was driving a Toyota Tundra motor truck ('the pick-up truck' or 'the vehicle') along the same roadway, but in the opposite direction. Mr Thomas stopped in preparation to turn right to enter Norbrook Acres Drive. When he started to execute the turn, the pick-up truck and Mr Reizin's motorcycle collided.

[3] The police charged Mr Thomas with careless driving. On 10 December 2015, he pleaded guilty in the Traffic Court to the offence of careless driving "in relation to the accident". This is not a fact in issue as Mr Thomas had admitted this in his defence filed on 5 March 2021.

[4] On 9 December 2020, Mr Reitzin filed a claim in the Supreme Court against four defendants, including Mr Thomas, seeking damages, interest and costs on the basis that Mr Thomas negligently operated the pick-up truck. Mr Thomas filed a defence denying that he was negligent and averring that the collision occurred solely as a result of, or was contributed to by, negligence on Mr Reitzin's part.

[5] Mr Reitzin later filed the application seeking summary judgment against Mr Thomas, who filed an affidavit opposing the application. Mr Reitzin amended his application, seeking to strike out portions of Mr Thomas' affidavit and seeking permission to issue a witness summons in order to obtain Mr Thomas' account of the incident he recorded in a written statement to the police on the day of the collision. The amended application went before Master Dickens (Ag) ('the learned Master') on 20 July 2022 and

9 May 2023. The learned Master only considered the preliminary applications. On 9 May 2023, the learned Master refused those applications and refused leave to appeal.

Mr Reitzin now seeks from this court permission to appeal the decision of the learned Master, as well as leave to adduce fresh evidence, namely, Mr Thomas' statement to the police on 30 October 2015, and to rely on that statement. Mr Reitzin also seeks the costs of the application.

Issues

[6] The issues arising from these applications are:

a. Whether Mr Reitzin can rely on, as fresh evidence, Mr Thomas' statement to the police on 30 October 2015.
b. Whether it is arguable that the learned Master erred in refusing to strike out all the portions of Mr Thomas' affidavit that Mr Reitzin challenged.
c. Whether it is arguable that the learned Master erred in refusing permission to cross-examine Mr Thomas.
d. Whether it is arguable that the learned Master erred in refusing Mr Reitzin's application for permission to issue a witness summons to produce Mr Thomas' statement to the insurer and the police statement.

Whether Mr Reitzin can rely on, as fresh evidence, Mr Thomas' statement to the police on 30 October 2015

[7] Mr Reitzin submitted that he was not in receipt of Mr Thomas' statement to the police at the time of making his amended application for summary judgment. He asserted that, despite his diligent efforts, he was unable to obtain the police statement in time. He asserted that he has since obtained the police statement, which he said is genuine and credible. Learned counsel submitted that the police statement would significantly influence the outcome of the learned Master's decision. Learned counsel contended that

the police statement is relevant as it contradicts the affidavit that Mr Thomas filed, opposing Mr Reitzin's summary judgment application. The contradictions, learned counsel submitted, are material in that, in Mr Thomas' affidavit, he makes certain statements, particularly concerning a motorcyclist, which were absent in his police statement.

[8] Learned counsel noted that in Mr Thomas' police statement, he did not mention a motorcyclist prior to the collision. Learned counsel averred that based on Mr Thomas' police statement, Mr Thomas only focused on another driver on the roadway instead of observing whether it was safe for him to turn right. In these circumstances, learned counsel submitted that the police statement demonstrates that Mr Thomas does not have a real prospect of successfully defending the claim since his defence was "merely fanciful" and contained both omissions and contradictions. The statement, Mr Reitzin submitted, ought to be admitted in the interests of justice. He relied on numerous authorities, including **Edwin M Hughes v La Baia Limited** [2011] UKPC 9, **Ladd v Marshall** [1954] EWCA Civ 1 and **Louis Campbell v Ambience Resort Properties Inc** [2022] JMCA Civ 4.

[9] Mr Jerome Spencer, for Mr Thomas, argued that Mr Reitzin's application before the court was improper. He noted that, pursuant to rule 2.2(1)(a) of the Court of Appeal Rules ('CAR'), an applicant who seeks to adduce fresh evidence on an application for permission to appeal must so indicate in the notice to appeal, which Mr Reitzin failed to do. In any event, Mr Spence submitted that there is no indication that the police statement would have caused the learned Master to change her decision. At best, Mr Spence argued, the police statement challenges Mr Thomas' credibility, which would not be suitable at an application for summary judgment. Mr Spencer further argued that Mr Reitzin should file an affidavit in the court below, in the context of the application for summary judgment, exhibiting the police statement.

[10] Mr Reitzin sought to adduce fresh evidence along with an application for permission to appeal. Rule 2.2(1) of the CAR provides that in those instances, where the appellant intends to adduce fresh evidence, the notice of appeal must include the grounds

on which the application for fresh evidence is made. This court is, however, empowered to treat the hearing of an application for permission to appeal as the hearing of the appeal (see rule 1.8(8)(c) of the CAR). In so doing, this court may then give permission for Mr Reitzin to apply to adduce fresh evidence despite the absence of the grounds of appeal to that effect in his notice of appeal (see rule 1.16(2)(b) of the CAR). This court will exercise its powers and treat the hearing of the application for permission to appeal as the hearing of the appeal and consider Mr Reitzin's application to adduce fresh evidence.

[11] The learned Master's decision on each of the applications involves the exercise of her discretion. This court will only disturb the exercise of the learned Master's discretion if:

a. she misunderstood the law or evidence or an inference that certain facts existed or did not exist;
b. the decision is demonstrably wrong; or
c. the judicial officer's decision is so aberrant that no judge regardful of his/her duty to act judicially could have reached it.

[12] Authority for those propositions is to be found at paras. [19] and [20] of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1. They will assist the court in its consideration of these applications.

[13] When considering applications for fresh evidence, this court is guided by the principles outlined in the case of **Ladd v Marshall**. On that authority, the court will only exercise its discretion to receive fresh evidence:

a. if the evidence the applicant seeks to adduce as fresh evidence was not available and could not have been obtained with reasonable diligence at the hearing on the merits;

b. if the evidence, had it been available, would probably have had an important impact on the outcome of the matter, although it need not have been decisive; and

c. where, although the evidence may not be incontrovertible, it is presumably to be believed or is apparently credible.

[14] All those criteria must be satisfied. They are less strictly applied where the hearing below was interlocutory (see **Russell Holdings Limited v L & W Enterprises Inc and Another** [2016] JMCA Civ 39 at paras [38] – [45]). The consideration is to be consistent with the overriding objective, and the primary consideration is that justice is done.

[15] Mr Reitzin has successfully cleared the first and third hurdles of **Ladd v Marshall**, as the document was not available to him at the time of the filing of the application for summary judgment, and it seems to be coming from a reliable source indicating that it was a statement that Mr Thomas made. Notwithstanding, since the learned Master has not yet heard the application for summary judgment, Mr Reitzin is at liberty to exhibit it before whichever judicial officer hears the application for summary judgment.

[16] However, the second condition of **Ladd v Marshall** poses a challenge to Mr Reitzin's position. This court acknowledges that the police statement does not contain any reference to a motorcyclist until after the collision is mentioned. It also recognises that the police statement does not, in the main, support the averments outlined in Mr Thomas' defence. Those differences, however, speak to Mr Thomas' credibility, which the finder of fact will have to determine at a trial. Contrary to Mr Reitzin's assertion, the statement does not contradict Mr Thomas' affidavit. Such a finding would require inferences to be drawn and make cross-examination necessary. In these circumstances, it is not likely that if the learned Master had sight of the police statement, it would have had an important impact on her decisions on the preliminary applications. The learned

Master was of the view that the case should not be conducted by way of a "mini-trial". This police statement would not have altered her view.

[17] Therefore, the application to admit Mr Thomas' statement as fresh evidence should be refused.

Whether it is arguable that the learned Master erred in refusing to strike out all the portions of Mr Thomas' affidavit that Mr Reitzin challenged

[18] In his application before the learned master, Mr Reitzin sought to strike out several portions of Mr Thomas' affidavit filed 27 April 2022. He ascribed various reasons for the different portions that he considered impermissible.

[19] The learned Master examined the portions of Mr Thomas' affidavit that Mr Reitzin sought to impugn and found that Mr Thomas' affidavit, when considered in its entirety, only challenged Mr Reitzin's evidence (see para. [25] of the learned Master's judgment). The only portion of Mr Thomas' affidavit that the learned Master struck out was a portion of para. 7, where Mr Thomas said that Mr Reitzin was in such pain that he could not speak at the scene of the collision. The learned Master found that that was not evidence that Mr Thomas could give.

[20] Mr Reitzin submitted that the learned Master failed to appreciate that those portions of Mr Thomas' affidavit were inadmissible on the various bases that he identified. An example of Mr Reitzin's complaint about the learned Master's finding, is his contention that she improperly considered Mr Thomas' evidence that he was not the servant or agent of the second or third defendants. Mr Reitzin pointed out that the learned Master erred because the application for summary judgment was against Mr Thomas in his personal capacity, being a negligent driver. Accordingly, learned counsel argued that Mr Thomas' statement to that effect was irrelevant.

[21] Mr Spencer pointed out that the learned Master struck out one portion of Mr Thomas' affidavit. He submitted that she correctly found that the other portions were relevant and direct responses to Mr Reitzin's affidavit.

[22] Rule 30.3 of the Civil Procedure Rules ('CPR') enables the court to strike any matter from an affidavit that is "scandalous, irrelevant or otherwise oppressive". The court, however, exercises the power to strike out cautiously. The learned Master carefully considered the relevant portions of Mr Thomas' affidavit and was correct in her finding that Mr Thomas' evidence merely gave his version of events and challenged Mr Reitzin's evidence. This was a finding that she was entitled to make. She was also entitled to delete the assertion that Mr Thomas made in para. 7 of his affidavit, as the statement was conjecture on Mr Thomas' part. It is at the trial that Mr Thomas' evidence can properly be tested under cross-examination. The learned Master's exercise of her discretion in this regard cannot be disturbed. There is no likelihood of success in this complaint.

Whether it is arguable that the learned Master erred in refusing permission to cross-examine Mr Thomas

[23] The learned Master acknowledged that she was empowered to permit the maker of an affidavit to attend for cross-examination. She noted, however, that the purpose of a summary judgment application is to rid the court of matters that are bound to fail and to facilitate them proceeding in a summary manner. She determined, therefore, that there must be a good reason to call a witness to give additional evidence in these circumstances. She underscored that there were two issues that Mr Reitzin sought to be resolved summarily. These were:

a. whether Mr Thomas has a real prospect of successfully defending the claim; and
b. whether Mr Thomas could deny negligence despite his admission in his defence that he pleaded guilty to careless driving arising from this incident.

[24] The learned Master ruled that the latter of these issues was a matter of law; accordingly, there was no need for Mr Thomas to be cross-examined to resolve it. The former, she said, required "an examination of [the] defence *vis-à-vis* the claim and [Mr Thomas'] affidavit evidence as against that of [Mr Reitzin]". She found that that exercise would morph the proceedings into a mini-trial; a feature which the authorities eschewed.

She ultimately found that this was not an appropriate case to permit cross-examination (see paras. [37] - [40] of the learned Master's judgment).

[25] There was no general rule, Mr Reitzin submitted, that cross-examination is impermissible on a summary judgment application. He argued that the learned Master erred in focusing solely on the case of **Barbican Heights Limited v Seafood and Ting International Limited** [2019] JMCA Civ 1, which determined that there ought not to be cross-examination during an application for summary judgment. He insisted that the learned Master's reliance on that case led her into error, as cross-examination of deponents should be allowed in proper cases. He contended that it would have been useful to have allowed the cross-examination, as that would be consistent with the overriding objective of saving expense. He relied on **Western Broadcasting Services v Edward Seaga** [2007] UKPC 19; (2007) 70 WIR 213. He further contended that, had the learned Master appreciated that Mr Thomas' version of how the motor vehicle crash occurred, was impossible, she would have permitted his request to cross-examine Mr Thomas. He cited **Comet Products UK Limited v Hawkex Plastics Limited** [1971] 2 QB 67 as support for this point.

[26] Mr Reitzin argued that the learned Master also erred when she failed to appreciate that the context of this case made it appropriate to order that Mr Thomas be cross-examined. He stated that Mr Thomas' guilty plea to the charge of careless driving meant that he admitted to the elements of careless driving. This guilty plea, learned counsel asserted, is important as it signified that Mr Thomas admitted to the elements of the offence. He relied on **Maxwell v R** (1996) 184 CLR 501 and **Meissner v R** [1995] HCA 41. In these circumstances, learned counsel posited that to cross-examine Mr Thomas would not amount to a mini-trial.

[27] Mr Spencer submitted that the learned Master's finding on this issue was correct. He noted that she relied on **Barbican Heights Limited v Seafood and Ting International** [2019] JMCA Civ 1, among other authorities, for the point that it is improper and impermissible to cross-examine parties on an application for summary

judgment. Learned counsel posited that the cases of **Maxwell v R** and **Meissner v R** were unhelpful as those were strictly criminal matters, and they did not consider the impact of a guilty plea in a criminal matter in a subsequent civil case. Learned counsel relied on **JW Stupple v Royal Insurance Co Ltd; S M Stupple v Royal Insurance Co Ltd** [1970] 3 All ER 230 ('**JW Stupple**').

[28] Mr Reitzin is not on good ground with this complaint. Summary judgment applications are not usually appropriate for negligence actions as "such cases invariably involve disputed factual issues" (see para. 34.18 of Blackstone's Civil Practice 2016). Lord Hope of Craighead made this point in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513 ('**Three Rivers No 3**'). He said, in part, at 534:

> "… this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

[29] It is accepted, however, that it is within the learned Master's discretion to determine whether or not to permit the cross-examination (see **Comet Products UK Limited v Hawkex Plastics Limited**).

[30] The cases of **Maxwell v R** and **Meissner v R** do not assist this analysis. They do not involve the juxtaposition of the results in a criminal case against ongoing civil proceedings, but instead are entirely proceedings concerned with a criminal case. **Western Broadcasting Services v Edward Seaga** is also distinguishable, on the facts, from this case. In that case, their Lordships took the view that the judge, at first instance, should not have resolved, by consideration on paper only, the disputed question as to whether the parties had arrived at a settlement of their dispute.

[31] Although the learned Master did not commence hearing Mr Reitzin's application for summary judgment, the application for permission to cross-examine Mr Thomas on his affidavit is suggestive of the concept of a "mini-trial", which the authorities proscribe. Summary judgment is not usually appropriate for disputed factual issues. Such issues are generally to be explored through cross-examination at a trial. The court, in **Swain v Hillman** [2001] 1 All ER 91, stipulated that the facility to grant summary judgment is not meant to dispense with a trial where there are issues which should be investigated at a trial. The court said that the judge is not authorised to conduct a "mini-trial".

[32] The court, in **E D & F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472, ruled that a default judgment should not be set aside because there were clear, written admissions by the defendant which demonstrated that it had no real prospect of success. Peter Gibson LJ set out the guiding principle in para. 10, in saying:

> "…However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and *Three Rivers DC v Bank of England (No.3)* [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95]."

[33] This case does not lend itself to an application of that principle. The guilty plea by Mr Thomas does not amount to a complete admission to the claim, especially in the context of an assertion that Mr Reitzin was contributorily negligent in the crash.

[34] This complaint has no real prospect of success.

Whether the learned Master erred in refusing to permit Mr Reitzin's application for permission to issue a witness summons to produce Mr Thomas' statement and police statement

[35] Mr Reitzin asked the court below to order that witness summonses be issued to produce:

a. Mr Thomas' statement to the insurer for the vehicle; and

b. Mr Thomas' statement to the police.

The learned Master found that it was unnecessary for the purpose of determining the summary judgment application to order that Mr Thomas' statements be produced and that the police officer should attend the hearing (see para. [48] of the learned Master's judgment). She determined that the court could review the pleadings and the affidavit evidence to conclude whether or not Mr Thomas has a real prospect of successfully defending the claim.

[36] The learned Master also found that issuing the witness summonses would result in costs being incurred instead of being saved. In addition, she said, doing so would result in a greater utilisation of the court's time than was necessary.

[37] Mr Reitzin submitted to this court that, from the evidence, it was clear that a claim for indemnity had been made to the British Caribbean Insurance Company ('BCIC'), the insurers of the pick-up truck. He argued that, having received one or more statements from Mr Thomas, BCIC paid him the limit in respect of that policy. To that end, learned counsel asserted that the statement that Mr Thomas made to the insurance company would reveal that Mr Thomas has no real prospect of successfully defending the claim. The statement, he asserted, was not privileged as its dominant purpose is not in anticipation of litigation but rather whether the insurer will indemnify the insured. He relied on **In the matter of Southland Coal Pty Ltd (rec & mgrs. apptd) (in liq)** [2006] NSWSC 899.

[38] In relation to a witness summons to the Commissioner of Police, Mr Reitzin argued that the learned Master misinterpreted his request as one seeking a police officer to attend court. Instead, learned counsel argued that what he sought was for a witness summons to be issued to the Commissioner of Police so that Mr Thomas' statement to the police concerning the motor vehicle accident could be produced.

[39] Mr Spencer submitted that the learned Master did not err when she refused to issue the witness summons. Learned counsel argued that the statement from BCIC is privileged, and further, Mr Reitzin's request to issue the witness summons amounted to an attempt to evade the normal pre-trial disclosure process. He further argued that as part of the discovery process, Mr Thomas would reveal all relevant documents.

[40] In considering these submissions the court notes that rule 33.2 of the CPR empowers the learned Master to issue a witness summons for a witness to attend court to give evidence or produce documents to the court. This is also, however, an exercise of a discretion.

[41] The court is mindful of the guidance of Gross J in **South Tyneside Borough Council v Wickes Building Supplies Ltd** [2004] EWHC 2428 (Comm); [2004] All ER (D) 69 (Nov). In that case, a lease, which was one of the documents sought to be produced, contained a confidentiality clause. The information was also commercially sensitive. The learned judge set aside the witness summons that sought the documents. Gross J, at para. 23 iv), said:

> "The fact that the documents of which production is sought are confidential or contain confidential information is not an absolute bar to the enforcement of their production by way of witness summons; however, in the exercise of its discretion, the Court is entitled to have regard to the fact that documents are confidential and that to order production would involve a breach of confidence. While the Court's paramount concern must be the fair disposal of the cause or matter, it is not unmindful of other legitimate interests and that to order production of a third party's confidential documents may be oppressive, intrusive or unfair. In this connection, when

> documents are confidential, the claim that their production is necessary for the fair resolution of proceedings may well be subjected to particularly close scrutiny."

[42] Based on the authority cited by Mr Reitzin, it is unlikely that Mr Thomas' statement to his insurers would constitute privileged communication, if the dominant purpose of submitting the statements was "in the ordinary course of [BCIC's] insurance business as to whether or not to grant indemnity" (para. 14. (i) of **In the matter of Southland Coal Pty Ltd (rec & mgrs. apptd) (in liq)**). The statement could, however, constitute confidential information, especially in the circumstances where legal proceedings have now been instituted against him. The court is entitled to take that situation into account, as Gross J did in **South Tyneside Borough Council v Wickes Building Supplies Ltd**.

[43] BCIC's payment, by itself, however, is not a sufficient basis for ordering the production of the statements. BCIC's motive for making the payment is not known, nor is the basis on which it agreed with Mr Reitzin to make the payment.

[44] Mr Reitzin has not demonstrated that the learned Master erred in this regard and, therefore, this court will refrain from exercising its independent discretion to make such an order.

[45] Accordingly, the appeal against the learned Master's refusal to issue the witness summons in respect of Mr Thomas' statement to the insurer of the vehicle cannot succeed.

[46] As it relates to the witness summons pertaining to the production of Mr Thomas' police statement, that issue is now otiose since Mr Reitzin has since obtained the statement.

Conclusion

[47] Mr Reitzin has not established that Mr Thomas' police report would have had an important impact on the outcome of the matter. Accordingly, his application to adduce the document must be refused. None of Mr Reitzin's complaints about the learned

Master's exercise of her discretion have been proved to be incorrect in principle. Accordingly, the application for leave to appeal should be dismissed.

HARRIS JA

[48] I have read, in draft, the judgment of my learned brother Brooks P. I agree with his reasoning and conclusion and have nothing to add.

G FRASER JA (AG)

[49] I, too, have read the draft judgment of my brother Brooks P. I agree with his reasoning and conclusions and have nothing useful to add.

BROOKS P

ORDER

1. The application for permission to appeal is granted.
2. The hearing of the application for permission to appeal is treated as the hearing of the appeal.
3. The application to adduce fresh evidence is refused.
4. The appeal is dismissed.
5. Costs of the appeal to the respondent to be agreed or taxed.