IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L S 134/01

BETWEEN	PAULETTE SMELLIE	PLAINTIFF
AND	RICHARD DAUGHERTY	DEFENDANT

Mr. Jeffrey Mordecai for Plaintiff.
Mr. David Johnson instructed by Piper and Samuda for Defendant.

Heard: June 3, July31, 2003

HARRISON J

Background to the application

The plaintiff has filed this suit as a result of a motor vehicle accident which occurred on the 10th day of June 1999. Interlocutory judgment in default of appearance was entered in judgment binder No. 729 Folio 1 on the 24th day of October 2001. The defendant/applicant by his summons now seeks an Order that the interlocutory judgment entered against him and all subsequent proceedings filed on the plaintiff's behalf be set aside on the ground that he has a good and meritorious defence to the plaintiff's claim.

The defendant's affidavit in support of this application has stated inter alia, that the said accident was caused by the plaintiff who without warning drove from premises owned and/or occupied by The Victoria Mutual Building Society along Half Way Tree Road into the path of his motor bus which was then proceeding along the said road. He further deposes that immediately before the collision and while exiting the said premises, the plaintiff had an unobstructed view of his bus.

The plaintiff on the other hand, places the blame fully on the defendant. It is pleaded in the statement of claim that the defendant had driven his motorbus on the wrong way of Half Way Tree Road thereby causing it to collide with the plaintiff's motorcar. The particulars of negligence allege inter alia :

"f)Overtaking a JUTC bus which had stopped in the one lane bus lane at a time when, at a place where and in a manner which was manifestly dangerous to do;
g) Suddenly and without warning driving unto the incorrect side of the road and into the path of the plaintiff's vehicle;
h) Driving the wrong way on a one-way road into the path of the Plaintiff's vehicle.
i)Unlawfully driving a JUTA vehicle in the wrong way bus lane on Half Way Tree Road designated for JUTC buses.

The plaintiff has deposed in her affidavit of the 28th June 2002 that the defendant has failed to disclose to this Honourable Court the following facts:

i) that he had filed proceedings in respect of the said accident in the Supreme Court and then later transferred it to the Resident Magistrate's Court in Plaint 1008/01.

ii) that there were negotiations between the parties' Attorneys and Susan Richardson, the Attorney acting on behalf of the defendant accepted liability on behalf of the defendant.

iii) that it was agreed between both Counsels that the defendant and his insurers would abandon his claim and settle the plaintiff's/respondent's counter claim in the sum of $436,519.80 plus costs of $20,000.00.

iv) that plaint 1008/01 was adjourned to the 9th August 2001when it was struck out due to the non-attendance of the defendant and his Attorney at Law.

v) that the learned Resident Magistrate was informed of the settlement but judgment could not be entered due to the absence of the defendant and

his Attorney and due to the fact that the plaintiff's counterclaim had not yet been filed.

The plaintiff contends that as a result of the failure of the defendant, his insurers and Attorney to give effect to the settlement agreement she had to commence suit in the Supreme Court against the defendant.

The submissions

The time allotted to deal with this matter was insufficient, hence after hearing Mr. Johnson fully and Mr. Mordecai, partially the matter was adjourned for Mr. Mordecai to complete his submissions in writing. Mr. Johnson was also permitted to file a written response to those submissions if he considered it necessary.

Mr. Johnson presented his submissions under two heads. He argued firstly, that paragraphs 5-8 inclusive of the affidavit of the plaintiff failed to disclose the source of information with respect to the alleged settlement agreement and in the circumstances those paragraphs would amount to hearsay and ought not to be relied upon. Woodrow Ltd v UDC 29 JLR 178 was referred to and relied upon by him. Secondly, he submitted that the contents set out in those paragraphs and the correspondence exhibited are 'without prejudice' even if not so stated thereon and are therefore not binding upon the defendant. See Chocoladefabriken Lindt and Anor v Nestle Co. Ltd 1978 RPC (Patent Cases) 287.

He further argued that there was no documentary proof in the form of a release and discharge or a consent order filed in respect of the alleged settlement and all there was before the Court, is an exchange of correspondence between the Attorneys the last of which was from Mr. Mordecai seeking to confirm a settlement of a sum higher than the sum put forward by Miss Richardson in an attempt to resolve the matter.

He submitted that the Defendant should be allowed to have his day in court since the affidavit evidence as well as the Assessor's Report have demonstrated that the defendant has a real prospect of successfully defending the claim. He further submitted that a breach of the provisions of the Road Traffic Act is not of itself evidence of negligence but is one of the factors to be taken into consideration in determining where liability rests. (See Powell v Phillips) (1972) 3 All ER 864).That issue he says is for the trial judge. He further contends that it was not admitted that the defendant was in breach of the provisions of the Road Traffic Act.

Mr. Mordecai in responding submitted that paragraphs 5-8 inclusive in the plaintiff's affidavit did not constitute hearsay since paragraph 4 introduced paragraph 5 onwards and was in effect a statement made by one of the parties to the proceedings. This was a situation he said, where one party is asserting the position in a suit against the other party. He referred to and relied upon the House of Lords authority of Rush and Tompkins (1989) AC 1292 and argued that the statement of the law dictated by Lord Griffiths was that one of the grounds on which 'without prejudice' material would be held admissible by a Court is where it is necessary to look at that material to ascertain if those 'without prejudice' negotiations produced a settlement agreement.

He further submitted that the plaintiff's affidavit evidence in the instant case has alleged that the Richardson/Mordecai correspondence and teleconference had resulted in a settlement agreement and which constituted an admission of liability by the defendant/applicant. He further submitted that the Court was under a duty to examine the 'without prejudice' material along with all the other evidence to determine whether there was, in fact, a settlement agreement constituting an admission of liability. Mr. Mordecai placed further reliance upon the authorities of TBV Power Limited; Tarmac PLC v Elm Energy and Recycling (U.K) Limited et al

(1997) EWCA Civ. 854 (27th January 1997) and Tomlin v Standard Telephones and Cables Ltd. (1969) 3 All E.R 201.

He also argued that the plaintiff/respondent had presented evidence regarding the settlement that was not answered much less contradicted.

He further argued that although Powell v Phillips (supra) had enunciated a correct principle of law the Road Traffic Act (Jamaica) did allow for a breach of the Road Code to be relied on in support of an allegation of negligence. See section 95(3) of the Road Traffic Act. He has contended however, that Counsel had failed to deal with the question of overtaking in a 'wrong way bus lane' which necessarily involved disobeying a solid white line prohibiting overtaking and driving the wrong way on a one way road which in this case was a major roadway with three lanes traveling in the opposite direction to the one way bus lane. He submitted that on a consideration of all the evidence there was no real prospect of a successful defence to the Plaintiff's suit.

With respect to the authorities cited in relation to the 'without prejudice' correspondence, Mr. Johnson submitted that these authorities indicate that the contents of without prejudice correspondence will be admissible if the issue is whether or not the negotiations between the parties resulted in a settlement. It was his view that those cases were distinguishable from the instant facts for the following reasons:

> "(a) The Plaintiff/Respondent has sued in negligence in these proceedings and the sole issue is whether the Defendant/Respondent was negligent in the operation of his motor vehicle. The Plaintiff/Respondent has at no time sued on the alleged agreement which she contends, crystallized from the without prejudice negotiations. The question of whether such an agreement was actually concluded is therefore irrelevant. The Court therefore ought not to

examine the negotiations which were conducted by the parties prior to the commencement of these proceedings.

(b) There is no evidence before the Court in any event to which the Court may have regard in determining whether there was in fact a concluded agreement as the Affidavit evidence upon which reliance is being placed is hearsay and inadmissible. The mere fact that the hearsay is being advanced by a party to the proceedings does not make it any less hearsay as this, if taken to its logical conclusion, would therefore mean that a plaintiff in the witness box, could give hearsay evidence at will. "

The Civil Procedure Rules

This application was filed under the old Code but it must now be dealt with under Rule 13.3 of the new Rules. The rule provides inter alia, that the court may set aside a judgment entered under Part 12 only if the defendant applies to the Court as soon as reasonably practicable after finding out that judgment had been entered. In addition a defendant must show that he has a real prospect of successfully defending the claim.

The Attorneys have conceded in their arguments before me that the issue of delay was not due for consideration in this matter. What is left to be decided then is whether or not the defendant/applicant has a real prospect of successfully defending this claim.

Assessment of the evidence

What is meant by the term "a real prospect of defending the claim"? Some assistance can be obtained from the case of Swain v Hillman [2001] 1 All E.R 91. Although it is a case dealing with an application for summary judgment the dicta is quite useful. Lord Woolf M.R said in that case that the words "no real prospect of

succeeding" did not need any amplification as they spoke for themselves. The word 'real' he said directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success. He further stated:

> 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

I adopt the above dicta and ask the question what ought to be the scope of the inquiry in the instant case? It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the defence is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based.

I now turn firstly, to the issue of the alleged settlement agreement. Mr. Mordecai had referred me to the case of Tomlin v Standard Telephones and Cables Ltd. (supra) and I do believe that it is worth the while repeating the head note of that case in this judgment. The facts are as follows:

> " The plaintiff suffered an accident during the course of his employment. His solicitor and his employers' insurers, during the course of negotiations, came to an arrangement that liability would be accepted on a 50% basis. The insurers estimated that half the damages assessable would be £625 and offered to pay that sum. This was rejected as unrealistic and inadequate. In one of the letters exchanged between the plaintiff's solicitor and the insurers, to solicitor wrote that the plaintiff would "agree to settle his case on a 50/50 basis as you propose and accordingly this leaves only the question of quantum to be disposed of". This letter was not refuted and in at least four letters written subsequently the insurers had referred to the arrangement for 50/50 as an "agreement". All the letters from the insurers were headed "Without Prejudice". It was contended that the correspondence headed "Without Prejudice" did not create a binding agreement between the parties since it only constituted negotiations for a settlement of the liability and damages and was not a partial settlement as to liability only and was therefore, not admissible.
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> Held – Ormrod J dissenting): (i) the letters were admissible as it was not possible to determine without looking into the correspondence whether there was a binding agreement (see p 203, letter h, and p 206, letter e, post).
>
> (ii) on the proper construction of the letters written by the defendants' representatives there was a definite and binding agreement on a 50/50 basis even though the question of the quantum of damages was left for further negotiation (see p 204, letter f, and p 207, letters h and i, post).

The correspondence and discussions between the Attorneys in the instant matter need to be considered. The first letter is dated June 12, 2001 and is addressed to the defendant's Attorney. It states inter alia:

> "I refer to my recent teleconference with you in respect of this matter which comes up for trial on June 19,2001. I indicated that I am of the view that the Plaintiff is wholly liable for this accident as:

1) he was traveling the wrong way on a one way road by overtaking JUTC buses traveling in the "wrong way bus lane"
2) he had no legal right to be in the bus lane given that he was driving a JUTA bus.

...

I write to request that you indicate your client's position on settling the Defendant's claim in full as requested by VMI from as early as July 19, 1999."

Letter dated June 27, 2001 was addressed also to Miss Richardson, the defendant's Attorney and it states inter alia:

" I write further to my letter dated June 12, 2001 and to informal discussion between Counsel during which you requested that I send you documents in support of the claim in the Defendant's counter claim ....."

On the 3rd July 2001 Miss Richardson responded in a letter addressed to Mr. Mordecai. She stated inter alia:

"Further to our discussions the offer is as follows:

$422,446.77
Costs $20,000.00
$442,446.77
I await your reply."

Mr. Mordecai responded in his letter of July 12, 2001 and he states inter alia:

" I write to confirm teleconference between Counsel of today's date during which it was agreed that this matter would be settled on the basis of the Plaintiff paying to the Defendant on the Defendant's counter-claim the sum of $436,519.58 plus costs to the Defendant of $20,000.00. Kindly have an Attorney hold for me to enter the Consent judgment as I am in another matter in Spanish Town that is for trial.

I am grateful for your cooperation in concluding this matter."

I ask myself, looking at the above correspondence, is there here a complete agreement and did the parties intend there to be a complete agreement? I do agree with Mr. Mordecai that the plaintiff has offered evidence that has not been answered nor contradicted by the defendant. The correspondence and discussions seem quite clearly to me that there was a complete settlement agreement between the parties. There is every indication that the agreement was sealed and it was no doubt for this reason why Mr. Mordecai concluded his letter of the 12th July 2001 with the words "I am grateful for your cooperation in concluding this matter". In fact this letter seemed to have concluded the talks between the parties since there was no further correspondence between them. All that was left to be done was for the consent judgment to have been announced to the Resident Magistrate. I disagree with the submissions made my Mr. Johnson on this issue and hold that there is indeed merit in Mr. Mordecai's submissions.

I turn next to the accident itself. There was an irregular procedure adopted by Mr. Mordecai in the filing of his affidavit of the 6th June 2003 and exhibiting thereto a statement given by the defendant shortly after the accident had occurred. This affidavit was filed after the defendant's Attorney had completed his submissions and the matter was adjourned for written submissions to be filed. I do agree with Mr. Johnson that the Court ought not to place any reliance upon the contents of this statement. I hold however, that there is merit in the submission raised by Mr.

Mordecai when he submitted that the defence has failed to deal with the defendant's act of overtaking in a 'wrong way bus lane' which necessarily involved disobeying a solid white line against him and which would involve him driving the wrong way on a one way road.

Conclusion

On a consideration of all the circumstances surrounding this accident it is my view and I so hold that the proposed defence has not demonstrated that the defendant has a real prospect of successfully defending the plaintiff's action in negligence. The application to set aside this judgment is therefore dismissed with costs to the plaintiff to be taxed if not agreed.