[2014] JMCA Civ 4

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 31/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**CANDINE ANDERSON**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Miss Catherine Minto and Miss K Michelle Reid instructed by Nunes, Scholefield, DeLeon & Co for the appellant

Miss Alethia Whyte instructed by the Director of State Proceedings for the respondent

2 October 2012 and 30 January 2014

HARRIS JA

[1] I have had the opportunity to read the judgment prepared by Morrison JA in draft. I agree with his reasoning and conclusion and have nothing to add.

MORRISON JA

[2] At the conclusion of the hearing of the appeal in this matter on 2 October

2012, the court allowed the appeal and set aside the judgment of K Anderson J, making no order as to costs. I wish to apologise profusely for only now, due to an oversight, providing the promised reasons for this decision.

[3] The issue which arises on this appeal is whether it was permissible for the judge, acting entirely of his own motion, to strike out the appellant's claim for constitutional relief and, as a consequence, set aside a judgment on admission entered against the respondent in her favour.

[4] On 22 May 2009, the appellant was a minor and a ward of the state confined to the Armadale Juvenile Correctional Centre in Alexandria ('Armadale'), in the parish of St Ann. On that date, while the appellant and other occupants of the facility were locked inside a dormitory at Armadale, it was engulfed by fire. By the time the fire was eventually brought under control, five female occupants of the facility had succumbed to its effects and the appellant, among others, had received severe injuries.

[5] The fire and its tragic consequences attracted national attention, resulting in the appointment by His Excellency, the Governor General, of a Commission of Enquiry under the Commissions of Enquiry Act. The sole commissioner was the Honourable Mr Justice Paul Harrison, OJ, CD, JP (retired president of the Court of Appeal). In his report, which was issued on 15 January 2010, Mr Justice Harrison found, among other things, that the decision made by the authorities over a year before the fire to house 23 girls in an unsuitable section of Armadale

was "…a patent breach of the duty to promote the best interests of children, violated the statutory requirements and was accordingly negligent, in all the circumstances" (Armadale Report, para 2.5).

[6] By a claim form filed on 22 February 2011, the appellant commenced an action against the respondent, in which she claimed (i) damages for negligence and/or breach of statutory duty arising from the fire, including aggravated and/or exemplary damages; and (ii) damages and/or compensation pursuant to the provisions of section 25 of the Constitution of Jamaica, arising from the manner in which the appellant was treated and confined at Armadale, which contributed to or led to the fire on 22 May 2009. The claim form was supported by detailed particulars of claim, in which the appellant particularised her injuries; her claim for aggravated and/or exemplary damages; and the breaches of her constitutional rights of which she complained.

[7] In an acknowledgment of service of the claim form filed on 11 March 2011, the respondent acknowledged receipt of the claim form and particulars of claim on 24 February 2011. The respondent's answers to the questions, "Do you intend to defend the claim?" and "Do you admit any part of the claim?" were, respectively, "Yes (as to quantum)", and "Yes (as to liability)". Thus, as Anderson J observed (at para. [5] of the judgment), the respondent "made it very clear…that he was not disputing liability in any respect,…[the only dispute]…was to be as regards the quantum of damages".

[8] On 8 April 2011, the appellant accordingly entered judgment on the respondent's admission "for Damages, Interest and Costs to be assessed". On 9 May 2011, Rattray J ordered the respondent to make an interim payment in the appellant's favour in the sum of $2,500,000.00.

[9] On 2 August 2011, the respondent filed a defence limited to the quantum of damages. In it, among other things, the respondent denied the appellant's entitlement to damages or compensation for breaches of her constitutional rights and contended that the claim for constitutional redress was in any event barred by section 25(2) of the Constitution.

[10] On 19 August 2011, the appellant filed notice of assessment of damages and the assessment was set for hearing on 8 December 2011.

[11] On 7 December 2011, the day before the appellant's damages were to be assessed, the respondent filed an application (i) for leave to withdraw the admission of liability which it had made in its earlier acknowledgment of service, and (ii) to set aside the judgment on admission which had been entered on 8 April 2011. In an affidavit also sworn to on 7 December 2011 (at para. 9), Miss Alethia Whyte, an attorney-at-law attached to the respondent's chambers, averred that the earlier admission of liability, insofar as it related to the alleged breaches of the appellant's constitutional rights, had been made "in error". In a further affidavit sworn to on 8 February 2012, Miss Whyte amplified this assertion as follows (at paras 19-20):

> "19. The allegations of constitutional breaches and an entitlement to compensation under the Constitution are live issues, and it is necessary for them to be determined by a tribunal of fact.
>
> 20. Accordingly, the admission as to liability in the Defendant's Acknowledgment of Service of Claim Form was made in error and was only intended for the causes of action of negligence and/or breach of statutory duty. The admission was not intended for the cause of action of breach of constitutional rights. The making of the admission as to liability without qualifying that it was only in relation to the causes of action of negligence and/or breach of statutory duty, was an oversight."

[12] Hardly surprisingly, the appellant contested this application vigorously. In an affidavit sworn by her on 12 January 2012, she rehearsed the factual and procedural history of the matter, pointing out that the respondent's chambers had participated fully in the enquiry conducted by Mr Justice Harrison, and that the admission of liability had been made by the respondent "with full knowledge" of the facts. An affidavit, in opposition to the application, was also sworn on 17 January 2012 and filed by Miss Catherine Minto, an attorney-at-law and a member of the firm of attorneys-at-law which has represented the appellant from the outset of the proceedings. Among the points made by Miss Minto was that, at the hearing of the application for an interim payment before Rattray J on 9 May 2011, the respondent's challenge to the appellant's claim for damages for breach of her constitutional rights related to the issue of quantum only. Miss Whyte's riposte to this point (at para. 6 of her further supplemental affidavit sworn to on 8 February 2012) was that, at that hearing, she had "objected to

damages being paid for breach of constitutional rights and indicated that the allegations put forward by the Claimant did not amount to a breach of constitutional rights". Further, she had also submitted, adequate means of redress were available under other law, thereby bringing into play section 25(2) of the Constitution.

[13] When the respondent's application came on for hearing before Anderson J on 10 February 2012, the respondent contended, additionally, that the judgment on admission was irregularly obtained, in that it failed to satisfy rule 14.8(1)(c)(i) of the Civil Procedure Rules 2002 ('the CPR'). The learned judge took the view that it would be best to determine this issue first, as, if the judgment was in fact wrongly entered, there would be no need for the court to go on to address the other issues.

[14] In his written judgment given on 17 February 2012, the learned judge concluded that the judgment had been properly entered against the respondent under rule 14.8(1)(c)(i), liability "to pay the whole of the claim" having been accepted in the acknowledgment of service. It was therefore appropriate for judgment to have been entered against the respondent, pursuant to rule 14.8(4) of the CPR, "for an amount to be decided by the court and costs".

[15] But, as regards the question whether the judgment on admission should be set aside, this was not, the judge then went on to say (at para. [7]), "the end of the matter". Taking a point which had not been placed or argued before him

by either party, Anderson J considered that it was not permissible for the appellant to combine a claim for damages sounding in tort with a claim for redress under the Constitution in one claim form, in the light of rule 56.9(1) of the CPR which requires the latter to be commenced by way of fixed date claim form, accompanied by an affidavit in support. What ought to have happened, the judge opined (at para. [9]), was that the appellant ought to have commenced two separate sets of proceedings –

> "…by means of a Claim Form and Fixed Date Claim Form respectively, and thereafter, the constitutional redress proceedings as would have been begun by Fixed Date Claim Form could have been converted to Claim Form proceedings and also this Court could have then also requested [sic] to consolidate those proceedings with the other Claim Form proceedings wherein the Claimant is seeking damages based on the law of tort."

[16] This not having been done, the learned judge concluded, the judgment on admission "as entered/obtained against the Defendant insofar as the Claimant's Claim for constitutional redress is concerned, was irregularly entered/obtained and must be set aside". In the light of this conclusion, the judge found it unnecessary to determine the respondent's primary application, which was for permission to withdraw the unqualified admission of liability. But the judge did indicate (at para. [10]) that the respondent was "perhaps fortunate" that he had felt obliged to decide that the judgment on admission had been irregularly obtained. In the result, the court struck out the claim for constitutional relief and

set aside the judgment on admission as regards that aspect of the claim. The date set for the assessment of damages was also vacated and the court ordered that the costs of the application should be costs in the claim.

[17] Pursuant to leave granted by the judge, the appellant challenged this decision on a number of grounds, which may be summarised in the following two contentions: (i) the judge erred in making an order on his own initiative, on a basis not argued by either party on the application before him, without first having provided the parties with a reasonable opportunity to make submissions to him on the point; and (ii) even if the judge could properly have acted as he did, he erred in concluding that it was necessary for the appellant to have initiated her claim for constitutional redress by way of separate fixed date claim form proceedings.

[18] On the first point, Miss Minto for the appellant referred us to rule 26.2(1) of the CPR, which permits the court, in the exercise of its general powers of management, to exercise its powers of its own initiative, provided that the conditions set out in rule 26.2(2)-(4) are satisfied:

> "(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.
>
> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.
>
> (4) Where the court proposes –

> (a) to make an order of its own initiative; and
>
> (b) to hold a hearing to decide whether to do so,
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> the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing."

[19] We were also referred to the decision of this court in ***Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Ltd*** (SCCA No 5/2009, judgment delivered 2 July 2009), in which (at para. 14) Cooke JA characterised the preconditions set out in rule 26.2 to the exercise by a judge of the court's powers on its own initiative as "mandatory prerequisites" (see also ***P & O Nedlloyd BV v Arab Metals Co and others (No 2)*** [2006] EWCA Civ 1717, para. 67, in which Moore-Bick LJ emphasised the importance of ensuring that "a person against whom an order may be made is given an opportunity to address the court and to place before it any relevant material before the order is finally made").

[20] On the second point, Miss Minto pointed out that rule 56 of the CPR, which governs applications for constitutional relief, does not in terms bar a joinder of claims for constitutional relief with other claims. Nor does it require the striking out of a claim where an improper joinder is made. Indeed, the court is given a very wide discretion to make such orders as will facilitate the matter proceeding, including directing that the whole application should be dealt with as a claim (rules 56.7(2) and (4) and 56.10(3)).

[21] Reliance was also placed on the statement by D McIntosh J at first instance in ***Hamilton v Hayles*** (Claim No 2009 HCV 04623, judgment delivered 4 December 2009, page 3) that "[t]he inherent power of the Court at first instance to strike out cases is one which should be exercised with great care and due diligence…[i]t should only be done in the simpliest [sic] cases and those which are clearcut cases of abuse of process".

[22] In any event, Miss Minto also observed, there is a long line of cases, in this court as also in the Supreme Court, in which claims for constitutional redress have been included in civil claims for damages for tort against servants and/or agents of the Crown.

[23] The best known of these cases is probably the decision of this court in ***Doris Fuller (Administratrix Estate Agana Barrett deceased) v The Attorney General*** (1998) 35 JLR 525. That was the case in which, infamously, the deceased was found dead after two days of incarceration in the lock-up at the Constant Spring Police Station. As a consequence, the deceased's personal representative sought to recover damages from the State on behalf of his estate under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. When the matter came on for assessment of damages, the plaintiff applied for an amendment to the statement of claim, which was granted by consent, to add the relief of, "Damages and/or compensation by way of constitutional redress". However, although the trial judge (K Harrison J, as he then was) awarded damages to the estate for loss of expectation of life, assault and battery

and false imprisonment, he declined to make an award for breach of the deceased's constitutional rights. The learned judge took the view that adequate means of redress for the contravention of the deceased's constitutional rights were available under the general law and that it was therefore not necessary for the court to exercise its powers under section 25(2) of the Constitution.

[24] The plaintiff appealed, first, against the quantum of the judge's award of damages, and, second, against the judge's refusal to make any award for breach of the deceased's constitutional rights. The appeal succeeded on the second, but not on the first, ground and, by a majority, damages in the sum of $1,000,000.00 were awarded to the estate by way of constitutional redress (Downer JA, who dissented on quantum only, would have awarded $1,500,000.00, plus exemplary damages, for constitutional redress).

[25] Patterson JA pointed out (at page 568) that the plaintiff had not applied to the Supreme Court for constitutional redress under the provisions of section 25 of the Constitution. But he directed attention to rule 3(iii) of the Judicature (Constitutional Redress) Rules 1963, which expressly entitles the court, in the course of any civil or criminal proceedings in which any question arises under the sections of the Constitution dealing with fundamental rights and freedoms, to "determine such question and give effect to such determination so far as applicable, in its judgment or decision in such action or proceeding". Thus, the learned judge concluded, the plaintiff having by her pleadings raised questions relating to the inhuman and degrading treatment meted out to the deceased by

servants of the Crown during the period of his incarceration, the trial judge was empowered by rule 3(iii) to "determine such question and give effect to such determination so far as applicable".

[26] Miss Minto also referred us to the decision of the Privy Council on appeal from the Court of Appeal of The Bahamas in ***Merson v Cartwright & Anor*** [2005] UKPC 38. In that case, the Board upheld (subject to any question of duplication) the trial judge's award of damages for breach of the appellant's constitutional rights, in addition to damages for the nominate torts in respect of which she had sued.

[27] Miss Alethia Whyte for the respondent declined to make any submissions in opposition to this appeal, observing that the point taken by Anderson J and the order made by him had not been contended for by the respondent. This was, in my view, the only sensible course for the respondent to have adopted. It seems to me to be clear that Anderson J ought not to have taken upon himself the task of deciding the matter on a point not raised by the parties without notifying them of his thinking and inviting submissions on the issue from the parties. Had he done so, he might well have been persuaded by the provisions of the rules and the other material placed before us by the appellant that the prudent thing for him to do was to confine himself to the substantive application that was before him, that is, the respondent's application for leave to withdraw the admission of liability in the acknowledgment of service. Instead, the respondent got a result that it did not seek, and no result on the issue upon

which it had sought the court's determination.

[28] In these circumstances, and in the light of the wholly realistic position taken by the respondent to this appeal, it was inevitable that the order of the learned judge should be set aside and these are my reasons for concurring in this outcome.

DUKHARAN JA

[29] I agree entirely with the judgment prepared by Morrison JA and have nothing to add.