JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00055

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

BETWEEN	**DONOVAN HUTCHINSON**	**APPLICANT**
AND	**OSHANE SIMON (By his mother and next friend Jacinth Smith)**	**RESPONDENT**

Lemar Neal instructed by Nea|Lex for the applicant

Raymond Samuels instructed by Samuels Samuels for the respondent

4 June and 5 July 2019

PHILLIPS JA

[1] Donovan Hutchinson (the applicant) sought permission to appeal against the decision of Barnes J (Ag) made on 15 February 2019, wherein she refused to set aside a default judgment granted against him on 9 July 2013, due to his failure to file an acknowledgment of service. This application was made on the basis that the learned judge had erred in refusing to set aside the default judgment pursuant to rules 13.2 and 13.3 of the Civil Procedure Rules 2002 (CPR). The applicant had also sought a stay of execution of the default judgment pending the outcome of the appeal.

Background

[2] It was alleged that on 30 October 2008, Oshane Simon (who sued by his mother and next friend, Jacinth Simon) (the respondent) was a pedestrian on the Annotto Bay Main Road in the parish of Saint Mary, when he was struck from behind by a motor car owned by the applicant and driven by Mr Anthony Hutchinson. The respondent, who was an infant, suffered a number of injuries to include: head injury with loss of consciousness; lacerations and abrasions; post concessional disorder and mental impairment loss of 35%; and severe dental trauma. As a result of the incident he was hospitalised for three days.

[3] On 29 August 2012, the respondent filed a claim against the applicant wherein he sought damages for negligence and consequential losses. Mr Derrick Blackwood, a process server, deponed in an affidavit of service filed 12 October 2012, that on 14 September 2012, he served "by delivering to and leaving with" the applicant: a claim form together with an acknowledgment of service form, prescribed notes to defendants and a defence form; along with particulars of claim and various documents attached. He further deponed that service was effected on the applicant at his home at "55 Iter **Borale** Housing Scheme", Annotto Bay in the parish of Saint Mary, between 4:00 pm and 4:30 pm (Emphasis added). He also stated that at the time of service he knew the applicant personally.

[4] As previously indicated, on 9 July 2013, judgment in default was entered against the applicant for his failure to file an acknowledgment of service. On 4 August 2016, a bailiff attempted to serve and enforce an order for seizure and sale of goods, dated 13

May 2016, in the sum of $3,579,334.82, on the applicant. As a result, and after consultation with his attorney-at-law, the applicant filed an application to set aside the default judgment on 29 August 2016. This application was made on grounds that: the applicant had never been served with the claim form and the accompanying documents and had no knowledge of the claim; it was made as soon as reasonably practicable in the circumstances; and that there is a reasonable prospect of successfully defending the claim. The respondent, by his mother and next friend, filed affidavits in response to the applicant's application. The application was heard by Barnes J (Ag) on 15 January 2019, and on 15 February 2019, she refused the applicant's application to set aside the default judgment; awarded costs to the respondent to be agreed or taxed; and refused leave to appeal.

[5] Thereafter, the applicant sought permission to appeal to this court on grounds that the learned judge erred in finding that the applicant had been served with the claim form and its supporting documents; and she had also erred in finding that the applicant's defence had no real prospect of success.

The application for permission to appeal

[6] Rule 1.8(7) of the Court of Appeal Rules 2002 provides that permission to appeal in civil cases will only be given, if this court or the court below finds that the appeal will have a real chance of success. Counsel for the applicant contended that his appeal will have a real chance of success because the learned judge was palpably wrong when she refused to set aside the default judgment pursuant to rules 13.2 and 13.3 of the CPR.

The two issues which therefore arise on this application for consideration by the court are:

1. whether the learned judge was correct to find that the applicant had been served with the claim form and its supporting documents; and
2. whether the learned judge was correct to find that the applicant had no real prospect of successfully defending the claim.

Was the learned judge correct to find that the applicant had been served with the claim form and its supporting documents?

[7] Rule 13.2 of the CPR illustrates the instances in which a court must set aside a default judgment. It provides that:

> "(1) The court must set aside a judgment entered under Part 12 if judgment was wrongly entered because –
>
> (a) in the case of a failure to file an acknowledgment of service, any of the conditions in rule 12.4 [that the claimant proves service of the claim form and particulars of claim; the period for filing an acknowledgment of service under rule 9.3 of the CPR has expired; and the defendant has not filed an acknowledgment of service, or defence to the claim or any part of it] was not satisfied;
>
> (b) in the case of judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied; or
>
> (c) the whole of the claim was satisfied before judgment was entered.

(2) The court may set aside judgment under this rule on or without an application."

The applicant therefore sought to convince Barnes J (Ag) that he had not been served with the claim form and particulars of claim, which, if accepted, meant that the default judgment entered against him must be set aside as of right.

[8] In his affidavit filed 29 August 2016, the applicant stated that he could not have been served on 14 September 2012, as at that time, he was on duty at the Jamaica Constabulary Force's Criminal Investigation Branch Headquarters, located at the 4th Floor, NCB South Towers, Kingston 6 in the parish of Saint Andrew. He further stated that he has lived at "Lot 55 Iter **Boreale** Housing Scheme, Annotto Bay in the parish of Saint Mary for over 8 years" and that he had never heard of a housing scheme called "Iter **Borale**" (as Mr Blackwood stated in his affidavit). In a supplemental affidavit filed 27 July 2017, the applicant deponed that he would work at the Criminal Investigation Branch five days per week, Mondays to Fridays. On Fridays, after work, he would not immediately go home; he would religiously play dominoes with his co-workers from about 4:00 pm until about 8:00 pm or 9:00 pm. He also stated that it would be impossible for him to arrive home in Saint Mary by 4:30 pm, if he had left his place of employment at 4:00 pm.

[9] Miss Charmaine Knight, the applicant's common law spouse, swore to an affidavit filed 27 July 2017, in support of the application to set aside the default judgment. She deponed that she resides with the applicant at Lot 55 Iter Boreale and is a house wife. She stated that on 14 September 2012, she was at home the entire day, and the

applicant was not present. She stated that he would work in Kingston and stay in Portmore in the parish of Saint Catherine during the week, and come home on Fridays at various hours, the earliest time being 7:00 pm. She stated that she was at home between 4:00 pm and 4:30 on 14 September 2012, and that no one came to the house and left documents for the applicant.

[10] In her reasons for judgment, the learned judge accepted on a balance of probabilities that the applicant was served with the claim form and it's supporting documents on 14 September 2012. She accepted Mr Blackwood as a witness of truth because he said that he knew the applicant before, and also because, rather than speaking with absolute surety about serving documents on the applicant more than six years ago, Mr Blackwood stated that the applicant "would look like the person" he had effected service on. She also accepted Mr Blackwood's evidence that he visited the Iter Boreale Housing Scheme asking for "Hutchie" and handed the documents to someone who "looked like him". The learned judge also accepted that the documents were served having regard to the fact that all subsequent court orders and/or documents were served upon the applicant at the same address (Lot 55 Iter Boreale Housing Scheme), by registered post, and there was nothing before her which indicated those court orders and/or documents had not been received or that they had been returned to the respondent's attorney.

[11] Mr Neal submitted that the learned judge had misdirected herself with regard to whether the judgment ought to have been set aside, pursuant to rule 13.2 of the CPR,

because there was no definitive evidence before her that the applicant had been served. In fact, he pointed the court to paragraph [4] of the learned judge's reasons for judgment where she agreed that there was some uncertainty as to the person upon whom those documents were served. Counsel asserted that the fact that Mr Blackwood went to the housing scheme asking for "Hutchie", and the fact that he stated that he knew him before, meant that he knew the individual upon whom he was to effect service, and so ought not to have exercised any doubt as to whom he had served. Counsel further indicated that the learned judge erred in falling to give adequate consideration to the affidavit of the applicant's common spouse, who stated that the applicant was not present on 14 September 2012 between 4:00 pm and 4:30 pm. He also urged the court to note that the respondent did not express a desire to cross-examine Miss Knight, and so some weight ought to have been placed on her uncontroverted evidence.

[12] Counsel for the respondent, Mr Raymond Samuels, argued that the respondent had satisfactorily proved service on the applicant. He indicated that credibility was an issue when it came to determining whether the applicant had been served. The learned judge, he submitted, had accepted Mr Blackwood to be a witness of truth. He also urged the court to note that there was no documentary evidence to support the applicant's assertions that he had been elsewhere, which, counsel submitted, could easily have been provided, given where the applicant had been employed at the material time. He stated that there was no issue that the process server went to the wrong address, and the learned judge was correct to state that all relevant documents

were sent to the applicant's address by registered post without being returned or having not been received. He stated that the evidence of the applicant's common law spouse was before the judge, and so there was nothing advanced by the applicant that would have led the judge to a different conclusion, and she had not erred in her finding in this regard.

[13] It as a well established and accepted principle that the Court of Appeal is slow to disturb findings of fact made by a judge sitting alone, especially on issues of credibility, unless it can be shown that such findings were not based on any evidence or was plainly wrong (see **Watt (or Thomas) v Thomas** [1947] AC 484).

[14] It is clear on the evidence that the applicant was connected to Lot 55 Iter Boreale Housing Scheme. In fact, he deponed, that that was where he had lived for over eight years. Mr Blackwood deponed that he had served the applicant at that same address. The learned judge found Mr Blackwood to be a witness of truth because, when he was cross-examined, he did not seek to bolster his credibility by asserting with absolute surety that he had served the applicant, more than six years after he had supposedly done so. She had also accepted that the applicant was known to Mr Blackwood, and that he had gone to the Iter Boreale Housing Scheme looking for "Hutchie", and had given the documents to someone who "looked" like him.

[15] In my view, the learned judge correctly noted that all other documents and orders related to the instant case were served at the same address, by registered post, and were not returned to the respondent's counsel, nor was there any indication that

they had not been received by the applicant. She also considered the fact that the instant case was not one in which the issue was being taken that service was effected at the wrong address, or one that service was irregular, in that, only some of the required documents had been served.

[16] Counsel for the respondent elected not to cross-examine Miss Knight on her affidavit which was indeed before the learned judge for her consideration. I noted that the learned made no reference to Miss Knight's affidavit, which she ought to have done. However, having examined Mr Blackwood's evidence and his demeanour, she found him to be credible, which would imply that she rejected the contents of Miss Knight's affidavit. This court would hesitate to interfere with her finding that in that regard.

[17] As a consequence, there was sufficient evidence before Barnes J (Ag) to support her finding that the documents were served on the applicant, and so it cannot be said that her finding it that regard was plainly wrong. Accordingly, there is no real chance of success in any ground of appeal which seeks to challenge that finding.

Was the learned judge correct to find that the applicant had no real prospect of successfully defending the claim?

[18] Rule 13.3 outlines the instances in which a court may set aside a default judgment. It states that:

> "(1) The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it.

(Rule 26.1(3) enables the court to attach conditions to any order.)"

The applicant's contention before Barnes J (Ag), and on appeal, was that he had a real prospect of successfully defending the claim on three main bases: (i) the injuries were inconsequential; (ii) contributory negligence arose; and (iii) Mr Anthony Hutchinson was not acting as his servant and/or agent at the time the accident had occurred. The learned judge referred to these defences at paragraphs [19]-[20] of her reasons for judgment, and found that the applicant had no defence with a real prospect of success on the merits. Counsel for the respondent indicated that he agreed with the decision of the learned judge that the applicant had no defence with a reasonable prospect of success. Each proposed defence (if they can be so called) will be considered in turn.

What was the nature and extent of the respondent's injuries?

[19] The applicant deponed that he only became aware of the accident weeks after it had occurred, and thereafter, he immediately contacted the respondent's mother who had told him that "the injury that the [respondent] had received was minor and did not

need much attention". He therefore denied the particulars of injury and special damages claimed by the respondent. The respondent's mother, in an affidavit filed 26 February 2018, denied ever telling the applicant that the respondent had only suffered "minor injuries nor did he need much attention" because he was severely injured.

[20] The applicant's assertion, by itself, is not a defence, but appears to be an attempt to mitigate the damages payable. Additionally, the applicant's assertion in this regard seems incredible, as one could not examine the medical reports attached to the particulars of claim and assert that the respondent's injuries were "minor and did not need much attention". Accordingly, his claim relating to a discussion with the respondent's mother that the respondent had not suffered any injuries does not raise a defence with any real prospects of success.

Was contributory negligence raised?

[21] Contributory negligence arises where a claimant suffers harm, partly as a result of his actions or those of persons other than the defendant. It operates to reduce the extent of the damages recoverable in respect of that harm to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage (see Halsbury's Laws of England, 2018, Volume 78, at paragraphs 75 and 76). The applicant has denied the particulars of negligence claimed by the respondent, and seemed to have raised the issue of contributory negligence.

[22] At paragraph 15 of his affidavit filed 29 August 2019, he stated:

> "That I have always maintained that I was not liable for the accident which gave rise to this claim and always intended to file a Defence to same had I been served as I cannot admit nor deny that allegations of negligence [sic] against [Mr Anthony Hutchinson] as the facts of the accident are not within my knowledge. I therefore put the [respondent] to strict proof of the allegations that [Mr Anthony Hutchinson] was negligent. I attach hereto a copy of my draft Defence and mark same as **'DH-1**' for identification." (Emphasis as in original)

[23] At paragraph 4 of his defence he stated that:

> "... [he] was told by [Mr Anthony Hutchinson] and verily believed that at the material time of the accident, [Mr Anthony Hutchinson] was driving [the applicant's] vehicle within the lawful rate of speed, when the [respondent], who was walking on the seaside wall, jumped off the wall and ran across the road and collided in the right section of the said motor car. Further, any or all injuries received by the [respondent] were caused directly by the [respondent's] negligence."

[24] In my view, neither paragraph provides a valid basis for defending the claim. In paragraph 15 of the applicant's affidavit (as cited at paragraph [22] herein), the applicant categorically states that the facts of the accident are not within his knowledge. In fact, paragraph 4 of the applicant's defence recites inadmissible hearsay evidence from Mr Anthony Hutchinson, who has not provided an affidavit or statement to the court outlining those facts. The police report, done almost three years after the accident had occurred, contains only hearsay evidence as to how the accident occurred. Issues may also arise as to the admissibility of the statements supposedly made by the

respondent to a doctor that are contained in a medical report from Apex Medical Centre dated 8 November 2011.

[25] Indeed, in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA (as he then was) at paragraph [23] of the judgment, indicated that under rules applicable before the CPR, the principle was that the facts contained in an affidavit of merit must be sworn to by someone with personal knowledge of those facts in order to demonstrate that there was "a prima facie defence" (see **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73 and **Evans v Bartlam** [1937] AC 473). However, since the CPR, Morrison JA noted that a stronger approach has been adopted, in that, "the written evidence in support of the application to set aside will have to address [the relevant] factors, and in particular the alleged defence on the merits" (see Stuart Sime, A Practical Approach to Civil Procedure, 10th Edition, paragraph 12.35).

[26] Accordingly, there were no facts before Barnes J (Ag) which purported to show and/or support the defence of contributory negligence.

Was the applicant liable for the actions of Mr Anthony Hutchinson?

[27] The applicant had deponed that at the time of the accident, his motor car was insured, and yet the insurers were not named as a party. I fail to see how this claim would resolve the issue of his liability.

[28] In his supplemental affidavit filed 27 July 2017, in support of his application to set aside the default judgment, the applicant deponed at paragraph 7 that:

> "On the day of the accident, [Mr Anthony Hutchinson] was not driving as my servant or agent. He was driving for his own benefit and purpose. The vehicle is used primarily as a taxi. [Mr Anthony Hutchinson] would drive the vehicle six days per week. One of those days would be for his sole benefit. Mondays and Fridays are the two busiest days and so on Fridays he would operate the vehicle for his own benefit as that is how he pays himself. At the material time he was not driving at my request or instructions and I exercise no form of control over him. The vehicle would be parked on Sundays."

[29] This statement made by the applicant tends to support the fact that he was vicariously liable for the accident. The general rule of vicarious liability is that anything done by a person, in the course of his employment, must be treated as also done by the employer; and anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal (see Halsbury's Laws of England, Volume 33, 2017, paragraph 120).

[30] The applicant admitted that he was the owner of the motor car involved in the accident, and that Mr Anthony Hutchinson was employed by him to operate the said motor car as a taxi. He stated that Mr Anthony Hutchinson would use the said motor car six days per week, Mondays and Friday's being the busiest days, but he would use it on Fridays "to pay himself". In other words, Mr Anthony Hutchinson's salary was the money he would receive on Fridays from operating the said motor car as a taxi.

[31] The applicant seemed to be suggesting that the accident had occurred on a day on which Mr Anthony Hutchinson had full custody and control of the motor car, and was operating the same for his own use and benefit, and as such, he (the applicant) would

not be liable. However, the accident occurred during the course of Mr Anthony Hutchinson's employment by the applicant, and while driving a motor car belonging to the applicant. In any event, the accident occurred on a Thursday, which was a day not to Mr Anthony Hutchinson's benefit, but to the applicant's. The applicant would therefore, in those circumstances, be inescapably vicariously liable. Moreover, Mr Anthony Hutchinson has not provided an affidavit or any statement speaking to any of the facts relating to the accident. Accordingly, there was no real prospect of successfully defending the claim on the basis that he was not liable for the accident.

[32] In the light of all the above, the finding made by the learned judge that the applicant had no defence was irresistible. There was no real prospect of successfully defending the claim and hence, no real chance of success in the proposed grounds of appeal.

The application for a stay

[33] As indicated, the applicant also sought a stay of execution of the default judgment entered on 9 July 2013, pending the outcome of the appeal. However, this was never argued before us as counsel for the applicant, Mr Lemar Neal, indicated that the success of that application was dependent on the outcome of the application for permission to appeal, and moreover, he was relying on his written submissions and the applicant's affidavit filed in support thereof. Since I have found that there is no real chance of success in the proposed grounds of appeal, and would refuse the application for permission to appeal, it is therefore unnecessary to consider whether the execution

of the default judgment ought to be stayed pending the outcome of the appeal. The application for a stay of execution of that judgment must therefore also be refused.

P WILLIAMS JA

[34] I have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

EDWARDS JA

[35] I too have read the draft judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The application for permission to appeal the decision of Barnes J (Ag) made on 15 February 2019 is refused.
2. The application for stay of execution of the default judgment entered on 9 July 2013 pending the outcome of the appeal is refused.
3. Costs to the respondent to be agreed or taxed.