[2015] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 159/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)

BETWEEN	**ISLAND CAR RENTALS LTD (MONTEGO BAY)**	**APPLICANT**
AND	**HEADLEY LINDO**	**RESPONDENT**

David Johnson instructed by Samuda and Johnson for the applicant

Norman Hill QC and Raymond Samuels instructed by Samuels and Samuels for the respondent

19 and 21 January 2015

BROOKS JA

[1] **Avis Rent-a-Car Ltd v Maitland** (1980) 32 WIR 294 has long been accepted as the authority for the principle that a person who lets a motor vehicle out on hire, is not, by virtue of that transaction, vicariously liable for the negligent driving of the person to whom he hires the vehicle. The applicant, Island Car Rentals Ltd (Island) relied heavily on that principle in its application for summary judgment in Mr Headley Lindo's claim against Island and other defendants. Island sought an order that Mr Lindo could not succeed against it in his claim for damages for negligence, because its

vehicle, when it was involved in the collision that caused him injury, was out of its control by virtue of a contract of hire.

[2] King J refused Island's application on the basis that, despite that well established principle, there was another issue joined between Mr Lindo and Island on the pleadings. That issue was whether Island had negligently allowed the vehicle, which it knew to be defective, to be driven on the public roadway. It was an issue, King J ruled, that required a trial.

[3] Island is aggrieved by that ruling and seeks permission to appeal against King J's refusal. King J had also refused permission to appeal, hence Island was obliged to make a fresh application for permission, to this court. Island complains that King J erred in his ruling because, in his answer to the application for summary judgment, Mr Lindo made no attempt to support his assertion in his pleadings that Island knew or ought to have known that its vehicle "was defective in that the brake system was not working properly".

[4] The main question to be decided, in assessing whether or not to grant permission to appeal, is whether Island's complaint has any reasonable prospect of success if it is granted permission to appeal. It is first necessary to outline the relevant facts of the case and the pleadings which preceded Island's application for summary judgment.

Background

[5] On 16 November 2005, Mr Lindo had been injured in a motor vehicle collision involving one of Island's vehicles and another vehicle in which he was a fee-paying passenger. He filed a claim, in 2008, against the owners and drivers of both vehicles. Island was named as the 2nd defendant to the claim.

[6] In his particulars of claim, Mr Lindo asserted that the driver of Island's vehicle, Mr Erwin Dostal, was its servant or agent at the time of the collision. In addition to that assertion, Mr Lindo's pleadings alleged that Island was negligent because it had allowed the vehicle to be driven on the road in a defective condition. Mr Lindo's particulars of negligence against Island also stipulated that he would "also rely on the Res Ipsa Loquiture [sic] doctrine".

[7] Island filed a defence to the claim. Firstly, it denied that Mr Dostal was negligent. Secondly, it denied that he was its servant or agent. Thirdly, it asserted that it had rented the vehicle to Mr Dostal's wife under a rental contract dated 1 November 2005, under which contract only Mrs Dostal was entitled to drive. It asserted that neither Mr nor Mrs Dostal was its servant or agent. It denied the allegations of negligence against it and, at page 2 of the defence, specifically denied the allegation of the defective braking system.

> "The allegation that the braking system of [its motor vehicle] was defective at the material time as alleged or at all [is denied], as [sic] 2nd Defendant puts the Claimant to proof and says the said motor vehicle was free of any such defect when hired and was not in its custody and control thereafter being in the custody and control of the hirer."

[8] Mr Lindo filed at least three applications for court orders in the course of the litigation, prior to Island's application for summary judgment. One of those applications included a request for permission to amend his particulars of claim. The proposed amended particulars of claim alleged that the rental contract was fraudulent. It also asserted Island's failure to ensure that its vehicle was insured for operation on the roadway.

[9] Island's application for summary judgment was filed in November 2011. That application, along with Mr Lindo's three applications, came on before K Anderson J on 4 July 2012. At that time, counsel for Mr Lindo withdrew his application to amend the particulars of claim, but did so without prejudice. Anderson J made various orders in respect of each application and fixed a date for a case management conference during which they would be considered.

[10] Island's application sought summary judgment in respect of the entire claim. The affidavit that Island filed in support of its application was sworn to by Mr Martin Gutzmer. In his affidavit, Mr Gutzmer addressed the contract of hireage between Island and Mrs Dostal. He stressed that during the period of hireage the vehicle was in the custody of Mrs Dostal and its use exclusively determined by her. He made it clear that Island sought summary judgment on the entire claim. After deposing that Mr Dostal was in no way connected to Island, Mr Gutzmer concluded his affidavit with the following paragraph:

> "9. In light of the matters previously referred to I verily believe that the Claimant has no real prospect in Law of succeeding on the claim filed herein. In the circumstances, I respectfully ask that the Court make the Orders sought in the Application for Summary Judgment filed herein on the 2nd Defendant's behalf."

Mr Gutzmer made no mention of the question of the state of the vehicle or whether or not it was defective.

[11] Mr Lindo filed an affidavit responding to the application for summary judgment. Apart from asserting generally that "there are numerous issues of fact and law which exist making this case inappropriate for summary judgment dispositions", and that there were "legal issues as to the negligence of the 2nd Defendant in that it…allowed the said motor vehicle…to be used on the road", Mr Lindo made no mention of the state of the vehicle. Nowhere in that affidavit did he assert that it had defective brakes or any other defect.

The proceedings before King J

[12] Island's attorneys-at-law, in their written submissions to King J, devoted one paragraph to the issue of the defective vehicle. In that paragraph, the submission was made that there was no evidence that the vehicle was defective. The paragraph concluded with a submission that an application for summary judgment could not be answered by reliance on the relevant pleadings. The relevant submissions are set out in full below:

> "11. The question therefore is whether the claimant has established on the available evidence that the 2nd Defendant's summary judgment application is in fact

misconceived. The core issues which have been distilled from the written submissions filed on the Claimant's behalf are:

a) <u>The contention that the 2nd Defendant was negligent in permitting the 1st Defendant to drive a defective motor vehicle on the public roadway.</u>

There is no evidence on affidavit from the Claimant or otherwise which confirms that the vehicle was defective either at the date of hireage or when the collision in issue occurred. It is therefore submitted that the Claimant cannot simply rely on an assertion of this nature in his pleadings to defeat the summary judgment application." (Underlining as in original)

[13] In his written response, counsel for Mr Lindo submitted, on the point of the issue of the defective vehicle, that it had not been shown that Mr Lindo had no real prospect of succeeding at trial. Learned counsel submitted that the issue required assessment at a trial. He said, in part, at paragraph 17 of his written submissions:

"17. In this particulars [sic] case it cannot be said at this stage that the Claimant has no real prospect of succeeding at the trial as the issues raised on the claim require findings of fact before applicable legal principles can be applied:

(i) In [sic] case of the claim for negligence in relation to sub-para (a) under Particulars of Negligence [sic] 2nd Defendant, the question as to whether the motor vehicle is defective would depend on the evidence at trial of the action in particular those witnesses who can testify as to how and why the collision occurred and subsequent inspection of the vehicle."

[14] In his ruling on the application, King J pointed out that the amended claim forms and particulars of claim sought to add new causes of action but had been filed after the six-year limitation period had expired and without the permission of the court. After recording the basis for Island's application as being the principle in **Avis v Maitland**, the learned judge noted that that was not the only issue raised on the pleadings. He then addressed the issue of the defective vehicle and pointed out that it was a live issue on the pleadings, and that Mr Lindo was entitled to have it tried. He said in this regard:

> "The fact is though, that the Claimant has from the outset constantly asserted as a basis for its charge of negligence against Island, that it permitted to be driven on the road a vehicle which it knew or ought to have known was defective. This was particularized in the initial claim filed, and maintained in the others filed since.
>
> It must be stressed that at this stage of the proceedings this application is being heard on the basis of assertions only, and not on the evidence which is yet to be revealed. An assertion having been made by the Claimant that Island rented a vehicle which it knew or ought to have known was defective, though denied, is a relevant fact in issue to be tried. The existence of that fact in issue and the necessity for it to be decided on evidence yet to be presented, renders [sic] it unnecessary to decide any of the other interesting issues canvassed in this application.
>
> The Claimant is entitled to maintain his assertion at least up to the point when his witness statements and/or expert reports have to be filed. For that reason this application for Summary Judgment is premature, and must fail."

The application

[15] In this application Mr Johnson, for Island, argued that Mr Lindo, having raised the issue of the defect in the vehicle, was obliged to support that assertion with

evidence. Learned counsel submitted that, despite being faced with an application for summary judgment, Mr Lindo provided no evidence whatsoever in that regard. Mr Johnson argued that where summary judgment has been sought, the burden of proof is laid on the respondent to show that his case has a real prospect of success. Learned counsel relied on **ASE Metals NV v Exclusive Holiday of Elegance Ltd** [2013] JMCA Civ 37 in support of his submissions.

[16] Mr Johnson accepted that Island did not produce any evidence in respect of the defective vehicle, but, he argued, the issue was thoroughly ventilated in submissions before the learned judge. In the circumstances the learned judge was wrong to have refused the application for summary judgment.

[17] Mr Hill QC, appearing for Mr Lindo, submitted that there were at least two clear issues before the learned judge, namely the issue of vicarious liability and the issue of the defective vehicle. Learned Queen's Counsel pointed out that Island should have produced evidence before the learned judge in respect of each issue. The rules, he submitted, place the burden of producing that evidence, on the applicant who seeks summary judgment. In this case, he argued, it was not sufficient for Island to have produced evidence in respect of one issue and not the other.

[18] Learned Queen's Counsel submitted that the issue of the defect was one of fact. In the absence of evidence on the point, he submitted, the application was clearly premature and the learned judge was correct in refusing Island's application for summary judgment. Learned counsel relied on the cases of **Shah and Another v**

HSBC Private Bank (UK) Ltd [2010] EWCA Civ 31, **Groveholt Ltd v Hughes and Another** [2008] EWHC 1358 (Ch) and **Miller v Cawley** [2002] EWCA Civ 1100 in support of his submissions.

The analysis

[19] Rule 1.8(9) of the Court of Appeal Rules 2002 (CAR) stipulates the general rule concerning applications for permission to appeal. The rule is that permission will "only be given if the court or the court below considers that an appeal will have a real chance of success". In considering whether Island's proposed appeal would have a real chance of success, it is necessary to examine some of the principles regarding applications for summary judgment. The major principles relevant to this case are:

a. Applications for summary judgment are governed by part 15 of the Civil Procedure Rules 2002 (as amended) (CPR). Rule 15.2 of the CPR states:

> "15.2 The court **may** give summary judgment on the claim or on a particular issue if it considers that -
>
> (a) **the claimant has no real prospect of succeeding on the claim or the issue**; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of [sic] statement of case if it discloses no reasonable ground for bringing or defending the claim.)" (Emphasis supplied)

Rule 15.6 confirms the fact that the court considering an application for summary judgment has a discretion in whether or not to grant the application. Paragraph (1) of the rule states, in part, that "[o]n hearing an application for summary judgment the court **may**-…" (emphasis supplied).

b. In applications for summary judgment "the overall burden of proof rests upon the [applicant] to establish that there are grounds for his belief that the respondent has no real prospect of success" (see **ED&F Man Liquid Products Ltd v Patel and Another** [2003] EWCA Civ 472; [2003] CPLR 384 at paragraph 9). It is true that the comment was not made in a case dealing with summary judgment, but the principle that an applicant for summary judgment must be required to do more than assert that the respondent "has no real prospect of succeeding on the claim or issue", is supported by rule 15.5 (1) which requires the applicant to "file affidavit evidence in support with the application". That evidence must necessarily address the claim or issue, on which the applicant seeks its relief. Support for the principle that the burden of proof, at the stage of summary judgment, rests on the applicant, may be found in the decision of this court in **ASE Metals NV v Exclusive Holiday**. The court, at paragraph [14] of the judgment endorsed the principle as set out in **ED & F Man**.

c. Summary judgment is not usually granted in negligence claims. In Blackstone's Civil Practice 2012, at paragraph 34.18, the learned editors opine that:

> "Although there is nothing in principle preventing a claimant from applying for summary judgment in claims seeking damages for negligence, such cases invariably involve disputed factual issues, so it is rare for a court to find that there is no real prospect once liability is denied….The question of whether a duty of care is owed often has to be decided in the light of all the facts and evidence (**Caparo Industries plc v Dickman** [1990] 2 AC 605; **Capital and Counties plc v Hamshire County Council** [1997] QB 1004)."

d. "Where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini trial" of the issues (see **ED & F Man** at paragraph 10).

e. In considering an application for summary judgment, the court must also bear in mind that granting summary judgment is a serious step. The words of Judge LJ in **Swain v Hillman** [2001] 1 All ER 91 are to be considered. He said, in part, at page 96:

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."

[20] It is also to be borne in mind that a ruling on an application for summary judgment is an exercise of a discretion given to the judge at first instance. This court will not lightly interfere with such an exercise. Morrison JA so stated in **Attorney General of Jamaica v John Mackay** [2012] JMCA App 2. He acknowledged the principle at paragraph [19] of his judgment and said, in part:

> "...the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'"

[21] In this case, Island was obliged to show that Mr Lindo would necessarily fail in all aspects of his claim against it. It was not entitled to address parts of his claim and ignore the rest. It advanced its **Avis v Maitland** point but made no effort to support its assertion that it delivered the vehicle to Mrs Dostal in good working condition and that it had had nothing to do with the vehicle thereafter. It is true that Mr Lindo, similarly, made no effort to support his assertion that the vehicle was defective, however, the burden of proof did not lie with Mr Lindo at that stage, and he was responding to the affidavit filed on behalf of Island.

[22] Mr Johnson's submission that there was a burden of proof on Mr Lindo at that time is not strictly correct. An application for summary judgment requires the applicant to produce credible evidence which demonstrates that the respondent has no real prospect of success. As was said above, the overall burden lies on the applicant. It is when the applicant produces credible evidence to support its application that a burden is placed on the respondent to show that his case has a real prospect of success. This was pointed out at paragraph 15 of the judgment in **ASE Metals NV v Exclusive Holiday:**

> "Once an applicant/claimant asserts that belief [that the respondent's case has no real prospect of success], **on credible grounds**, a defendant seeking to resist an application for summary judgment is required to show that he has a case 'which is better than merely arguable' (see paragraph 8 of **ED & F Man**). The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success'." (Emphasis supplied)

[23] The result of the failure on both sides to produce any evidence in respect of the alleged defect, meant that, as the learned judge found, there was a live issue left for resolution. That resolution is for a judge at a trial after hearing the evidence that the parties will respectively adduce in that regard. It was not within King J's remit to resolve the issue. He was quite correct in denying Island summary judgment on the entire claim in the circumstances.

[24] The learned judge did not address the question of whether the issue of vicarious liability could be resolved at the hearing before him. It does not appear that either of the parties considered that it could be dealt with as a discrete issue in the claim. It is to be noted that the application did not seek judgment specifically in respect of that issue; it spoke to the claim as a whole. It may also be that with the issue of whether or not the rental agreement was fraudulent being unresolved, the learned judge was of the view that the entire matter should be left for trial. In that regard, the learned judge was of the view that the issue of whether the amendment was permissible, should be left for consideration at another time. This is because the amendment seemed to have been done after the limitation had already expired.

[25] Regrettably, the learned judge, having refused the application, did not immediately conduct a case management conference, as rule 15.6(3) required him to do in the case of a refusal.

[26] Based on the above assessment, and despite the lapse by the learned judge, Island has no real prospect of success in an appeal against the refusal to grant summary judgment. Accordingly, its application for permission to appeal must fail.

[27] It may be noted that a similar situation arose in **Stewart and Others v Samuels** SCCA No 2/2005 (delivered 18 November 2005) where the applicant for summary judgment sought to rely on the defence of accord and satisfaction. In its application it exhibited a form of release signed by the respondent who was the claimant in that case. The respondent contended that the document had been signed as a result of undue influence being brought to bear on him. This court supported the decision of the judge at first instance that, despite the existence of the document, the issue of undue influence was a live issue that should be adjudicated at trial.

Summary and conclusion

[28] In order to secure permission to appeal, Island has to show that it has a real prospect of succeeding if it were granted permission. The point on which it has complained against the decision of King J is one in which it has no real prospect of success. It failed to place any material before the learned judge which was conclusively in its favour on an issue of fact which had been raised on the pleadings, namely that it was in no way negligent in allowing its vehicle to be driven on the road. The learned judge's refusal of Island's application for summary judgment, in the exercise of the discretion given to him by the CPR, cannot therefore be faulted.

McDONALD-BISHOP JA (Ag)

[29] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

SINCLAIR-HAYNES JA (Ag)

[30] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing that I can usefully add.

BROOKS JA

ORDER:

a. The application for permission to appeal is refused.

b. Costs of the application to the respondent to be taxed if not agreed.