[2019] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 30/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**WINSOME BROWN**	**APPELLANT**
AND	**CLEVELAND SCARLETT**	**RESPONDENT**

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the appellant

Donald Gittens instructed by JamLawCaribbean for the respondent

17, 23 July and 13 December 2019

PHILLIPS JA

[1] I have read in draft the judgment of my sister Straw JA. I agree with her reasoning and conclusion and have nothing to add.

STRAW JA

Background

[2] This matter arose from an accident, involving both parties' motor vehicles, which took place on 14 March 2008 along the Holland Bamboo main road in the parish of Saint Elizabeth.

[3] Resulting from the accident, the respondent alleged that he suffered loss and damage. The respondent submitted a claim to the appellant's insurers (JN General Insurance Company Limited, formerly NEM Insurance Company (Jamaica) Limited) and an agreement was reached.

[4] This agreement titled "Third Party Release" dated 18 November 2008 was signed by the respondent and witnessed by an underwriting clerk of Advantage General Insurance Company Limited, the insurers of the respondent. The agreement is set out below:

> "**THIRD PARTY RELEASE**
>
> CLAIM NO: CLPVT0003787 DATE: November 18, 2008
>
> **Cleveland Scarlett** agrees to accept from N.E.M. INSURANCE COMPANY (JAMAICA) LIMITED on behalf of **Winsome Brown** (Insured) and **Valdie Bromfield** (Driver) of motor vehicle bearing registration number **8124 EU** the sum of **One Hundred & Seventy Three Thousand & Three Hundred & Fifty Dollars ($173,350.00)** in full settlement of all claims past, present and pending inclusive of legal costs and in particular to the claim made arising from the accident which occurred at **Hallon Bamboo Main Road** in the parish of **St. Elizabeth** on the 14/03/08 involving motor vehicle bearing registration number **8124 EU** and property owned by **Winsome Brown** and motor vehicle bearing registration number **2771 EP** and property owned by **Cleveland Scarlett**.
>
> IT IS AGREED AND UNDERSTOOD that this payment is received by **Cleveland Scarlett** by way of compromise of the claim made by and without the admission of liability on the part of the said NEM. INSURANCE COMPANY (JAMAICA) LIMITED and **Winsome Brown** (Insured) and **Valdie Bromfield** (Driver) in consideration thereof I do hereby release and discharge the said NEM INSURANCE COMPANY (JAMAICA) and **Winsome Brown** (Insured) and **Valdie Bromfield** (Driver) each of them of [sic] and from all claims and demands whatsoever arising directly or indirectly out of the said accident and HEREBY UNDERTAKE that we will not at any time

> hereafter take or bring any action or proceeding or make any property claim whatsoever in respect of the said accident."

[5] About a year and a half later, on 19 May 2010, the respondent filed a claim in the Supreme Court against the appellant and the driver of her motor vehicle. The respondent claimed damages for personal injuries which he allegedly suffered as a result of the negligence of the appellant's driver.

[6] Further, on 21 May 2010 the appellant's insurers were served with notice of proceedings (filed 19 May 2010) which is done pursuant to the Motor Vehicles Insurance (Third-Party Risks) Act.[1]

[7] The claim form itself was not served until 10 June 2011, after an order was obtained[2] by counsel for the respondent which extended the time for service and allowed service by specified method. The appellant's insurers filed an acknowledgement of service on 23 June 2011, followed by a defence on behalf of the appellant on 12 August 2011. The essence of the defence was that the respondent signed a release and discharge and was therefore estopped from pursuing the claim. A bare denial was raised in response to the allegations of negligence.

[8] Some three years later, on 7 January 2015, the appellant made an application for summary judgment which was refused by Lawrence-Beswick J on 18 February 2016. It

---

[1] Section 18(2)(b) provides, "Subject to subsection (1A), no sum shall be payable by an insurer under the foregoing provisions of this section – in respect of any judgment, unless before or within ten days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;"

[2] on 18 May 2011

is this decision which gave rise to the appellant's notice of appeal (filed 2 March 2016). Subsequently, an amended notice and grounds of appeal was filed on 17 July 2019. It is these amended grounds which form the basis of this appeal.

[9] There is a second matter before this court, that is, a counter-notice of appeal (filed 23 July 2019) whereby the respondent is seeking to appeal the learned judge's order refusing his application to file a reply to the defence or more precisely to allow the reply to the defence to stand as it was filed on 17 February 2016. This application was made orally before the learned judge. It is unclear from the judgment as well as the record of counsel whether this application was made on 17 February 2016 or the following day, on 18 February 2016, when submissions continued. Suffice it to say the application was refused on 18 February 2016 and the learned judge indicated her reasons for same at paragraph [6] of her judgment. For completeness, it should be noted that an application for permission to appeal was filed on 17 July 2019 in this court and permission to appeal was granted on the same day.

[10] For reasons which will become apparent subsequently, it should be noted that in respect of both parties, counsel who appeared before this court did not appear in the proceedings below.

The appeal in respect of the refusal to grant summary judgment

[11] The appellant has relied on four grounds of appeal. Namely that the learned judge erred in law and/or fact, and/or misdirected herself when she:

(i) relied on the affidavit evidence of the respondent in the court below when same was not properly before her having regard to rule 15.5(2) of the Civil Procedure Rules, 2002 as amended;

(ii) concluded that the respondent's assertion that his insurers were acting as agents of the appellant's insurers raises a serious question concerning the signing of the release and discharge;

(iii) concluded that if the matter were to proceed to trial there would be an opportunity to properly ask for leave to put further pertinent evidence before a trial court when the only claim before her was one of negligence and the reply which addressed the issue raised by the respondent was not permitted to stand; and

(iv) failed to grant summary judgment in light of the defence of the appellant, the affidavit evidence of the appellant and the claim form and particulars of claim.

[12] The grounds in relation to the counter-notice of appeal are set out below:

> "The grounds of appeal are that the finding of fact is erroneous and the finding of law is unreasonable."

In particular, the findings of fact and law, respectively, that were challenged are stated as follows:

> "That the aforesaid oral application for permission was not supported by affidavit evidence (see paragraph 16 of the judgment)."
>
> "The finding that the absence of evidence explaining the reason for the delay in filing the reply to the defence meant that there was no basis to grant leave to file the said reply to defence (see paragraph 17 of the judgment)."

Relevant principles

[13] The grant or refusal of an application for summary judgment is discretionary, as such, this court must not interfere with the exercise of a judge's discretion merely on the ground that the members of this court would have exercised the discretion differently. It is settled that this court will only set aside the exercise of a judge's discretion where it was (i) based on a misunderstanding of the law or evidence; or (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it (see **Hadmor Productions Ltd and others v Hamilton and another**[3] and **The Attorney General of Jamaica v John Mackay**[4]).

[14] In determining whether or not to grant summary judgment at the request of the appellant, the learned judge had to consider whether the respondent had a real prospect of succeeding on his claim. Rule 15.2(a) of the CPR provides:

> "15.2 The court may give summary judgment on the claims or on a particular issue if it considers that –

[3] [1982] 1 All ER 1042, 1046
[4] [2012] JMCA App 1 at paras [19] and [20]

a. the claimant has no real prospect of succeeding on the claim or the issue; or

b. …"

[15] In **Sagicor Bank Jamaica Limited v Taylor-Wright**[5], the Board had this to say:

> "16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.
>
> 17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.
>
> 18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2…"

[16] Further, in **Barbican Heights Limited v Seafood and Ting International Limited**[6], a recent decision of this court, the principles relevant to summary judgment originally from **S v Gloucestershire County Council; L v Tower Hamlets London**

[5] [2018] UKPC 12
[6] [2019] JMCA Civ 1

Borough Council and another[7] were adopted by Sinclair Haynes JA at paragraph [78]:

> "…[On] an application for summary judgment the claimant must satisfy the court of the following:
>
> > '(a) All substantial facts relevant to the claimant's case, which are reasonably capable of being before the court, must be before the court.
> >
> > (b) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.
> >
> > (c) There must be no real prospect of oral evidence affecting the court's assessment of the facts.'"

These principles would be equally applicable where the application for summary judgment is made by the defendant, as in the case at bar.

Ground 1: The learned judge erred in law and/or fact, and/or misdirected herself when she relied on the affidavit evidence of the respondent in the court below when same was not properly before her having regard to rule 15.5(2) of the Civil Procedure Rules, 2002 as amended

Submissions on behalf of the appellant

[17] Counsel for the appellant, Mrs Senior-Smith, argued that the procedural requirements were not met by the respondent and as such, the learned judge fell into error when she relied on the evidence contained in the affidavit sworn to by the respondent, filed on 8 February 2016 in response to the affidavits filed in support of the summary judgment application. The affidavit was filed a day before the application first came for hearing and was never served on the appellant. Counsel stridently submitted that this was in breach of rule 15.5(2) of the Civil Procedure Rules (CPR), which requires a respondent to a summary judgment application who wishes to rely on

[7] [2000] 3 All ER 346

evidence to file an affidavit and serve copies on the applicant not less than seven days before the hearing.

[18] Mrs Senior-Smith acknowledged that an email was sent on 5 February 2016 to counsel who represented the appellant in the proceedings below, and that the said email indicated that there was an intention to file an affidavit and attached a draft. She maintains however that the affidavit was never in fact served. Counsel submitted that, even if the unfiled draft affidavit attached to the email could constitute service, the appellant still would have been short-served. For even greater impact, she directed this court's attention to rule 3.2(4) which sets out how time is computed.

Submissions on behalf of the respondent

[19] Counsel for the respondent, Mr Gittens, submitted that the issue of short service was not taken before the learned judge. If such an objection had been taken, he contended, that would have been stated in the judgment as the reliance on the affidavit was so fundamental to the proceedings.

[20] Further, it was submitted that the draft affidavit was the same as the one which was eventually filed. The affidavit was filed by facsimile and was also sent to counsel who represented the appellant below. Mr Gittens contended that the affidavit should be treated as served from 5 February 2016 (the date of the email).

Discussion and analysis

[21] In respect of evidence for the purpose of a summary judgment hearing, rule 15.5(2) of the CPR provides:

> "A respondent who wishes to rely on evidence must –
>
> (a) file affidavit evidence; and
>
> (b) serve copies on the applicant and any other respondent to the application, not less than 7 days before the summary judgment hearing."

[22] There is no doubt that the learned judge relied on the impugned affidavit as demonstrated in her reasons for judgment. This judgment was delivered orally and reduced to writing for the purposes of this appeal. Based on rule 15.5(2)(b), it ought to have been filed and served on the appellant at least seven days before the hearing for summary judgment. Regrettably, the learned judge's reasons for judgment do not state whether there was an objection to the use of the affidavit or if consent was given. It is also quite regrettable that, based on admissions by Mrs Senior-Smith, counsel who appeared for the appellant below could not definitively state whether or not such an objection was raised.

[23] In any event, there appears to have been an adjournment on 9 February to 17 and 18 February 2016. It is perhaps not merely coincidental that the summary judgment hearing was adjourned for seven days. This would have allowed for adherence with rule 15.5(2)(b).

[24] In light of all the above circumstances, there is, as such, no merit in this ground of appeal as it cannot be concluded that the learned judge palpably erred in placing reliance on the affidavit of the respondent.

Ground 2: The learned judge erred in law and/or fact, and/or misdirected herself when she concluded that the respondent's assertion that his insurers

were acting as agents of the appellant's insurers raises a serious question concerning the signing of the release and discharge

Submissions on behalf of the appellant

[25] Mrs Senior-Smith took issue with the learned judge's statement at paragraph [8] of her judgment that the respondent was influenced by his own insurers, who acted as agents for the appellant's insurers, and was not informed that he could seek legal counsel.

[26] She contended that this statement was not supported by the respondent's evidence as he never stated that his insurers were acting as agents for the appellant's insurers. She directed the court's attention to paragraph 3 of his affidavit, wherein he made a distinction between his insurers and the appellant's. Mrs Senior-Smith submitted that the respondent only spoke to his encounter with his insurers and that no blame was ascribed by him to the appellant's insurers regarding the signing of the release.

[27] Mrs Senior-Smith made it clear in her submissions that the appellant was relying on the release as a defence to the respondent's claim which was based on a single cause of action - negligence. She went further to submit that the issue of signing the release and discharge simply did not arise on the cause of action.

Submissions on behalf of the respondent

[28] Mr Gittens did not specifically address this issue in his submissions.

Discussion and analysis

[29] Paragraph [8] of the learned judge's judgment contains the impugned remark. This paragraph is set out below:

> "[8] As it concerns the summary judgment, in my view, the claimant is in substance stating that he was unaware of what he signed, that he did not understand the effect of what he signed. He was influenced by his own insurers who acted as agents for the defendant's insurers and he was not informed that he could seek legal counsel."

[30] She appears to have set out a summary of her understanding of what his affidavit contained. The appellant's counsel is correct that the affidavit does not refer to the insurers of the respondent as the agents for the insurers of the appellant. Further, it expressed no allegations of wrongdoing specifically against the insurers of the appellant or the appellant herself. It may be that the learned judge intended to express that the insurers of the respondent facilitated the signing of the document and disbursement of the cheque on behalf of the insurers of the appellant. However, while the use of the word "agent" in popular use may have a number of different meanings, in law, the word "agency" is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The authority of the agent may be expressed or implied from the conduct of the parties (see **Halsbury's Laws of England**, 2008, Volume 1, 5th edition at paragraphs 29 and 30).

[31] The learned judge would have erred in stating that the respondent, in his affidavit, expressly asserted an agency relationship between the insurers of both

parties, if that was her intention. However, the use of the word "agent" may also have been used by the learned judge to indicate that such a relationship may be implied between the two relevant insurance companies.

[32] In his affidavit, the respondent expressed that he was misled by his own insurers as to the contents of what he had been asked to sign and the learned judge referred to these aspects of the respondent's evidence which she found to have challenged the validity and enforceability of the release and discharge.

[33] As a result of the above circumstances, it cannot be concluded that the learned judge misdirected herself in relation to the assertion of an agency relationship. Ultimately, whether or not any such assertion could be deemed to be part of a factual background raising serious issues to be tried, can only be determined within the context of a consideration of grounds 3 and 4 and ultimately the ground raised by the counter notice of appeal. Grounds 3 and 4 will be considered together as the issues raised in these grounds must be dealt with cumulatively in order to determine whether the learned judge was correct to have refused the application for summary judgment. The submissions of each counsel on both grounds will however be set out separately below.

Ground 3: The learned judge erred in law and/or fact, and/or misdirected herself when she concluded that if the matter were to proceed to trial there would be an opportunity to properly ask for leave to put further pertinent evidence before a trial court when the only claim before her was one of negligence and the reply which addressed the issue raised by the respondent was not permitted to stand

Submissions on behalf of the appellant

[34] Mrs Senior-Smith submitted, by reference to the particulars of claim, that the respondent's claim was one for damages for personal injury and special damages were pleaded in the sum of $1,815,604.74. The appellant's defence met these averments by (i) admitting the allegations in relation to the motor vehicle accident, (ii) neither admitting nor denying the allegations of injury, (iii) denying the allegation of negligence, and (iv) by asserting that the third party release and the payment of $173,350.00 estopped the claim from being pursued.

[35] It was submitted that the appellant's application for summary judgment mirrored the defence and that no reply had been filed to that defence until five years later, on 17 February 2016. The principle of law that was raised in the defence as well as the application for summary judgment was that of accord and satisfaction.

[36] Mrs Senior-Smith took particular issue with the learned judge's finding (at paragraph [9]) that if the matter were to proceed to trial there would be an opportunity to properly ask for leave to put further pertinent evidence before a trial court. This would in counsel's estimation be an attempt to raise a secondary cause of action which would be impermissible for two reasons. Firstly, a new cause of action would be statute barred as the limitation period had expired. Secondly, this new cause of action could only be pursued against the respondent's insurers who were not made a party to the claim. She reiterated that the respondent was alleging that it was his insurers who did not read or explain the document to him nor inform him that he could seek legal counsel and advised him that the release was only in relation to property damage. The

respondent alleged that he had been told to sign by his insurers and he appeared to be raising the principles of mistake and/or undue influence. Counsel pointed out that the respondent had not alleged that he was unable to read, and even if he thought he was signing a partial release the law in relation to accord and satisfaction is clear. There was no need for the matter to go to trial. The case of **Alcan Jamaica Company v Delroy Austin and anor**[8] was relied upon in support of this contention.

[37] Further, counsel submitted that the learned judge's refusal to grant leave for the filing of the reply to the defence meant that the effect of rule 8.9A of the CPR would operate so as to preclude the respondent from setting up any factual argument against the appellant in the court below. In essence, the respondent was shut out from responding to the defence.

[38] Mrs Senior-Smith contended that the learned judge was constrained to refuse the application for leave to file the reply as it was not supported by any affidavit evidence but went further to submit that even if the judge had allowed the reply, the proper party was not before the court.

Submissions on behalf of the respondent

[39] Mr Gittens submitted that once the appellant relied on the release document raised in her defence, the circumstances of the signing of the document will become a

---

[8] (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 106/2002, judgment delivered 20 December 2004

live and relevant issue at the trial. These circumstances might address the state of mind of the respondent and the matters that were in his contemplation at the time of signing.

[40] Summary judgment against the respondent would deny him the opportunity to challenge the release which does not indicate that it was read to or read by the appellant before signing or that the respondent was given an opportunity to obtain legal advice before signing it.

[41] Mr Gittens submitted that the application for summary judgment also failed because the release and discharge contained ambiguities and inherent self-contradictions which must be construed against the appellant on whose behalf it was drafted and proffered.

[42] The release, according to Mr Gittens, did not exclude personal injuries. It specifically referred to property damage, which has not been claimed in the court below. He further submitted that the release does not refer to future claims, only past, present and pending claims. He contended also that the general words that the document used to proscribe future claims were circumscribed by words limiting those general words to property damage, that is, claims already made by the respondent.

[43] He stated therefore that there is a triable issue as to whether the release document signed by the respondent prohibits his action filed for personal injuries and it is contended that his evidence at trial as to his understanding of the release will be relevant to the resolution of this issue.

[44] It was counsel's submission that these issues ought to be fully ventilated at a trial of the claim and should not be stifled on a mini-trial at the hearing of an application for summary judgment. The appellant failed to establish any principle of law that a release and discharge once signed, could not thereafter be challenged on any ground. Reliance was placed on the case of **Bank of Credit and Commerce International SA v Munawar Ali and others**[9] for the proper approach in considering release documents and the application of the relevant principles. Counsel commended the judgment of Lord Bingham to the court, in particular the passages at paragraphs 7 to 9 and 11 to 18.

Ground 4: The learned judge erred in law and/or fact, and/or misdirected herself when she failed to grant summary judgment in light of the defence of the appellant, the affidavit evidence of the appellant and the claim form and particulars of claim

Submissions on behalf of the appellant

[45] Having regard to the claim form, particulars of claim, defence and the affidavit evidence, Mrs Senior-Smith submitted that the only cause of action before the court was in negligence. In light of this, the learned judge was wrong in not granting summary judgment in favour of the appellant. Reference was made to the following cases – **Elaine Dotting v Carmen Clifford (Executrix of the Estate of Dr Royston Clifford) and anor**[10], **Rio Brown v N.E.M. Insurance Company (JA) Ltd.**[11] and **Magee v Pennine Insurance Co. Ltd**.[12]

---

[9] [2001] UKHL 8

[10] (unreported), Supreme Court, Jamaica, Claim No. 2006HCV0338, judgment delivered 19 March 2007

[11] [2012] JMSC Civil 27

[46] Counsel contended that the learned judge did not address the construction of the release and that this was a failure on her part. She further submitted that no particular form of words was required for a release to be valid, and relied on the dictum of McDonald-Bishop J (as she then was) in **Elaine Dotting**.

[47] It was submitted that the release and discharge agreement was the contractual foundation upon which an offer was made and accepted by the respondent. It acted to extinguish any further claim against the appellant and her insurers. The satisfaction was a complete defence to the respondent's claim. Reliance was placed on **Rio Brown** in support of this point. As such, Mrs Senior-Smith contended that the application for summary judgment ought to have been granted as the release and discharge was binding and precluded the respondent from bringing any further actions or proceedings.

Submissions on behalf of the respondent

[48] Mr Gittens, in essence, relied on his earlier submissions that the application for summary judgment failed because the release and discharge contained ambiguities and inherent self-contradictions which must be construed against the appellant on whose behalf it was drafted and proffered.

[49] He repeated his contention that there was a triable issue as to whether the release document signed by the respondent prohibits his action filed for personal injuries and that it was his evidence at trial as to his understanding of the release which would be relevant to the resolution of this issue.

---

[12] [1969] 2 QB 507

[50] Counsel also submitted that the refusal of the court below to extend the time to file the reply was inconsistent with the finding that there were issues fit for trial.

Discussion and analysis in relation to grounds 3 and 4

[51] It is clear from the judgment that the learned judge did not expressly construe the release and discharge as she failed to make any pronouncement about whether it constituted a complete or partial defence. The relevant portions of her judgment are found at paragraphs [8] - [10]:

> "[8] As it concerns the summary judgment, in my view, the claimant is in substance stating that he was unaware of what he signed, that he did not understand the effect of what he signed. He was influenced by his own insurers who acted as agents for the defendant's insurers and he was not informed that he could seek legal counsel.
>
> [9] I recognise that the defence stated in substance, what has become the substratum of the application for summary judgment and there was no response to that for several years. It seems to me that if this matter were to proceed to trial there would be an opportunity to properly ask for leave to put further pertinent evidence before a trial court.
>
> [10] In my view serious issues have now arisen, concerning inter alia, the circumstances in which the release and discharge was signed. In my view these need to be resolved at a trial when inter alia, the circumstances of the signing of the documents can be detailed fully. I therefore do not regard this as a matter which can be dealt with summarily and I refuse the application for summary judgment."

[52] Further, the learned judge did not mention if she had regard to any of the number of authorities relied on by counsel for the appellant in relation to the applicable

law as to release and discharge; namely **Alcan Jamaica Company v Delroy Austin and anor**, **Elaine Dotting** and **Rio Brown v NEM Insurance Company**.

[53] However, implicit in her finding at paragraph [10] (set out in paragraph [51] above) is that she was persuaded to exercise her discretion as she did, in refusing to grant summary judgement, by the affidavit evidence of the respondent. This evidence, as stated previously, raised a number of allegations which clearly cast doubts in the learned judge's mind as to whether the release and discharge was to be binding in its effect. The affidavit evidence also raises the question of the scope of the release. This court makes no pronouncement as to the construction of the release and discharge, as it is not necessary for the resolution of this appeal.

[54] In my view, the learned judge was entitled to exercise her discretion as she did, based on the evidence which she had before her, particularly having regard to the principles relevant to summary judgment, set out at paragraph [16] above. Although she did not set out the principles on which she relied, it is apparent that she considered that summary judgment was not appropriate as there were facts in dispute and there was a real prospect of pertinent evidence affecting the court's assessment of the facts (see **Barbican Heights Limited**).

[55] At this stage, therefore, the learned judge would have been correct in her conclusions as it related to the suitability of summary judgment. There appears to be merit in Mrs Senior-Smith's submission that some of the parties against which allegations were made in relation to the validity and enforceability of the release and

discharge are not presently before the court. However, it seems that if the respondent is able to establish that there was an agency relationship between his insurers and the appellant and her insurers, then it may very well be sufficient that the principals are before the court. This will be a matter to be resolved firstly at the case management conference and ultimately by the trial judge and accordingly no pronouncement is being made by this court.

[56] This and other issues have arisen in light of the learned judge's ruling, as submitted by Mrs Senior-Smith. The pleadings which are currently before the court, do not raise the issues asserted by the respondent in his affidavit, in light of the failure of the application to have the reply stand as filed. These assertions would necessarily be relevant to the insurers of the respondent, who are not party to the action. Did the learned judge palpably err in exercising her discretion as she did then, in light of the above factors, especially having regard to the fact that she refused to grant leave for the reply as filed to stand? In particular, did the learned judge err when she stated that, if the matter were to proceed to trial there would be an opportunity to put further evidence before the trial court?

[57] Mrs Senior-Smith has submitted that the effect of her ruling (in refusing leave in relation to the filing of the reply) must be that the only relevant consideration that remained would be to construe the document and pronounce on whether it constituted a complete defence to the issue of negligence. She stated that this was the only cause of action raised by the respondent against the appellant and the driver of her motor vehicle in the particulars of claim.

[58] As it stands, the respondent, whose reply was not allowed to stand as filed, has no pleadings which relate to the release and discharge. This has left the parties in a precarious position as to the way forward. While the learned judge recognised that there would be a need for further pertinent evidence to be put before the court in relation to the circumstances surrounding the signing of the document, she failed to have due regard to how this process was to be achieved. Although this issue was not advanced by either counsel, it has been recognised that the learned judge failed in particular to exercise her power on an application for summary judgment as prescribed by the CPR. The court, having refused the summary judgment application, is to treat the hearing as a case management conference. Rule 15.6(3) states:

> "Where the proceedings are not brought to an end the court **must** also treat the hearing as a case management conference." (Emphasis added)

[59] The wisdom of rule 15.6(3) is that where summary judgment is refused (whether on the claim or on a particular issue) and the matter is not brought to an end, the court is compelled to recognise that it should chart the way forward by making orders for the purpose of managing the case and furthering the overriding objective. In so doing, the court will be clothed with the extensive powers of case management (as laid out in Part 26 of the CPR).

[60] Had the case management conference been held in this instance, the procedural issues identified by Mrs Senior-Smith at paragraph [36] could have been considered and addressed. Apart from the usual orders in relation to the filing of witness statements

etc, it is apparent that certain procedural applications would necessarily follow the refusal to grant summary judgment. These procedural applications might include an application for permission to add a party/or parties to the action. It is recognised that by virtue of rules 19.4(2) and (3), the court could consider the addition of a new party, if the relevant limitation period was current when the proceedings were started and the claim cannot be properly carried on against an existing party unless the new party is added. The court can, pursuant to rule 10.9 of the CPR, permit additional pleadings and pursuant to rule 20.4, grant amendments to the pleadings. It would therefore be for the court hearing any such subsequent applications to determine whether they ought to be granted and, if not granted, whether the respondent has any basis to proceed to trial against the parties before the court based on the state of the pleadings or in respect of any additional and/or amended pleadings.

[61] However, the impact of the absence of any relevant pleadings as it concerns the circumstances of the signing of the release and discharge will now be considered within the context of the learned judge's refusal to allow the filing of the reply as raised in the counter-notice of appeal.

Counter-notice of appeal

[62] As mentioned earlier, the respondent (now referred to as the counter-appellant) filed a counter-notice of appeal. He seeks the following orders from this court:

> "(1) That the Respondent (then Claimant) has permission to file a Reply to Defence.

> (2) That the affidavit filed by the Claimant (now Respondent) on February 8, 2016 be allowed to stand in support of the application to extend the time for filing the Reply to Defence.
>
> (3) That the time for filing the Reply to Defence and for filing the aforesaid affidavit be extended, and that the Reply to Defence filed on February 17, 2016 and the affidavit filed on February 8, 2016 be permitted to stand."

[63] The findings that were challenged are that (i) the oral application for permission was not supported by affidavit evidence and (ii) the absence of evidence explaining the reason for the delay in filing the reply to the defence meant that there was no basis to grant leave to file the said reply.

Submissions of the counter-appellant

[64] Mr Gittens contended that these findings were erroneous and unreasonable, respectively. In his oral submissions, Mr Gittens argued that the late filing of the reply to the defence would have caused no prejudice to the counter-respondent, and if prejudice could be demonstrated then it could be remedied by costs.

[65] It was initially submitted that the affidavit of the counter-appellant constituted evidence capable of supporting the application. The learned judge's reliance on that affidavit to find that there were triable issues was inconsistent with her finding that there was no affidavit evidence to support the application to file the response. When asked by this court to identify the portions of the affidavit that could have been used to support the said application in relation to the issue of delay, counsel candidly agreed that no explanation was provided in the affidavit for the delay. He went on to submit that this court has ruled in some instances that delay by itself is not fatal.

[66] Mr Gittens went further to submit that the consequence placed on the failure to reply would amount to a form of default judgment in favour of the counter-respondent, as far as the facts alleged in the defence were raised for the first time. The CPR do not make the filing of a reply mandatory and it is only where a claimant wishes to raise facts that are unascertainable from the previous statement of case that a reply is necessary. In the case at bar, the facts flowed from an examination of the release and discharge and the claimant ought not to be shut out from responding.

The response

[67] Mrs Senior-Smith submitted that rule 10.9(1) of the CPR clearly states that a reply to a defence is to be filed within 14 days of the service of the defence. She emphasised that the reply was filed four years after the defence was served and three years after the notice of application for summary judgment was served.

[68] She submitted that the learned judge was correct in her conclusion that there was no evidence before her which could allow the extension of time to file the reply. Reliance was placed on **Raymond Clough et al v Winston Spaulding et al**[13] in particular paragraphs [6] and [7]. She further submitted that there must be material on which a court can act, the delay was excessive in the instant case and the counter-appellant ought to have advanced reasons by way of evidence.

---

[13] [2013] JMCA Civ 7

[69] In all the circumstances, Mrs Senior-Smith submitted that the delay was fatal as there was no reason provided for the inordinate delay. The counter-appellant has put nothing forward to show that the learned judge erred in refusing the extension of time.

[70] On the issue of prejudice, it was submitted that the prejudice that would arise would be insurmountable for the counter-respondent. She contended that there was nothing in the pleadings that connected the counter-respondent to the misdeeds alleged. The counter-appellant's insurers would have to be added to the claim and it would not be sufficient to allege that the counter-respondent's insurers acted as agents. The proper parties were not before the court since the reply raises issues outside of construction. The issue of construction did not arise on the pleadings, as such it was necessary for a reply to be filed, however the counter-appellant failed to do so in accordance with the rules.

[71] The **Bank of Credit and Commerce** case was said to be of no assistance as it was distinguishable. The facts lent themselves to a completely different contextual background.

Discussion and analysis

[72] Before considering the issues raised in this ground, it is important to set out the effect of the averments raised in the reply that was filed on 17 February 2016 and was before the learned judge for her consideration. It challenges the validity of the release and discharge on several bases. Firstly, it alleges that the insurers of the counter-appellant, "in arranging for the insurers of the [counter-appellant] to deliver the cheque

to, and to have the Document signed by, the [counter-appellant], the insurers of the [counter-respondent] constituted the insurers of the [counter-appellant] as their agents and not just as their couriers and are so bound by their acts and omissions". It then alleges issues of undue influence by the insurers of the counter-appellant; that he was influenced to believe that he was attending to sign a document only in relation to property damage; for this reason, he failed to read the document carefully; he was not advised he could seek legal advice; and they failed to ensure that he read and fully understood the document.

[73] It avers misrepresentation by his insurers in relation to the effect that he was only signing the release and discharge in relation to property damage. It also avers mistake on the part of the counter-appellant as to the facts of the terms and effect of the document and that this mistake was also contributed to by his insurers, as the agents of the counter-respondent's insurers. These are therefore issues that would have to be raised in pleadings in order for any reliance to be placed on them in a trial.

[74] Counsel for the counter-respondent is correct that an affidavit explaining the reasons for such a long delay was necessary. The defence was filed 12 August 2011. While there is no evidence as such when it was served on the counter-appellant (then claimant), there is no allegation that it was not served. By virtue of rule 10.6, the reply ought to have been filed within 14 days of the service of the defence. This was not done until a reply was filed on 17 February 2016, in the midst of a hearing of an application for summary judgment. In effect, the counter-appellant would have been at least four years out of time.

[75] In **Raymond Clough**, the defence and counterclaim was filed and served 11 November 2005 and the application for extension of time to file reply and defence to counterclaim was filed on 14 January 2009. The date for hearing was subsequently adjourned to 15 July 2009, however no affidavit in support of the application was filed, even after this adjournment. The learned judge dismissed the application for that very reason. In this court, the necessity as to whether affidavit evidence was required in support of the application was considered. Harris JA considered rules 11.9(1) and (2) before coming to the conclusion that such evidence was required. She indicated as such at paragraphs [39] and [40]:

> "…The question now arising is whether in light of the inordinate delay, the appellants ought to have advanced evidence on affidavit supporting the application. In other words, in the circumstances of this case would an affidavit be a highly requisite feature?...in the present case, evidence by way of an affidavit was an essential requirement, and that and that [sic] the word 'required' in rule 11.9(1) means 'needed for the purpose' of satisfying the rule, practice direction or court order, and where there has been a delay in complying with the timetable of the rules, there would be need for evidence by an applicant, explaining the failure for doing so…
>
> [40] it would not have been the intention of the framers of the rules that in every case, upon an application for extension of time, there would be no necessity for evidence by way of affidavit to be placed before the court. It is of significance that this court, has on many occasions, ruled that, where there has been a delay, on an application for an extension of time, the court, in exercising its discretion, should take into consideration several factors…"

[76] Harris JA at paragraph [40] went on to refer to the dictum of Panton JA (as he then was) in **Strachan v Gleaner Company Ltd and Stokes**[14], where he sets out the legal position in regards to applications for extension of time:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider –
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."

[77] She then concluded, at paragraph [42], that where there is a delay, there must be material on which the court can act; that a court would only be in a position to exercise its discretion, if it has before it, evidence, furnished by an applicant, explaining the delay.

[78] Although Mrs Senior-Smith has contended that there was no affidavit evidence supporting the application for the reply to stand as filed, this court has no difficulty in accepting that the learned judge would have had relevant evidence in the form of the

[14] (unreported)

affidavit filed in answer to the application for summary judgment. However, the said affidavit did not refer to the delay nor give an explanation for it. The exposition of the law by Mrs Senior-Smith is sound in principle in relation to the absence of an explanation for the delay. However, there are distinctive features in the present set of circumstances when compared to the circumstances in **Raymond Clough** that must be considered.

[79] In the context of the circumstances as were presented to the learned judge, this court is of the opinion that the effect of the two orders (that is, the refusal to grant summary judgment and the refusal to allow the extension of time to file the reply or to stand as filed) combined with the failure to proceed towards case management has led to an aberrant result.

[80] I would therefore agree with Mr Gitten's contention that some incongruity has resulted in the learned judge's refusal to grant summary judgment on the basis that there were triable issues and the failure of the counter-appellant's application in relation to the filing of the reply – the very pleading which would put these issues before the court. Bearing in mind her reason for refusing to allow the reply to stand as filed - the absence of an affidavit explaining the delay - her discretion could have been exercised towards the granting of an adjournment of that application, pending the filing of an appropriate affidavit for her consideration. It is only then that the process relevant to adducing further pertinent evidence could be engaged. To this end, I would reiterate my observation that had the learned judge treated the hearing as a case management

conference, as she was required to do pursuant to rule 15.6(3), then this aberrant result would have been avoided.

Conclusion

[81] I would remind counsel by virtue of rule 1.3 that it is the duty of the parties to assist the court in furthering the overriding objective which includes ensuring that the case is dealt with expeditiously and fairly. This could hardly be said to have been done where an application was made orally without any supporting evidence, addressing the reason for the delay of over four years and no further attempt was made to request time for a supplemental affidavit to be filed which would address the reason for delay.

[82] In the final analysis, the learned judge did not err in refusing the application for summary judgment. However, her refusal to grant the oral application in relation to the reply in the manner that she did, coupled with her failure to properly assess the impact of such a refusal, in light of her obligation under the CPR has left the parties in a quandary as to how the matter was to proceed.

[83] In light of this, in my opinion, the appeal ought to be dismissed and the counter-appeal allowed in part. Having regard to this court's powers under rule 2.15(c) of the Court of Appeal Rules, the matter must be remitted for a case management conference to be held. It is expected that the counter-appellant would make a more detailed and comprehensive application with supporting affidavit in relation to the reply. It would be for the judge hearing such an application to determine, if permitted, the extent and scope of the reply. Further, the judge would also have to assess the status of the

parties' pleaded cases in light of their duty to set out their respective cases and make appropriate orders to enable the court to determine the issues in controversy between the parties. These orders may include allowing amendments to the extant pleadings. As mentioned previously, the counter-respondent's defence to the allegations of negligence constitutes a bare denial which does not accord with rule 10.5(4) of the Civil Procedure Rules. Currently, the counter-appellant's pleadings deal with the issue of negligence only and the counter-respondent's with accord and satisfaction, so there is discord between them as they are non-responsive. The counter-respondent will have to consider whether proceeding forward without amending the pleadings would be a risk, as the counter-appellant's reply, if permitted as prayed, would address the counter-respondent's pleadings as they currently stand. Finally, it may be helpful in all the circumstances that the case management conference be conducted and any subsequent applications be determined by another judge.

FOSTER-PUSEY JA

[84] I too have read in draft the judgment of my sister Straw JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The appeal is dismissed.

2. The counter-appeal is allowed in part.

3. The matter is remitted to the Supreme Court for a case management conference to be held.

4. Each party is to bear their own costs in respect of the appeal and counter-appeal.