[2010] JMCA App 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 43/2008

MOTION NO. 16/09

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE BROOKS, J.A. (Ag.)

BETWEEN	**PAGET DeFREITAS**	**1ST APPLICANT**
AND	**CLOVIS BROWN**	**2ND APPLICANT**
AND	**THE JAMAICA OBSERVER LIMITED**	**3RD APPLICANT**
AND	**ENOCH KARL BLYTHE**	**RESPONDENT**

Winston Spaulding, QC and Charles Piper for the applicants

Canute Brown and L. Jack Hines for the respondent

26, 30 July and 1 October 2010

PANTON, P.

[1] The following are our reasons for refusing, on 30 July 2010, an application by the applicants herein for leave to appeal to Her Majesty in Council in respect of an order made by this court (Panton, P., Cooke and Morrison, JJA) on 30 July 2009. The latter order was in the following terms:

> "Application to discharge order of single judge granted. Order of the court below is reinstated.

> Costs of this application to the applicant to be agreed or taxed. Matter to proceed in the Supreme Court in the usual way."

[2] By an amended writ of summons and endorsement, filed in the Supreme Court on 14 September 2000, the respondent herein is seeking damages for libel which he says is contained "in an article and cartoon appearing in the editorial on page eight of the Sunday Observer dated the 14th day of November 1999 entitled "A blighted prospect"?, written and published by the Defendants." The article has been reproduced in the statement of claim. In their amended defence, the applicants deny that the article has a defamatory meaning. They also plead that the occasion was one of qualified privilege on a matter of public interest, and that the words and cartoon were not published maliciously. In his reply, the respondent counters that the words and cartoon complained of were published maliciously, and he sets out particulars from which he claims malice may be inferred.

[3] It is the reply filed 8 May 2008 that has given rise to the present proceedings. Hibbert J had, on 30 April 2008, granted leave to file the reply out of time, and to serve it within seven days. On 11 March 2009, Harrison JA, sitting as a single judge of this Court set aside the order of Hibbert J but on 30 July 2009 the court unanimously discharged the order of Harrison JA and directed that the matter was to proceed in the usual way in the Supreme Court.

[4] Morrison JA in delivering the judgment of this court, said that it is clear that "… as a matter of law, malice is not an ingredient of the cause of action for libel and there is accordingly no necessity to plead it, …" (para.15). Given that fact as well as there not being a duty to anticipate the defence, the court concluded that it was entirely appropriate for the respondent to respond by alleging malice in the reply, rather than by way of amendment of the particulars of claim. The court concluded that rule 10.9 (1) of the Civil Procedure Rules which permits a reply is sufficiently general in its terms to embrace a reply to allege malice in defamation proceedings. The court further concluded that the right of reply is not affected by rule 69.2(c) which deals solely with the giving of particulars in support of an allegation of malice in particulars of claim or in a counterclaim. Morrison JA indicated that there was nothing placed before the court to suggest that Hibbert J had exercised his discretion by applying any incorrect principle or by taking into consideration irrelevant matters.

[5] Against this background, the applicants, while conceding that this is strictly a procedural matter, nevertheless submitted that this was a matter of "great general or public importance". Of course, for the application to have succeeded, this Court would have had to share that opinion too. Section 110(2) of the Constitution provides in part:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings;"

[6] In the relisted notice of motion, which was amended when the matter came on for hearing before us, the applicants posed the following questions as being of such great general or public importance, that they ought to be submitted to Her Majesty in Council:

"(i) whether by restoring the order of the Court below permitting the filing of a Reply in purported compliance with the provisions of Part 69.2 of the Civil Procedure Rules, this Honourable Court has erred in law having regard to the clear and unambiguous provisions of Part 69.2 of the said Rules requiring that particulars of malice be included in the Particulars of Claim.

(ii) Whether the decision is acceptable in the administration of justice by authorizing a litigant to file a Reply containing Particulars which the Rules specifically provide must be set out in the Particulars of Claim; which departure has the effect of depriving a party or parties in civil proceedings of a right and duty to respond by pleading to new allegations raised for the first time in a Reply.

(iii) Whether it is open to this Honourable Court to sanction a departure from the clear provisions of Part 8.9, 8.9A and Part 69.2 of the Civil Procedure Rules without undermining the provisions of the Civil Procedure Rules."

[7] In their written submissions, the applicants submitted that although the issue may have its origin in a procedural context, that did not obviate the fact that substantial consequences may flow from the departure from compliance with the Civil Procedure Rules. In oral submissions, Mr Winston Spaulding QC for the applicants, accepted that inordinate delay affects the interests of justice, and that it is important that litigation should be conducted as far as possible with dispatch. However, he said, one cannot simply say that the rule is procedural. There are cases, he said, with substantial procedural issues that have been referred to the Privy Council for determination. He counted among these ***Dr Stokes and Gleaner Company v Abrahams*** (1992) 29 J.L.R. 79 and ***Texan Management Limited and Others v Pacific Electric Wire and Cable Company Limited*** [2009] UKPC Case Ref 46 – PCA 18 of 2009.

[8] In ***Dr Stokes and Gleaner Company v Abrahams***, the Court of Appeal had set aside a default judgment and allowed the appellants (Dr Stokes and the Gleaner Company) time to file a defence to the respondent Abrahams' action for libel published in the Gleaner Company's newspaper. In seeking leave to appeal to Her Majesty in Council, eight questions which were said to involve questions of great general importance were filed. Five of these questions were in respect of the form and contents of the affidavit of merit filed by Dr Stokes and the Gleaner Company in their effort to have the default judgment set aside. It was contended on behalf of the respondent Abrahams that the Judicature (Civil Procedure Code) Act which governed the affidavit of merit had not been

complied with. Question no. 3 is typical of the questions posed in this regard. It reads thus:

> "Whether the Affidavit of Merit complies with provisions of Section 408 of the Judicature Civil Procedure Code. And whether the Affidavit of Merit which does not comply with the provisions of the said Section 408 can constitute a proper basis for an Affidavit of Merit in an application to set aside a regularly obtained default Judgment."

The remaining three questions related to whether a plea of justification or qualified privilege in a libel action ought to contain particulars of same. Questions 4 and 5 were as follows:

> "(4) Whether or not the requirement that a plea of [justification] in a libel action must contain particulars which support the alleged plea is a matter of mere procedure or a substantive right in a Plaintiff to know precisely the case that he has to meet at a trial.
>
> (5) Whether or not the same is true in the case of a Defence of Qualified Privilege in respect of precise facts in the impugned words, or article or other document."

[9] Rowe, P. in delivering the judgment of the court, said "… absolutely no issue of general or public importance is raised in the 4th and 5th questions in this application." In respect of the overall application, the court held as follows:

> "(i) the principle which guides the Court in deciding whether to grant leave is that it is not enough that a difficult question of law arose, it must be an important question of law; further the question must be one not merely affecting the rights of the particular litigants, but a decision which would guide and bind others in their

> commercial and domestic relations. In the instant case the respondent had failed to show that a decision on any questions raised in the application would be a guide to anyone in the future and the issues raised were procedural and not part of the substantive law;
>
> (ii) …"

[10] In ***Texan Management Limited and Others v Pacific Electric Wire and Cable Company Limited*** the respondent (PEWC) commenced proceedings in Hong Kong, Singapore, Beijing, the United States of America and the British Virgin Islands to recover or preserve assets which it claimed were purchased by three of its directors from its funds. These directors, it claimed, were guilty of breach of fiduciary duty by using its funds to acquire investments for themselves. In the British Virgin Islands proceedings, several declarations and orders were sought. For present purposes, these need not be itemized. It is sufficient to say that on 12 July 2005, the appellants filed a notice of application, seeking a declaration that the court should not exercise its jurisdiction to try the claim, and a stay on the ground of forum non conveniens. PEWC took procedural points but Hariprashad-Charles J dismissed the procedural objections and granted a stay on forum non conveniens grounds. The learned judge concluded that "… the case had strong connections with Hong Kong. Quite apart from the question of the governing law, the dispute concerned actions carried out in Hong Kong by Hong Kong or Taiwanese individuals. Many witnesses were likely to be required. They were all resident in Hong Kong or

Taiwan, and none was resident in the BVI. The essence of the disputes had already been the subject of two sets of proceedings in Hong Kong. The claim did not have any real connection with the BVI except that the defendants were domiciled there. But there were several strong connections with the chosen jurisdiction, Hong Kong". (para. 38).

[11] The Eastern Caribbean Court of Appeal allowed PEWC's appeal by holding that the court below did not have a discretion to dismiss the procedural challenge, but the Court of Appeal did not address the forum non conveniens issues. On 6 October 2008, the Court of Appeal granted leave to appeal "… because it required the guidance of Her Majesty in Council on the procedural issues." (para. 24). According to Lord Collins, if the Court of Appeal was right this was a case "… where the law of procedure prevents the appellants from invoking a power which is designed to ensure that the litigation is centred in the court 'in which the case may be tried more suitably … for the ends of justice'," (para. 1).

[12] The issues which arose on the appeal to Her Majesty in Council included the following:

> (1) whether the BVI court has an inherent jurisdiction to grant a stay on forum non conveniens grounds, independent of the provisions of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000;
>
> (2) whether the Rules require that evidence in support of the application filed by the

appellants must be filed at the same time as the notice of application; and

(3) whether the failure to file such evidence results in the application being a nullity, or whether the court has the power to excuse or cure non-compliance.

[13] The Privy Council held that there is no doubt that there is an inherent jurisdiction to stay proceedings. The authorities, it said, strongly suggest that the inherent jurisdiction to stay proceedings is such a fundamental one that it will not normally be displaced by express powers to grant a stay. The Privy Council pointed out that this position had been held by the BVI Court of Appeal itself in ***Addari v Addari*** (2005). However, the modern tendency, the Board said, is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the Civil Procedure Rules, on the basis that "… it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules:" (para. 57). The Privy Council held further that:

(1) a defendant served within the jurisdiction who has reasons for applying for a stay on <u>forum non conveniens</u> grounds at that time should normally make the application under the Civil Procedure Rules;

(2) except where the consequence of failure to comply with a rule has been specified, where there has been an error of procedure or failure to comply with a rule, the failure does not invalidate any step in the proceedings, and the court may make an order to put matters right;

(3) together these powers are sufficient to give effect to the overriding purpose of the jurisdiction to stay proceedings on forum non conveniens grounds, to ensure that the claim is tried in the forum which is more suitable for the interests of the parties and the end of justice; and

(4) where the circumstances which give rise to an application for a stay arise after the service of proceedings and outside the time limits in the Civil Procedure Rules, then the application may be made either under the inherent jurisdiction or under the court's powers of management in the Civil Procedure Rules.

[14] The appeal was allowed and the order of Hariprashad–Charles, J restored. The Privy Council was of the view that the judge had properly exercised her discretion in excusing what it termed a minor procedural defect (para. 87), and that in respect of forum non conveniens, "PEWC has not been able to point to any error of principle, nor to any matter which [she] wrongly took into account, or wrongly failed to take into account, nor has it been able to show that she was plainly wrong". (para. 94).

[15] So far as the case of ***Dr Stokes and the Gleaner Company v Abrahams*** is concerned, it seems that learned Queen's Counsel, Mr Spaulding, has given it an elevation that it does not deserve in respect of the issue at hand. It will be recalled that the application for leave to appeal to Her Majesty in Council was refused. That which eventually reached the Privy Council was an appeal against the quantum of damages. As regards the ***Texan Management***

Limited case, the Eastern Caribbean Court of Appeal was clearly of the opinion that a serious conflict existed between the inherent jurisdiction and the Civil Procedure Rules, and wished guidance as to the resolution of the conflict. The fact that suits were filed elsewhere was no doubt a factor in the court's thinking.

[16] We view the situation before us as intrinsically procedural. The claim as framed is not based on malice. The applicants in their defence have been the first to raise malice by saying that what they did was not affected by malice. In the reply, as stated earlier, the respondent has joined issue with the applicants and has asserted that the words and cartoon complained of were published maliciously. As Mr Canute Brown, for the respondent, has pointed out, the reply has simply referred to articles that were published by the applicants, and which were included in the list of documents filed upon disclosure. Mr Brown submitted that there is nothing new in the articles, so the fact that the pleadings have now closed is of no moment as there is nothing that the applicants need to address by way of pleading. We agree with Mr Brown.

[17] The fact that we view the matter as procedural was not the only reason for our refusal of the application. We are clear in our view that the questions posed did not qualify for submission for the consideration of Her Majesty in Council as there was absolutely nothing of great general or public importance in any of them. The matters are really peculiar to the parties involved in the

litigation, and there is nothing to suggest that the interpretation of the rule in question will have a draconian effect.

ORDER

Application refused.

Costs to the respondent to be agreed or taxed.