[2023] JMCA App 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MRS JUSTICE G FRASER JA (AG)

MOTION NO COA2023MT00008

SUPREME COURT CIVIL APPEAL NO COA2021CV00063

BETWEEN	**CHRISTOPHER DUNKLEY**	**APPLICANT**
AND	**GUARDIAN LIFE LIMITED**	**RESPONDENT**

Miss Jacqueline Cummings and Miss Rochelle Mills instructed by Phillipson Partners for the applicant

Kevin Powell and Mikhail Williams instructed by Hylton Powell for the respondent

20, 24 November and 20 December 2023

Constitutional Law – Motion for leave to appeal to His Majesty in Council - Conditional leave – Whether the matter is one of great general or public importance - Whether requirements for leave to appeal satisfied - Constitution of Jamaica section 110 (2)(a) – Civil Procedures Rules rule 26.3 (1)

F WILLIAMS JA

[1] I have read in draft the reasons for judgment of G Fraser JA (Ag) and agree. There is nothing that I wish to add.

D FRASER JA

[2] I too have read the reasons for judgment of G Fraser JA (Ag) and agree.

G FRASER JA (AG)

Introduction

[3] On 24 November 2023, after hearing counsel's oral arguments and having digested the written submissions and other material provided, we refused the applicant leave to appeal to His Majesty in Council, pursuant to section 110(2)(a) of the Constitution of Jamaica ('the Constitution'), and made the following orders:

> "1. The notice of application for court orders for injunction pending appeal, filed on 2 August 2023, is refused. The notice of motion for conditional leave to appeal to His Majesty in Council, filed on 25 May 2023 is refused.
>
> 2. Costs of the application to the respondent to be agreed or taxed."

These are our promised reasons for making the above orders.

Background

[4] This application emanates from a suit filed in the Supreme Court, whereby the respondent, Guardian Life Limited ('GLL') on 31 July 2019, filed a claim against the applicant. The claim was for damages stemming from alleged defamation in relation to statements the applicant published in a letter dated January 25, 2019. In response, on 30 April 2021, the applicant had filed his defence and a counterclaim relying on several defences including that of absolute privilege. The applicant had averred that he was acting on the instructions of his client when he wrote the letter and that there were relevant issues arising under the Protected Disclosures Act ('the Act'). GLL, on 12 November 2019, filed an application in the Supreme Court to strike out parts of the applicant's defence and the counterclaim. That application was heard by Hart-Hines J ('the learned judge') who granted GLL's application. Her reasons for the decision are pronounced in her written judgment with neutral citation **Guardian Life Limited v Christopher Dunkley** [2021] JMSC Civ 115.

[5] Dissatisfied with the orders made by the learned judge, the applicant, on 6 July 2021, appealed her decision by filing his notice and grounds of appeal on a procedural appeal before this court. On 5 May 2023, the written judgment of this court was handed down with neutral citation **Dunkley (Christopher) v Guardian Life**

Limited [2023] JMCA Civ 26. P Williams JA, in indicating the court's reasons, opined, at para. [98], that; "It has not been shown that the learned judge misunderstood the law or the evidence before her when she struck out parts of the defence and the counterclaim". For all intents and purposes, this court determined that the applicant had not shown that the judge had erred in the exercise of her discretion, and the appeal was thereby dismissed.

[6] On 25 May 2023, the applicant filed a notice of motion for conditional leave to appeal to His Majesty in Council ('the notice of motion') from the decision of this court. The applicant cited some five grounds of appeal criticizing *inter alia*, the panel's treatment and "analysis of the application and scope of the rules of absolute and qualified privilege…".

The applicant's submissions

[7] The notice of motion invoked section 110(2)(a) of the Constitution of Jamaica. The applicant attempted to persuade the court that certain questions involved in the appeal, "that concern the rules of absolute and qualified privilege and their application in general and to all Attorneys-at-Law in particular, acting in the course of the administration of the law", were of such great general or public importance or otherwise, that they ought to be submitted for consideration to His Majesty in Council.

[8] The application was supported by an affidavit sworn and filed 25 May 2023. In that affidavit, the applicant, who is an attorney-at-Law, rehashed the genesis of the claim filed by the respondent, the instructions he had received from his client Mrs Catherine Allen, and his overall involvement as counsel retained. The written submissions filed by the applicant followed the tone of his affidavit, and additionally rehashed the proceedings before the court below and on the appeal. A substantial portion of the written submissions was occupied with a review of the law concerning absolute and qualified privilege and the citation of numerous authorities which, the applicant submitted, supported his position that he was entitled to rely on those principles of law.

[9] Counsel Miss Cummings, on the applicant's behalf, in oral arguments, submitted that the future of all counsel was at stake, as they were now vulnerable to lawsuits

whilst acting on their client's instructions. She urged that, in circumstances such as obtained in this matter, the applicant's letter written to the Financial Services Commission ('FSC') and Central Bank of Trinidad and Tobago ('CBTT') should be the subject of absolute privilege or qualified privilege as an attorney-at-law writing on behalf of his client. She argued that, notwithstanding that there was no prosecution ensuing against GLL after the letter was written, that does not mean that it was not written in furtherance of proceedings instituted by the applicant's client or pending proceedings. The letter spoke about a claim number and there were related affidavits filed. She submitted that the letter "clearly" was written in relation to a matter before the court. Counsel lamented that the learned judge, as too this court, had decided the matter on a very narrow point. The privilege that the applicant advocated, she said, operated as immunity from suit and is based on common law. As such, once it is accepted that absolute and qualified privilege are the relevant issues in a case, then the case ought to go no further.

[10] Ms Cummings acknowledged that the Act does not make a provision for immunity in the circumstances at bar, but nonetheless submitted that, it was absurd to say the lawyer is not so protected. The Act was passed to allow whistle-blowers and certain investigative entities to give and receive information, but since Parliament can only regulate within its borders, it did not contemplate that reports can be made in other jurisdictions. That is why the court's interpretation by narrowing the gap is erroneous. The applicant, counsel submitted, would not be asking the Privy Council to expand the provisions of the legislation but rather to say whether absolute privilege or qualified privilege obtains where the whistle blowing occurs in another jurisdiction.

The respondent's submissions

[11] The respondent opposed the application and urged this court not to exercise its discretion in the applicant's favour because the applicant had not satisfied the conditions necessary, pursuant to section 110(2) of the Constitution. The relevant section of the Constitution, cited by the respondent's counsel, Mr Powell, is reproduced below for ease of reference. The provision recites that:

> "(2) An appeal shall lie from decisions of the Court of Appeal to [His] 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 [His] Majesty in Council, decisions in any civil proceedings, …"

[12] Counsel Mr Powell strenuously submitted that the questions posed by the applicant for submission to His Majesty in Council were not questions of any great general or public importance. Counsel relied on the authorities of **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27 and **The General Legal Council (ex parte Elizabeth Hartley) v Janice Causwell** [2017] JMCA App 16 ('**Janice Causwell**'), as to the measure of the Court of Appeal's discretion in granting applications of this nature. In essence, the respondent submitted that the applicant must satisfy the criteria as summarized by this court in **Janice Causwell**, but he had failed to do so.

[13] Counsel Mr Powell focused the court's attention on the contents of the applicant's written submissions wherein the applicant had set out in summary, the issues raised on the appeal to this court as follows:

> "i. Whether an Attorney-at-Law's communication to parties in extant court proceedings is an occasion of absolute privilege.
>
> ii. Whether an Attorney-at-Law's communication to relevant regulators form part of the due administration of the law and therefore, an occasion of absolute privilege.
>
> iii. Whether the prosecution of a complainant under the Protected Disclosures Act ('the Act') extends to an Attorney-at-Law acting on instructions and agency authority to make written communication to a competent authority."

[14] Counsel Mr Powell, in his written submissions, posited that "it would therefore appear that the summarized issues represent the issues that were determinative of the appeal, and which would have to satisfy the condition of being of great general

and public importance". Counsel further submitted that none of those issues are "subject to serious debate". Those issues, counsel urged are all a matter of settled law. Counsel further criticized as "misconceived" the contention of the applicant that a final adjudication of this case was required as the issues on appeal concerned an important precedent, which was applicable to judges, attorneys-at-law, regulators, other quasi-judicial bodies, complainants, police, and politicians. Counsel submitted that the issue in the instant case was much narrower than described by the applicant and the court had not contended with, nor determined, any issue pertaining to absolute or qualified privilege generally, concerning the foregoing category of persons.

[15] In relation to the clarification of the operations of the Act that is sought by the applicant, counsel Mr Powell, in his oral arguments, pointed out that the Act created immunity from criminal, civil and disciplinary proceedings in relation to protected disclosures under the provisions of that legislation. Absolute privilege is a common law defence in a claim for defamation of character, that is based on public policy where words are spoken on a particular occasion. He further argued that the questions that the applicant is asking this court to certify all relate to absolute privilege and qualified privilege where no reference is made to the Act which created a separate immunity (statutory immunity).

Analysis

[16] The question as to the true and proper interpretation to be given to section 110(2)(a) of the Constitution, has been the subject of review in this court and has generated much jurisprudence and guidance. In **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009, Phillips JA set out, at page 9, three steps that ought to be used in construing this section namely:

> "… Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said,

> raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance."

[17] Since the applicant avers that his application is predicated upon section 110(2)(a) of the Constitution, I will also venture to examine the meaning of the qualifying phrases utilized in that section. The phrase "of great general or public importance" has been explained in several authorities emanating from this court. In **Norton Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, Phillips JA at para. [32] enunciated that:

> "...A question 'of great general or public importance' is one that is regarded as being subject to serious debate. It must be not just a difficult question of law but an important question of law that not only affects the rights of particular litigants but one whose decision will bind others in their commercial and domestic relations. It must not merely be a question that the parties wish to have considered by the Privy Council in an effort to see whether the Law Lords would agree with the decision of the Court of Appeal. It must be a case of gravity involving a matter of public interest, or one affecting property of a considerable amount or where the case is otherwise of some public importance or of a very substantial character (see **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **Vick Chemical Company v Cecil DeCordova and Others** (1948) 5 JLR 106; **Dr Dudley Stokes and Gleaner Company Limited v Eric Anthony Abrahams** (1992) 29 JLR 79); and **Daily Telegraph Newspaper Company Limited v McLaughlin** [1904] AC 776)."

[18] The word "otherwise" has also been the subject of judicial interpretation. In the case of **Olasemo v Barnett Ltd** (1995) 51 WIR 191 Downer JA at page 197, extrapolated the following meaning:

> "So the ample phrase 'or otherwise' must be given a generous construction as to accord the court discretion to grant leave to appeal in interlocutory matters not covered by the specific phrase 'by reason of its great general or public importance'. The phrase 'or otherwise' therefore enlarges the category of appeals. To my mind one such category is where an interlocutory order is conclusive of the action."

[19] Similarly, at page 201, Wolfe JA (as he then was) stated as follows:

> "…Clearly, the phrase 'or otherwise' was added by the legislature to enlarge the discretion of the court to include matters which were not necessarily of great general or public importance, but which in the opinion of the court might require some definitive statement of the law from the highest judicial authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. The phrase 'or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to their lordships' Board for guidance on the law. The matter requiring the guidance of their lordships' Board may be of an interlocutory nature, but it does not follow that every interlocutory matter will come within the rubric 'or otherwise'."

[20] Based on the foregoing authorities, it is pellucid that in order for the court to grant leave, the applicant must convince the court that the proposed appeal raises questions which arise from the decision of the Court of Appeal, are determinative of the substantive issues on the merits of the appeal, and are by their nature of great general or public importance or where the case is otherwise of a very substantial general and public character. In this regard, I also have considered the case of **Janice Causwell**, cited by the respondent, and of great assistance to me are the nine summarized principles enunciated by McDonald-Bishop JA - principles that are not merely relevant but vital to an application such as the present one. I pause here to acknowledge that the decision of this court in **Janice Causwell** was reversed on appeal to the Privy Council in the decision, **Causwell (Respondent) v The General Legal Council (*ex parte* Elizabeth Hartley) (Appellant) (Jamaica)** [2019] UKPC 9, however, that portion of the judgment summarizing the appropriate principles in referring matters to the Privy Council is still valid.

[21] It is to be noted that the applicant had not formulated a question or questions which he desired to be submitted to His Majesty in Council for determination. Counsel Miss Cummings, on the applicant's behalf, was pointedly requested by this court so to do. Counsel during her oral arguments, formulated two questions, the questions were as follows:

> "(1) Does the rule of absolute and or qualified privilege involving counsel, refer to only a defence to be ventilated at trial, rather than a preliminary point of immunity from suit to be heard at the appearance before the court?
>
> (2) Should the learned judge have found that the letter was not written in furtherance of court proceedings instituted by Mr Dunkley's client and not written on an occasion of absolute privilege, in the absence of affidavit evidence from the respondent herein?"

[22] The consideration for this court is whether the applicant in this case has passed the threshold test. In making that determination I refer to those portions of the judgment of this court in this matter, which the applicant pinpointed as the aspects of the judgment with which he takes issue. The applicant had alluded to and made brief references to paras. [41], [51] and [52] which seemed to be concerned with the court's agreement with the learned judge's interpretation and application of certain authorities cited (**Munster v Lamb** (1883) 11 QBD 588; **Taylor and others v Director of the Serious Fraud Office and others** [1998] UKHL 39, **Patrick Mahon & Anor v Dr Christian Rahn & Ors (No 2)** [2000] EWCA Civ 185 ('**Mahon**') and **Richard Anders Westcott v Dr Sarah Westcott** [2008] EWCA Civ 818 ('**Westcott v Westcott**')). The applicant complained that, in upholding the learned judge's assessment of the issues that were before her, the panel failed to apply the principle outlined in **Westcott v Westcott**, that is, for the necessity of the due administration of justice, complaints that do not lead to prosecution are still protected by absolute privilege. Similar allusions were made to para. [66] relative to the issue of qualified privilege. The applicant again complained that this court wrongly deferred that issue to be ventilated and explored at the trial, and that the treatment thus is against the weight of the authorities (**Regan v Taylor** [2000] All ER (D) 307 and **Leila Emile Khader v Mariam Aziz and Anor** [2009] EWHC 2027 (QB)).

[23] The applicant had also referred to several pieces of legislation including the Defamation Act and the impact of the decision on the applicant *qua* attorney-at-law acting on instructions. Although there was mention of the Act, the extent of its relevance seemingly concerned its application to Mrs Allen (the client) and not the applicant directly.

[24] Having perused the judgment of this court, published as **Christopher Dunkley v Guardian Life** [2023] JMCA Civ 26, I am of the view that the complaints that were made on appeal by the applicant, when heard by this court were thoroughly investigated and the judgment of this court was comprehensive and had dealt with all issues fully.

[25] As submitted by the respondent, paras. [4], [5], [17], [51] and [65] of the judgment are indeed relevant as to the test to be applied in these proceedings. At paras. [3], [4] and [5] the court set out the background and history of the appeal, as also the applicant's amended defence and counterclaim that he had filed in the court below. It is to be noted that the applicant had averred that he was entitled to the defences of truth, fair comment, qualified privilege, absolute privilege, and public interest immunity, pursuant to the Defamation Act and at common law. At paras. [17] – [19] the court had examined the basis upon which the learned judge had arrived at her determination. The learned judge had examined the pleadings to make her determination and was satisfied that: the applicant's defence and counterclaim disclosed no real prospect of success; the contents of the impugned letter did not fall within the scope of the Act; it was not penned on an occasion which would attract absolute privilege; and there was no basis for bringing the countersuit. At para. [51], after reviewing the authorities and written submissions proffered by the parties, this court approved the methodology and approach taken by the learned judge and made the finding that she had not erred as a matter of fact or law in her findings or in the exercise of her discretion.

[26] At para. [65] this court made the finding that:

> "…Mr Dunkley cannot rely on the statutory protection afforded to Mrs Allen by virtue of the Act. In any event,

> CBTT did not fall within the category of prescribed persons to whom disclosure could be made in Jamaica, so it is also questionable whether Mrs Allen could, herself, have written to the CBTT and claimed that that disclosure was protected. The striking out of those paragraphs in his defence that could be viewed as seeking to rely on the protection of the Act cannot be faulted."

[27] This court's judgment as I understand it, did not state at any time, nor can it be reasonably inferred therefrom, that absolute privilege and or qualified privilege could not apply to attorneys-at-law acting on their client's instructions. Nor indeed is that judgment capable of any reasonable construction that those legal principles are only applicable to court proceedings. On the contrary, the court at para. [46], had indicated explicitly that the protection that extends to statements made in the course of and directly related to court proceedings further extends to those made in relation to certain tribunals and investigations. Therefore, the applicant's position in that regard is clearly misconceived. It seems to me that the approach taken by the applicant regarding the intended questions, sets out a position that has been created by the applicant in order to develop a debate on an issue which does not currently exist. The questions posed do not amount to "questions of any great general or public importance or otherwise".

[28] I agree with the respondent's assessment that the submissions of the applicant pertaining to the issues he regards to be of great general or public importance or otherwise are misconceived. There is no uncertainty about the "well settled" principles of absolute privilege and qualified privilege which were argued *in extenso* before the learned judge and again before this court. Ultimately, this court found that the learned judge applied the proper principles relating to absolute privilege in the context of the Act, that she demonstrated an understanding of the role of the regulating bodies (CBTT and FSC) to whom the letter was sent and was correct in her finding that the letter in question was not penned during proceedings before the court. This court also found that the learned judge had not erred in law and had demonstrated by her review of case law (**Mahon**) that "she in fact appreciated that absolute privilege extends beyond statements related directly to court proceedings and could be relied on in circumstances where there was a regulatory enquiry or investigations…".

[29] To my mind there is no issue concerning the relevant law that was applied, there is no difficult or important question of law yet to be determined. The question which the learned judge determined in the exercise of her discretion, which was not interfered with on appeal, relates specifically to the rights of the applicant, and is not "apt to guide and bind others in their commercial, domestic and other relations" (see **Janice Causwell**).

[30] I am of the view that the questions which the applicant wished to pose to His Majesty in Council are not of any great general or public importance or otherwise. On the contrary, the questions formulated by Ms Cummings at this court's insistence, particularly the second question, concerns the exercise of the judge's discretion in the circumstances which were before her, relative to the respondent's application for striking out. Section 26.3(1) of the Civil Procedure Rules, 2002, empowers a judge of the Supreme Court to "strike out a statement of case or part of a statement of case …" in specified circumstances. This is a discretion given to the court as heralded by the words "if it appears to the court…". Subsections (b), (c) and (d) are concerned with an appreciation of the parties' "statement of case" which does not anticipate or require that the learned judge was obliged to hear evidence from anyone.

[31] Furthermore, when I examined the questions that were formulated, they did not arise from the decision of this court. As noted above, when the appeal was heard by this court, the focus was whether the judge had erred in the exercise of her discretion. The applicant has not shown that any issue arose from the approach that this court took, which would require a definitive statement of the law from His Majesty in Council. So, in keeping with the principles identified by McDonald-Bishop JA in **Janice Causwell**, I would agree with counsel Mr Powell, that the proposed questions do not arise from the judgment of the Court of Appeal, and, in any event, neither do they require any serious debate before Her Majesty in Council. Equally, they do not pose any difficult or important questions of law, and it is not appropriate to send questions to His Majesty in Council, just to see whether the Board would concur with the opinions of this court.

Conclusion

[32] Having considered the material provided by both parties, as well as the helpful submissions of counsel, I favoured the submissions of the respondent. Counsel Mr Powell was adamant that the second question posed, was far too wide, and with this, I agree. In any event, there was nothing stated therein which had arisen in the appeal. The court had dealt with absolute privilege in the context of the Act and the specified categories of persons who were protected thereunder and the relevant bodies which were entitled to receive information relative to investigations by said bodies.

[33] In the light of all of the above, neither of the questions in the proposed appeal posited by the applicant in the notice of motion before the court is of any great general or public importance or otherwise worthy of consideration before His Majesty in Council, and thus do not fall within the provisions of section 110(2)(a) of the Constitution. It was for these reasons that we made the orders set out in para. [3] herein.