[2019] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 38/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN JOANNA LUGG-BARNABY APPELLANT

AND HUBERT JOHNSON RESPONDENT

Written submissions filed by Ms Carol Davis for the appellant

Written submissions filed by Dunbar & Co for the respondent

7 June 2019

PROCEDURAL APPEAL

(Considered on paper by the court pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

BROOKS JA

[1] I have read in draft the judgment of my brother Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read in draft the judgment of my brother Pusey JA (Ag) and agree with his reasoning and conclusion.

PUSEY JA (AG)

[3] This is an appeal from the decision of Wolfe-Reece J (Ag) (as she then was), made on 13 April 2018.

[4] The appellant's primary complaint is that the learned judge wrongly exercised her discretion when she refused to strike out the defence and enter judgment against the respondent, pursuant to rule 74.14(6) of the Civil Procedure Rules ("the CPR"). She also complains that the learned judge erred in setting the matter for case management conference thereby "effectively dispensing" with mediation, without considering any of the requirements set out in rule 74.4 of the CPR.

[5] Accordingly, the appellant has asked this court to set aside the order of the learned judge, strike out the respondent's defence, enter judgment in her favour and order that the claim be set for the assessment of damages.

Background

[6] The substantive claim to which the appeal relates arises from a motor vehicle accident which occurred on 5 October 2013. By her claim, the appellant seeks damages for personal injuries and losses she alleges that she sustained as a consequence of the said motor vehicle accident.

[7] The appellant, a pillion rider on a motor cycle involved in the accident, commenced a claim against the respondent on 3 March 2015. In response, the respondent filed a defence on 2 October 2015, denying liability and alleging in the alternative, contributory negligence on the part of the motor cyclist.

[8] The parties initially agreed to mediation taking place on 19 July 2017. However, by his affidavit sworn to on 27 March 2018, the respondent averred that he was unable to attend the mediation as his mother became ill and required surgery, as a result of which he left the jurisdiction to be with her for an extended time. He further deponed that counsel for the appellant, by her letter of 13 July 2017, also indicated that she was unavailable to attend the mediation on the agreed date. Thereafter, attempts were made by counsel for the appellant to reschedule the mediation. A date was eventually agreed between the parties and the mediation set for 7 February 2018.

[9] By her affidavit sworn to on 13 February 2018, the appellant deponed that on or about 29 January 2018, counsel for the respondent advised that the respondent was outside the jurisdiction and unable to attend the mediation. Nonetheless, the mediation date was not changed. Present at the mediation were the appellant and her counsel as well as counsel representing the respondent. Counsel for the respondent indicated to the mediator that she had been unable to contact the respondent as he was outside the jurisdiction. Accordingly, the mediation was aborted.

[10] The appellant, aggrieved by the outcome of the mediation, filed the application, which came before, and was decided by, Wolfe-Reece J (Ag).

Issue

[11] Dissatisfied with the outcome of the hearing, the appellant filed notice and grounds of appeal on 18 April 2018, appealing the learned judge's orders. A total of seven grounds of appeal were filed. The primary issue for this court's determination,

arising from these grounds of appeal, is whether the learned judge can be faulted, in the exercise of her discretion, for having refused to strike out the respondent's defence and enter judgment against him and setting the matter for case management conference.

Discussion and finding

[12] This court has repeatedly stated that it is loath to interfere with the exercise of a discretion of a judge at first instance on an interlocutory application unless it can be shown that it was based on a misunderstanding by the judge of the law or the evidence, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision "is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, paragraph [20] and **The Minister Housing v New Falmouth Resorts Ltd** [2016] JMCA Civ 20, paragraph [37]). It is within this context that the appellant's challenge of the learned judge's exercise of her discretion, must be examined.

[13] The provisions of the CPR that are relevant to this matter are rules 74.3(4) and (5), 74.4, 74.9 and 74.14(6). Rule 74.3(4) and (5) stipulates that:

> "(4) A matter may be referred to mediation at any time prior to a pre trial review by the consent of the parties.
>
> (5) A matter may be referred to mediation at any time by order of a judge or master."

[14] Rule 74.9(1) states that all parties and their respective attorneys-at-law (where represented) must attend all mediation sessions. Where the mediator's report indicates that a defendant party did not attend the mediation, rule 74.14(6) empowers the court, upon an application by the claimant, to strike out the defence and enter judgment against that defendant. It is indisputable that rule 74.14(6) grants the court a discretion that it may exercise, to impose sanctions on a party for failing to attend mediation. The onus is therefore on the appellant to satisfy this court that the learned judge wrongly exercised her discretion, when she refused to strike out the respondent's defence and enter judgment against him.

[15] Counsel Miss Carol Davis, for the appellant, has conceded that the learned judge was exercising a discretion, but submitted that that discretion cannot be arbitrarily exercised. She contended that the respondent being outside of the jurisdiction, without more, was not a sufficient reason for failure to attend mediation. However, on the evidence of the appellant before the learned judge, the reason for the absence of the respondent from mediation was not limited to the respondent being outside of the jurisdiction. This is so, as counsel attending the mediation on behalf of the respondent, indicated that she was unable to contact him, a fact which was known to, and acknowledged by the appellant's counsel, as demonstrated by the report of the mediator and her letter dated 30 January 2018. There was also evidence before the learned judge, that the first scheduled mediation had not taken place as a result of the unavailability of both parties.

[16] In the light of all the evidence, it cannot be said that the learned judge wrongly exercised her discretion by refusing to strike out the appellant's defence and enter judgment against him.

[17] Additionally, I cannot agree with Miss Davis' submission that by setting the matter for case management conference, the learned judge effectively dispensed with mediation, thereby depriving the appellant of its benefit. It was also within the learned judge's discretion, and in keeping with the duty of the court to actively manage cases before it in accordance with rule 25.1 of the CPR, to have, given the circumstances of the instant case as discerned from the evidence, set the matter for case management.

[18] Rule 25.1(g) provides that:

> "The court must further the overriding objective by actively managing cases, this may include -
>
> ...
>
> (g) fixing timetables or otherwise controlling the progress of the case;
>
> ..."

The learned judge was therefore, in furtherance of the overriding objective, actively managing the matter, by fixing a timetable for its progression, given the evidence which emanated from the application that was before her.

[19] Furthermore, by setting the matter to progress to case management conference, the learned judge did not effectively dispense with mediation, nor did she run afoul of

rule 74.4 of the CPR, which sets out the requirements for dispensing with mediation. Rule 74.4 provides that:

> "(1) The court may postpone or dispense with a reference to mediation if it is satisfied that:
>
> a) good faith efforts to settle have been made and were not successful;
>
> b) the costs of mediation would be disproportionate to the value of the claim or the benefits that might be achieved by mediation;
>
> c) the case involves a matter of public policy and mediation may not be appropriate; or
>
> d) for some other good or sufficient reason, mediation would not be appropriate.
>
> (2) When the court dispenses with mediation, a case management conference should be scheduled, where appropriate.
>
> (3) Applications to postpone or dispense with mediation and all other applications under this Part may be heard on paper."

It would appear that the learned judge was mindful of the rule and was also careful not to have made an order dispensing with mediation so as to deprive the parties of its benefits, if they so desired, or if the court considered it so warranted. Pursuant to rule 74.3(4) and (5), a matter may be referred to mediation at any time prior to a pre trial review, by the consent of the parties or at any time by order of a judge or master. As such, an order for a further referral to mediation could be made at the case management conference.

[20] I therefore consider that the orders of the learned judge cannot be impugned. Accordingly, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

BROOKS JA

ORDER

1) The appeal is dismissed.

2) The decision of Wolfe-Reece J (Ag), made on 13 April 2018, is affirmed.

3) Costs of the appeal to the respondent to be agreed or taxed.