JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 152/09

BETWEEN	**MERLENE MURRAY-BROWN**	**APPLICANT**
AND	**DUNSTAN HARPER**	**1st RESPONDENT**
AND	**WINSOME HARPER**	**2nd RESPONDENT**

Franz Jobson and Lawrence Philpotts-Brown instructed by Messrs. Clough Long and Company for the Applicant

Ms. Sandra C. Johnson instructed by Sandra C. Johnson & Company for the Respondents

12 January and 1 February 2010

IN CHAMBERS

PHILLIPS, JA

[1] This is an application for permission to appeal to the Court of Appeal the order of Edwards J (Ag) made on the 29 July, 2009, wherein the learned trial judge refused to set aside an interlocutory judgment filed in default of defence, ordered costs to the respondents to be agreed or taxed, and refused leave to appeal her order.

[2] The applicant relies on 2 grounds:

> (1) That the order of Edwards J (Ag) is an interlocutory order, by virtue of section 11(1) (f) of

the Judicature (Appellate Jurisdiction) Act and rule 1.8 (1) of the Court of Appeal Rules. Permission is therefore required to appeal the judgment and since Edwards J (Ag) refused permission, the application was made anew before a single judge of appeal.

(2) The appeal has a real chance of success.

With regard to the first ground, I must indicate right away that I am in agreement that the order is an interlocutory one and thus permission must be sought and granted in order for the applicant to pursue an appeal in this court.

The proceedings below

[3] The respondents in this matter, Dunstan and Winsome Harper, on the 21 December, 2007 filed a claim form against the applicant, Merlene Murray- Brown for damages for personal injuries and loss arising out of a motor vehicle accident which took place on the 18 November, 2004. The respondents alleged that whilst the 1st respondent was "lawfully driving" his Nissan Pick-Up Motor Truck Licensed No. 6705 AI, in which the 2nd respondent was a passenger , along the Point Main Road in the parish of Hanover, the applicant's servant and/or agent so recklessly, negligently and carelessly drove the applicant's Leyland Motor Truck Licensed No. CB6742 that it collided into the rear of the 1st respondent's motor truck, which was stationary on the soft shoulder of the said roadway due to reduced visibility caused by thick smoke on the roadway.

As a result of the collision, the respondents claimed to have suffered personal injuries, sustained loss, damage and incurred expenses.

[4] Particulars of claim were filed with the claim form and included particulars of negligence of the applicant's servant and/or agent, which stated inter alia that he was driving at too fast a rate of speed; failed to proceed along the roadway in a cautious manner in light of the thick cloud of smoke on the roadway; failed to conform to the hazard light signal which was then showing on the 1st respondent's motor vehicle; and generally failed to keep a proper look out or to drive in a manner so as to avoid an accident given the hazardous conditions existing on the roadway at the material time. The particulars of claim also included particulars of injuries of the respondents and of their special damages.

[5] The applicant filed an acknowledgement of service on the 30 April, 2008 indicating that she intended to defend the claim. This was however not served immediately, as it appears from the record to have been served on the 23 June, 2008. In the interim the respondents filed on the 29 May, 2008 judgment in default of acknowledgment of service. Subsequent to this, unknown to the respondents, the applicant filed her defence on the 2 July, 2008. On the 21 October, 2008, the respondents were advised by the Deputy Registrar to re-do the judgment papers previously filed as the acknowledgment of service had been filed in time.

They were also informed that the defence was also filed but out of time. The defence filed would then have been about 4 weeks out of time.

[6] On 27 October, 2008 the respondents filed judgment in default of defence, which was duly entered by the Deputy Registrar in Judgment Binder 746 Folio 5 but not served on the applicant until 19 March, 2009. The judgment in default of defence although it was dated 27 October, 2008 and bore the date stamp of the Supreme Court of the said date, the date on the document had been crossed out to say 29 May, 2008, which was the Supreme Court date stamp on the earlier judgment filed in default of acknowledgement of service. This apparently led the applicant to initially claim before the court below that the judgment obtained in default of defence was irregular, but since this clearly was not so, and no arguments were proffered before me to that effect, I shall say no more about it.

[7] On 28 March, 2008 the applicant filed the application to set aside the judgment entered in default of defence, and sought leave for the defence already filed to stand or that the applicant be given 14 days to file it's defence. The grounds of that application, were, inter alia that the applicant had a real prospect of successfully defending the claim, the applicant had made the application as soon as was reasonably practicable after she became aware of the entry of the judgment in

default of defence, and that she had a good explanation for failing to file the defence in time.

[8] The applicant filed an affidavit in support of the application setting out the chronological history of the matter as set out above. She further stated that as soon as she became aware of the judgment, she instructed her attorneys to make an application to set it aside as she had already filed a defence, as she had always intended to defend the claim. The applicant also deponed that she had a good defence to the claim. She stated further that she had a real prospect of successfully defending the claim, for, at the material time she denied that whether by herself or by her servants and/or agents she was guilty of any negligence. She also stated in paragraph 11 of her affidavit as follows:

> "11. Further that on the occasion complained of the driver of the Defendant's [applicant's] vehicle did so without the consent of the Defendant and in clear breach of the stated instructions given by the Defendant and hence was on a frolic of his own and was not my servant and/or agent."

The defence which had been filed out of time, without the permission of the court, was attached to the affidavit and contained the statement made at paragraph 11 above in the pleading.

[9] The respondents responded by filing their affidavit on the 24 June, 2009 which contained 7 exhibits. They attached as exhibit D & W1, a copy of a letter dated 26 October, 2006 from the insurers of the applicant,

indicating that based on information in their possession the driver of the applicant's car at the material time was one Wayne Augustus, and checks at the Tax Office had revealed no trace of a licence having been issued to him. This, they said was a breach of the applicant's policy and also a misrepresentation of certain facts.

[10] This letter prompted exhibit D &W2 from the respondents' attorneys indicating that they were informed that the insurers would not be indemnifying the applicant in respect of the accident and therefore inviting the applicant to enter into negotiations to settle the matter. The respondents deposed that the parties did enter into negotiations for settlement but the negotiations did not bear fruit and so they filed suit and entered the judgments as described herein, which were attached to the affidavit as exhibits D & W3, 4 & 5.

[11] The respondents stated that the defence had no merit as the 1st respondent's vehicle was stationary on the soft shoulder due to the smoke and diminished visibility, and it was the wanton disregard for the hazard on the roadway by the applicant's servant and/or agent which caused the accident, particularly since the applicant collided with the rear of the respondent's vehicle.

[12] The respondents also challenged the sincerity of the applicant's defence as it did not address the specific acts of negligence pleaded,

and stated that although the applicant had denied that the driver was her servant and/or agent, she had indicated as long ago as 2005 that Wayne Augustus had deceived her into believing that he had a valid driver's licence and so had been hired by her without any due diligence checks. The respondents also stated that the applicant had tried to substitute the driver's name to that of Patrick Baker, but that had been rejected by the insurers who had stuck to the name of Wayne Augustas which appeared on the police report as the driver of the applicant's Leyland truck. The respondents attached a copy of the police report dated 24 March, 2005 as exhibit D & W6, and as exhibit D & W7, a copy of a letter dated 1 December, 2005, from the applicant. This latter letter was addressed to the respondents' attorneys and as it formed an integral part of both proceedings, the application in the court below and in the application before me, I will set it out in its entirety as follows:

> "8 Elesmere Drive
> Kingston 19
>
> December 1, 2005
>
> Sandra C. Johnson & Company
> 77 Church Street
> Kingston
>
> Dear Sir/Madam,
>
> Please be advice (sic) that we take into consideration your client (sic) Mr. and Mrs. Duncan Harper who were both injured in the motor vehicle accident.

> However, due to misleading information regarding our driver's name the insurance was delayed. The insurance is now in progress because of its awareness of drivers (sic) name (Patrick Baker).
>
> Therefore, I kindly ask you to contact Mr. Roland Lawrence at Covenant Insurance Brokers Ltd. for further information.
>
> Yours respectfully,
>
> Miss Marlene Murray"

The respondents therefore challenged what they called a new defence, "at this late stage of the proceedings, which was a mere sham" and argued that it ought to be rejected by the court.

[13] The applicant filed an affidavit in response and indicated that negotiations had taken place without prejudice, and that the respondents' attorneys had rejected the offer made to them. She maintained that she had a valid defence, denied that she had employed Wayne Augustas without due diligence, and or that he had deceived her into believing that he had a valid driver's licence, and that she had tried to substitute the name of the driver. Additionally, she stated that she had not signed exhibit D & W7, and finally claimed that as the respondents had sued her, she was entitled to raise and rely on any defence open to her, which included the defence that the driver at the material time was

on a frolic of his own having disobeyed clear instructions and therefore was not her servant and/or agent.

[14] The application went before Edwards J on the 29 July, 2009. The learned trial judge indicated in her judgment that the relevant rule with regard to setting aside or varying a judgment is rule 13.3 of the Civil Procedure Rules (CPR), 2002. Ultimately, she found that the applicant had not demonstrated that she had a real prospect of successfully defending the claim, although she found that she had applied to the court as soon as was reasonably practicable after the judgment had been entered, that is, within a reasonable time. However, with regard to whether the applicant had given a "good explanation" for the failure to file her defence in time, she found that the only reason given by the applicant, was "mere inadvertence". She added that no explanation had been given for the same in the affidavit of merit, nor in the submissions of counsel. In fact, the learned trial judge stated that in her view, "By no stretch of imagination can inadvertence be a good explanation for failing to file a defence in the time stipulated". Needless to say, the applicant strongly criticizes this statement.

[15] With regard to the merit of the defence, the learned trial judge had this to say:

> "I find this defence to be gloriously vague and general in its formulation and content, both in the affidavit of merit and the draft defence attached."

The learned trial judge was concerned about the fact that the defence was supposedly a simple one alleging that the vehicle had been driven without the owner's consent and against stated instructions, yet no information had been supplied to the court in this regard. The judge noted that here were two different drivers named in the matter, one in the letter signed by the applicant and one in the police report. She was concerned that the applicant in her affidavit of 28 July, 2009 referred to the driver of the vehicle as Wayne Augustas, and claimed that he was on a frolic of his own, and in the same affidavit denied signing the letter of 1 December, 2005, D &W7, which stated the driver to be Patrick Baker, yet at the hearing of the matter before her, the applicant indicated that she had signed the letter, although not in her lawyer's office but at the insurance company. Finally, the judge concluded that the respondents had a judgment regularly obtained and it was a thing of value. The defence that was being relied on had surfaced only after protracted negotiations, and even at that late stage there was no information with regard to who the driver was and where he might be. There was also no defence, she stated to the accident itself. The applicant, she stated seemed to be "under a misunderstanding that a mere statement that a

driver was on a frolic of his own is sufficient defence to a claim in negligence. It is not". The application to set aside the judgment was therefore refused with costs to the respondents to be agreed or taxed.

The application – The submissions

[16] At the hearing before me, Mr Jobson on behalf of the applicant, referred to the matters that the court should consider when setting aside a judgment entered in default of the filing of a statement of case, as set out in rule 13.3(2) of the CPR, which were also set out in the judgment of Edwards J (Ag). Rule 13.3(2) reads:

> "(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:
>
> (a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered
>
> (b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."

He pointed out that the court had found that the applicant had complied with rule13.3(2)(a), in that, he said, the judge had found that the applicant had acted timeously. However, with regard to rule 13.3(2)(b), the applicant had failed to give a good and reasonable explanation for the failure to file her defence in time. The judge, he said had erred when she said that "mere inadvertence" was insufficient. Counsel referred to and relied on Blackstone's Civil Practice 2005, Chapter 20, on Default

Judgment, at paragraph 20.14, under the sub heading Discretion to set aside, with particular reference to the case, **Law v St Margaret's Insurance Ltd** (2001) LTL 18/1/2001, which stated:

> "Where the Court of Appeal allowed a judgment to be set aside despite the defendant's solicitors' procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person, the overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined."

[17. Counsel submitted that in the instant case the acknowledgment of service was filed in time and the defence had been filed although approximately 4 weeks late. However, the explanation given by the applicant of "inadvertence of the attorneys" is similar to the "procedural errors" relied on in the **St. Margaret Insurance** case. Indeed, the errors may be more significant in that case and the Court of Appeal set aside the judgment. Counsel indicated that in the instant case the court ought to have ruled similarly. Counsel submitted further that the learned trial judge should have focused her attention on evaluating the merits of the case in order to ascertain if the applicant had a real prospect of successfully defending the claim. In this regard he said that the judge had erred when she stated that the defence filed was too vague and/or general. He submitted that the defence that the driver was not

authorized to drive the truck, without the owner's consent and on a frolic of his own, was sufficient information for the respondents to know the case they have to meet. He relied on the case of **Kenneth Hyman v Audley Matthews & Anor,** SCCA No. 64/2003 and **The Administrator General for Jamaica v. Audley Matthews & Anor,** SCCA No. 73/2003, delivered 8 November 2006, and particularly the dictum of Harrison P (as he then was) on page 6 wherein he stated:

> "His defence, denying liability, that the driver Walsh Anderson was not at the relevant time driving as his servant or his agent, relied on the well known case of **Avis Rent-a-Car Ltd. v Maitland** (1980) 32 W.I.R. 294 following **Launchbury v Morgan** (1971) 1 All ER 642. This if proven, is undoubtedly a good defence to the action."

[18] Counsel submitted that the applicant had therefore pleaded a good defence. It was not vague, and any further information required could be obtained in the discovery process. The weight and or credibility to be accorded the evidence ought to be left to the fact finder at the trial. Counsel submitted further that it was inappropriate to require the applicant's full case to be set out at this stage of the proceedings, as it is not required by the rules. The applicant had indicated a good defence, but it was filed out of time and a judgment had been entered in default of the same. The court ought in those circumstances, he submitted, to grant permission for the filing of the appeal.

[19] In reply, Ms. Sandra Johnson for the respondents submitted that the judge was exercising her discretion in circumstances where a judgment had been obtained regularly which, the learned judge had correctly stated, is a thing of value. She said on any perusal of the defence which had been filed, out of time, one would have to conclude as the learned judge did, that it was woefully inadequate. The affidavits before the court also did not give any explanation of this "alleged frolic of his own" nor did they offer any explanation as to why the applicant was saying that the driver of the applicant's vehicle was not negligent. Counsel submitted that the applicant ought not to be permitted to "blow hot and cold". Was the applicant not negligent, or was the driver of her motor truck not her servant and/or agent? Counsel submitted that the judge was entitled to form a negative view of the sincerity of the defence when the applicant had not put before the court any explanation for the inconsistencies existing with regard to the two (2) drivers. In fact the applicant herself had fuelled this disbelief as she had written the letter of 1 December, 2005, then denied that it bore her signature and then accepted at the hearing that it did. Indeed counsel said that to date the applicant has not put before the court, even in this application, who was the driver of her truck at the material time. She has not even said that she does not know who he was, so she must be taken to have that knowledge and without any other explanation, must be taken to be vicariously liable

for the negligent driving of the vehicle at the material time. Further, counsel said this is a case where the parties had been in protracted negotiations for a considerable period of time. The applicant therefore ought to have had all information by the time of the suit and certainly by the time that the defence ought to have been filed and /or the application to set aside the judgment when entered.

[20] Counsel conceded that the inadvertence of attorneys could in certain instances be a good explanation for the delay in not being in compliance with the rules, however, in this case, it is clear that was not all that the judge considered. In fact, the judge set out the basis for the exercise of her discretion, which counsel submitted cannot be faulted. Counsel further submitted that the **Hyman** case is inapplicable to the instant case as the facts that supported the "good defence" in the **Avis** case, referred to in the judgment of the learned President, are entirely dissimilar to the facts in this case, as there has not been any suggestion of the motor truck being on rental. Counsel also drew my attention to paragraphs 20.13, and 20.14 in the Blackstone's Civil Practice, 2005 and in particular, the case of **International Finance v Utexafrica sprl** (2001)CLC 1361, where it was stated that "the test in CPR, r. 13.3 (1)(a), of having a real prospect of success means that the prospects must be better than merely arguable." Also, in the case of **E.D and F. Man Liquid Products Ltd v Patel** (2003) EWCA Civil 472, [2003] CPLR 384, the Court of Appeal

confirmed this proposition and that the test is higher than it was under RSC, order 14. In **Rahman v Rahman** (1999) LTL 26/11/99 the court considered the nature of the discretion to set aside a default judgment under CPR, r.13.3. It concluded that the elements the judge had to consider were the nature of the defence, the period of delay (i.e. why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective."

[21] It was submitted that there was information in relation to the prejudice suffered by the respondents before the learned trial judge on which she could have acted. Counsel therefore submitted finally that the applicant had failed to satisfy the threshold before the learned judge and had no real chance of success on appeal and the application for permission to appeal ought to be refused.

[22] In response, Mr Jobson said that the **Rahman** case spelt out different aspects of the overriding objective, which he said required the court to find justice, which meant allowing the case to be tried on its merits. Also, he submitted, it is possible that the driver of the truck may not have been known to the applicant, as she may only have obtained that information much later, and the obligation of the applicant is merely to defend herself.

Discussion

[23] Rule 13.3 of the CPR governs cases, as its sub title suggests, where the court may set aside or vary default judgments. In September 2006, the rule was amended and there are no longer cumulative provisions which would permit a "knock-out blow" if one of the criteria is not met. The focus of the court now in the exercise of its discretion is to assess whether the applicant has a real prospect of successfully defending the claim, but the court must also consider the matters set out in 13.3(2) (a) & (b) of the rules. It is important to note however that on appeal, the court ought not to review the entire application and evidence which was before the trial judge to see whether the court would have exercised its discretion differently. The court ought only to interfere with the decision of the single judge in the exercise of her discretion, if she was plainly wrong. The court must assess if the judge has misunderstood the principles of law or applied the correct principles wrongly. I will therefore proceed within the guidelines of this legal framework.

[24] In my view the learned judge demonstrated that she was applying the provisions of rule13.3 of the CPR, although it may not have been as clear as it could have been that the primary consideration is that set out in rule13.3(1). Rule 13.3 states as follows:

> "(1) The court may set aside or vary a judgment entered under Part 12 if the

defendant has a real prospect of successfully defending the claim.

(2) In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:

(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered.

(b) given a good explanation for the failure to file an acknowledgement of service or a defence, as the case may be.

(3) Where this rule gives the court power to set aside a judgment, the court may instead vary it."

[25] Notwithstanding that however, the judge did set out her several concerns, particularly since the accident had taken place many years ago on 18 November, 2004. In spite of the passage of time, the applicant had still not provided the court with the following information:

(1) Who was the driver of the applicant's motor truck at the relevant time?

(2) How did that person gain access to the said motor truck so that they could have been involved in an accident on Point Road in the parish of Hanover?

(3) Details of the alleged negligence of the 1st respondent, as he has claimed that his vehicle was stationary on the soft shoulder due

to the thick smoke on the road which had decreased visibility when his vehicle was struck in the rear. One would have expected that if the applicant is denying negligence on the part of her driver, even though not a servant and/or agent, particulars of the negligence alleged on the part of the 1st respondent would have been set out.

[26] I accept the submissions of counsel for the respondents that at some point in time the applicant must have expected that the court would wish to know what her case really was. I do not accept counsel for the applicant's position that the applicant is not required to put her full case before the court at this stage, that the information with regard to the driver can be supplied at discovery ,and that she is only required to put forward such information as she believes is necessary to defend herself. In my view, those days of filing statements of case which are obscure and vague are long gone. Under the new regime, a defendant must set out all the facts on which she relies to dispute the claim - (Rule10.5 (1)). The rules also require that where the defendant denies any allegation in the claim or particulars of claim, she must state her reasons for doing so and if she intends to prove a different version of events from that of the claimant then her own version must be set out in the defence. (Rule10.5 (a) & (b)). The rules also state that the defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been, unless the court gives permission. (Rule10.7).

Further the applicant was before the court trying to set aside a judgment that had already been entered against her. The burden was on her therefore to convince the judge that she had a real prospect of successfully defending the claim. The question one must ask is how could she expect to do so by withholding information from the court, or failing to endeavour to obtain information which was relevant to her application and to her case.

[27] Additionally, the applicant was also faced with the allegation of attempting to mislead her insurance company with a named driver, not in the police report, who was to substitute the driver in the report and whom the insurance company was alleging had no driver's licence, which would therefore impugn the indemnity of the insured. It was therefore incumbent on her to place as much information as possible before the court in order for the court to exercise its discretion in her favour. This she failed to do to her peril. I accept the dicta in the cases in paragraphs 20.13 and 20.14 of the Blackstone's Civil Practice, referred to above that the test applicable to the threshold of having a real prospect of success means that the prospects must be better than merely arguable. The case put forward by the applicant appears unarguable.

[28] Neither party referred to the Privy Council case of **Clinton Bernard v the Attorney General of Jamaica** PC Appeal No. 30/2003 delivered 7

October, 2004, where the law lords addressed the question of vicarious liability, applicable to this case, and in referring to the House of Lords case of **Lister v Hesley Hall Ltd** (2002) 1 AC 215, the law lords stated that the relevant question which must be asked is "…. whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable". The law lords went on to say that:

> "The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee…… "

Lord Steyn, who delivered the decision of the Board, commented that throughout the judgments recently given on this area of the law, "there is an emphasis on the proposition that an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on". Finally, in paragraph 23 of the judgment, he referred to Lord Millet's observation in **Lister**, where he stated that it is by itself, "no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortuous but criminal, or that he was acting exclusively for his own benefit, or that he was acting

contrary to express instructions, or that his conduct was the very negation of his employer's duty".

[29] In this case the applicant has introduced "the risk of the wrong", as her vehicle was in the custody of someone who was using the same in a manner which appeared to be dangerous to others and by which use she must be considered closely connected to the wrong which occurred. The applicant has attempted to allege that the driver was on a frolic of his own, and acting contrary to instructions, but this is no answer, as the driver had her vehicle with her keys, she had not reported the vehicle stolen and after 5 years has failed to place any information before the court for the court to exercise a discretion in her favour. I cannot therefore see how the applicant could endeavour in these circumstances to show that the learned judge was plainly wrong, and I would hold that the applicant has not shown any real chance of success on appeal.

[30] There is just one other matter that I must comment on however that is, the statement made by the learned trial judge that, "by no stretch of imagination can inadvertence be a good explanation for failing to file defence in the time stipulated". The fact is that there are many cases in which the litigants are left exposed and their rights infringed due to attorneys errors made inadvertently, which the court must review. In the interests of justice, and based on the overriding objective, the peculiar

facts of a particular case, and depending on the question of possible prejudice or not as the case may be to any party, the court must step in to protect the litigant when those whom he has paid to do so have failed him, although it was not intended. (See the **St Margaret Insurance** case). However, as this was only one part of the court's consideration and based on the view I take of the substantive ground, the application would fail in any event.

[31] The application for permission to appeal is refused, with costs to the respondents to be agreed or taxed.