[2018] JMCA App 36

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 178/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**GLADSTONE SHACKLEFORD**	**1ST APPLICANT**
AND	**EUGENE POLSON**	**2ND APPLICANT**
AND	**SHAUNA SMITH**	**1ST RESPONDENT**
AND	**AAYANA BENT (A minor, by her mother and next friend SHAUNA SMITH)**	**2ND RESPONDENT**

Ms Raquel Dunbar instructed by Dunbar & Co for the applicants

Kevin Williams and Ms Regina Wong instructed by Grant Stewart Phillips & Co for the respondents

7 and 26 November 2018

MORRISON P

[1] I have read, in draft, the judgment of Brooks JA. His written reasons accurately convey the bases on which the court arrived at its decision.

BROOKS JA

[2] We heard this application on 7 November 2018 and, after hearing the submissions of learned counsel and considering the material provided by the respective parties, we ordered as follows:

> "a. The application for extension of time in which to apply for permission to appeal is granted.
>
> b. The application for permission to appeal against the learned judge's refusal to set aside the default judgment is refused.
>
> c. The application for permission to appeal against the learned judge's order for an interim payment is granted, and the hearing of the application, is, by consent, treated as the hearing of the appeal.
>
> d. The appeal in respect of the learned judge's order for an interim payment is allowed and the order for the interim payment is set aside.
>
> e. The registrar of the Supreme Court shall fix a date for the hearing of the application for the order for an interim payment.
>
> f. No order as to costs."

At the time of delivering the decision, we promised that we would reduce our reasons, therefor, to writing and provide them to the parties. This is a fulfilment of that promise.

[3] Messrs Gladstone Shackleford and Eugene Polson (the applicants) are the owner and driver, respectively, of a motor bus that crashed into the back of a parked truck in the parish of Portland. Ms Shauna Smith and her young daughter, Aayana Bent (the respondents) were passengers in the bus at the time of the crash. Both were injured.

They sued the applicants for damages for negligence and obtained a judgment in default of defence against them.

[4] The applicants sought to correct their situation. They filed a statement of defence and an ancillary claim seeking to ascribe liability, completely or in part, to the owner and driver of the truck. They then applied to set aside the default judgment and for permission to file the defence out of time. A judge of the Supreme Court heard their application. As part of the orders that she made, the learned judge:

a. refused their application;

b. ordered that they should make an interim payment to the respondents; and

c. refused their application for leave to appeal.

[5] The applicants have now applied to this court for leave to appeal from those orders. They contend that the learned judge made a number of errors and that they should be allowed to appeal from her orders and to have them set aside. In particular, counsel for the applicants contend that the learned judge:

a. failed to appreciate that their defence of contributory liability by the truck driver and, by extension, its owner, has a real prospect of success;

b. made grave procedural errors in ordering the interim payment; and

c. failed to consider the ability of the applicants to satisfy the order for the interim payment.

[6] The respondents have opposed the application for leave to appeal. In an affidavit in opposition to the application, they assert that it is flawed and destined to fail. According to them, the proposed appeal, has no real prospect of success, because:

i. the documents which the applicants sought to use to support their application before the learned judge were all improperly filed and were of no effect;

ii. the proposed defence has no real prospect of success;

iii. there was no evidence before the learned judge to allow her to set aside the default judgment; and

iv. the context in which the learned judge made the order for the interim payment did not cause injustice, and she was not required to consider the ability of the applicants to make that payment.

[7] Before assessing the amended application, it is necessary to outline the relevant facts of the case and the various issues that were raised before the learned judge.

Background

[8] The respondents' attorneys-at-law applied, on 2 June 2016, for the default judgment. The applicants' attorneys-at-law indicated, by letter dated 26 August 2016,

that they were interested in the case. They were informed, by letter dated 7 September 2016, that the application for default judgment had already been made.

[9] The relevant dates and events in respect of the litigation, thereafter, are as follows:

a. on 12 September 2016, the applicants' attorneys-at-law filed documents intituled:
   i. Defence;
   ii. Ancillary Claim Form; and
   iii. Ancillary Claimants'/Defendants' Particulars of Claim;

b. on 11 January 2017, the applicants' attorneys-at-law filed an application for permission to file the defence out of time and to set aside the default judgment;

c. on 27 September 2017, the scheduled assessment of damages was not heard and was adjourned;

d. on 15 November 2017, the respondents' attorneys-at-law applied for an interim payment;

e. on 19 January 2018, the application for interim payment was adjourned to 29 May 2018 and the application to set aside the default judgment and for permission to file the defence out of time, was heard by the learned judge;

f. the learned judge reserved her decision to 6 July 2018, allowing the parties in the meantime to file further submissions in respect of the ancillary claim;

g. on 29 May 2018, the application for interim payment was further adjourned, by another judge, to 24 July 2018;

h. on 6 July 2018, the learned judge, without hearing any further submissions, made the orders, from which the applicants seek leave to appeal.

The present application

[10] By rule 1.8(1) of the Court of Appeal Rules (CAR), the applicants ought to have filed their application for permission to appeal in this court within 14 days of the learned judge's order. They failed to do so. They did not file it until 8 August 2018. They did not, before filing, seek or secure an extension of time. That is but one of the criticisms that the respondents have levelled at this application. In response to that particular criticism, which the respondents' counsel made in their written submissions, the applicants filed their amended application on 1 November 2018. The amendment sought to cure that defect.

[11] Ms Raquel Dunbar, who also represented the applicants in the court below, filed an affidavit in support of that amended application. She stated that the delay was due, in part, to the time taken to conduct research into the applicants' position, and, in part,

to the time it took to receive instructions from the applicants and their insurer. She asked the court to excuse the delay as not being inordinate.

[12] The court does have the authority to extend the time within which to apply for permission to appeal (rule 1.7(2)(b) of the CAR).

The applicable principles

[13] The criteria, for assessing applications such as this, are accepted as being set out in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported) Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. Although **Leymon Strachan** was decided prior to the promulgation of the CAR, the criteria set out by Panton JA (as he then was) in that case are still deemed relevant to the regime of the CAR. Among the cases in which they have been cited with approval, is **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23. Panton JA stated the relevant criteria at page 20 of the judgment in **Leymon Strachan**. He said:

> "The legal position may therefore be summarised thus:
>
> (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 a 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 an extension of time, as the overriding principle is that justice has to be done."

[14] The present application will be assessed against those criteria.

The analysis

a. The length of the delay

[15] The delay in filing the original application is not so long as to be considered inordinate in the circumstances. The delayed amendment to the application was necessitated by an error on the part of the applicants' attorneys-at-law. The delay should not be fatal to the application.

b. The reasons for the delay

[16] Ms Dunbar's proffered reason for the delay cannot be said to be a good reason. It certainly does not explain any delay on the part of the applicants and their insurer. A more prudent approach would have been to file the application for permission to appeal and thereby protect the applicants' position, while conducting further research and awaiting the applicants' instructions. Nonetheless, that flaw will not prevent the consideration of whether the proposed appeal is arguable.

c. Whether there is an arguable appeal

[17] The applicants proposed a formidable list of grounds on which they wish to appeal. They are set out in an attachment to the affidavit in support of the present application and are repeated here only for completeness. There will be no attempt to address them in any detail. They are:

> "(i) The Learned Judge erred in failing to sufficiently consider and weigh the contents of the Defendants' Affidavit which indicated that liability does not rest solely on the Defendants;
>
> (ii) The Learned Judge failed to consider that there is an allegation of contribution against another person who the Defendants are seeking permission to join as a party to the claim;
>
> (iii) The Learned Judge failed to give due weight to the facts set out in the Affidavit;
>
> (iv) That the Learned Judge erred in accepting the contents of the Claimants' Affidavit as to how the accident happened without having had the benefit of cross-examination of that information within the forum of Trial;
>
> (v) The Learned Judge failed to appreciate that at this stage of the proceedings where the facts are disputed that she ought not to come to a conclusion without having the benefit of Trial;
>
> (vi) The Learned Judge erred by conducting a mini-trial at the hearing to set aside the Default Judgment;
>
> (vii) The Learned Judge erred in rejecting that the Applicant had not demonstrated that he had a real prospect of success of Defence without the benefit of a trial or cross-examination;

(viii) The Learned Judge erred in making an order for interim payment as that Application was not before her and hence her decision was premature;

(ix) The Learned Judge erred in that she failed to understand that the pre-conditions were met: -

a. She failed to consider that there was no admission of liability;

b. The Defendants were contended that some other person was responsible for the accident and therefore she could not be sure that the Claimants would recover substantial damages from the Defendants solely;

c. She failed to ascertain the extent to which the Defendants were insured and that the coverage was sufficient to satisfy the amount she ordered for interim payment.

(x) Other grounds of appeal will be added when the notes of evidence are available.

[18] The applicants supported their application before the learned judge with an affidavit by Mr Shackleford only. In that affidavit, he sought to state how the crash occurred. He was however not present at the time that the crash occurred. He did not state, in his affidavit, that he was repeating what had been told to him by Mr Polson, or anyone, nor did he say that he believed what he had been told to be true.

[19] Ms Dunbar submitted that the contents of Mr Shackleford's affidavit, which spoke to the way in which the crash occurred, should not be considered inadmissible hearsay. Learned counsel submitted that Mr Shackleford had stated that he was deposing on behalf of Mr Polson and himself and therefore his affidavits should be taken as Mr

Polson's account. Miss Dunbar argued that the learned judge was wrong to reject those portions of the affidavit.

[20] The learned judge rejected Mr Schackleford's statements, about the way the crash occurred, as inadmissible hearsay. She was correct to reject them. They did not satisfy either the principles at common law, concerning an affidavit as to merits (see **Ramkissoon v Olds Discount Co (TCC) Ltd** (1961) 4 WIR 73), or the requirements of rule 30.3(2) of the Civil Procedure Rules (CPR), regarding the consideration of such hearsay. Miss Dunbar in not on good ground in her submission to the contrary. The submission ignores rule 30.3 of the CPR, the relevant part of which states:

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and
>
> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, **provided that the affidavit indicates**-
>
> (i) **which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief**; and
>
> (ii) **the source for any matters of information and belief**." Emphasis supplied

[21] There was, therefore, no affidavit of merit before the learned judge. Even if the hearsay statements had been admitted, they could not be considered credible for the purpose of setting aside the default judgment. The facts to be gleaned from the record show that the third party's truck was parked on the brow of a hill and Mr Polson drove the bus into the rear of the truck. Mr Shackleford's hearsay statement in his affidavit, indicated that when Mr Polson drove into the truck, his vision was impaired by sunlight. This was, clearly, during the daytime, where the ambient lighting could not have been a contributing factor to any impairment of Mr Polson's vision. It is, therefore, highly improbable that Mr Polson would not have had sufficient time to stop his vehicle, rather than driving in a vision-impaired state, and crashing into the truck, unless:

a. he was driving too fast in the circumstances; or

b. he continued to drive despite being impaired by the sunlight.

The result is that he would, at a trial, be found to be driving negligently and the respondents would be entitled to judgment against him, and against Mr Shackleford.

[22] It may be said, therefore, that it is plain that the learned judge was right in finding that the applicants have no real prospect of successfully defending the respondents' claim. Her reasoning on the aspect of liability is unimpeachable.

[23] It is also to be borne in mind that a ruling on an application to set aside a default judgment is an exercise of a discretion given to the judge at first instance. This court will not lightly interfere with such an exercise. Morrison JA (as he then was) so stated

in **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2. He acknowledged the principle at paragraph [19] of his judgment and said, in part:

> "...the proposed appeal will naturally attract Lord Diplock's well-known caution in ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'"

[24] The complaint about the interim payment may, however, be considered one with a real prospect of success. The application for the interim payment was not before the learned judge at the time that she made the order. Mr Williams, who also appeared for the respondents in the court below, admitted that he was taken by surprise by this aspect of the learned judge's order.

[25] The learned judge may have been trying to make the best use of that court's scarce resources, but unfortunately, she failed to afford the parties the fundamental right of an opportunity to address her on their respective positions on the application for an interim payment. In this regard, she erred. A consequence of the error is that the applicants credibly complain that they did not have the opportunity to address the issue of the quantum of the interim payment in the context of the sum for which they were insured.

d. The degree of prejudice to the other party

[26] In considering the degree of prejudice to the respective parties, it is unnecessary to consider the issue of liability. The aspect left to be decided is the best way of treating with the issue of the complaint about the order for the interim payment. It is important in the context of prejudice to bear in mind that the respondents have both suffered physical injury. Ms Smith has ongoing medical concerns and expenses. Compensation is required. It is undoubted that it will have to be paid by the applicants and their insurer.

[27] It is also to be noted that Miss Dunbar does not oppose the grant of an order for an interim payment. It has already been noted that the applicants should be afforded an opportunity to address a court on the appropriate quantum of an interim payment.

[28] There should, therefore, be a hearing of the application, with both parties entitled to make submissions if they are so inclined.

e. the decision that justice requires

[29] Based on the reasoning set out above, the justice of the case requires the refusal of the application as it concerns the issue of liability.

[30] The error in respect of the interim payment should be remedied by making an order that that application be set for hearing in the court below.

Summary and conclusion

[31] In order to secure an extension of time in which to apply for permission to appeal, the applicants would have had to show that they had a real prospect of

succeeding if they were granted that permission. They have failed in that regard, in respect of their liability to compensate the respondents for the physical injuries that the respondents have suffered.

[32] The applicants have, however, demonstrated that they did have a valid complaint against the procedure that the learned judge adopted in making the order for an interim payment to the respondents. This is because there was no application before her for that relief. A hearing of an application for the interim payment is required.

[33] In that context, and in order to make the most efficient use of this court's resources, the court consulted with the parties and intimated the approach that it was inclined to take. The parties agreed that, for efficiency and to save costs, the hearing of this application should be treated as the hearing of the appeal. The orders, mentioned above, were therefore made.

[34] Those are my reasons for agreeing to those orders.

P WILLIAMS JA

[35] I too have read the reasons for judgment drafted by Brooks JA. They accurately reflect my own reasons for agreeing to the decision, which the court handed down.