Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 00429

BETWEEN	**ADEBOWALE ADEITE (Father and administrator of the estate of Adebayo Adeite)**	**1ST CLAIMANT**
AND	**SOFIA ADEITE (Mother and administrator Of the Estate of Adebayo Adeite)**	**2nd CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & company for the claimants.

Mr. Jerome Spencer instructed by the Director of State Proceedings for the defendant.

Heard February 28; March 5 and 18th June 2007

MCDONALD J.(Ag.)

The Claimants have applied to enter judgment in default of defence against the Defendant and the Defendant has applied for permission to file its defence out of time.

The latter application took priority for hearing, although filed later in time.

The Claimants claim is based on alleged misstatement made by the Superintendent of Police for St. Andrew South and/or his agents acting on his behalf in the execution of their duties.

The Claimants allege that the Defendant through its servants and/or agent were negligent in making certain representations in a police report in answer to their enquiries concerning the details of an accident in which their son Adebayo Adeite was killed.

They alleged that this report negligently misrepresented that motor vehicle registered 2019 DB was

(a) owned by Stephen Silvera and;

(b) insured by United General Insurance Company.

The Claimants further allege that in making the aforesaid representation the Superintendent of Police and/or his agents knew or ought to have known that they would rely on the information provided and were under a duty to take care in making the representations to the first claimant and breached that duty by:-

(a) preparing an accident report without any or any proper investigation or verification of the information on which they were based

(b) failing to obtain necessary and proper information and explanations in the preparation of the report and

(c) certifying the said report without proper regard to its correctness and/or accuracy.

As a result the claimants filed a claim against Peter Sasso and Stephen Silvera.

They obtained judgment in Suit No. 2003 HCV 1563 on the 11th November 2004 against both defendants.

Mrs. Taylor-Wright submitted that Stephen Silvera was not the owner and was wrongly sued and as a consequence the claimants were unable to recover their judgment because the insurer had never insured Stephen Silvera or the vehicle in question.

She said that Peter Sasso, the driver was sued an agent of the wrong person with the result that neither the "owner" nor the driver were properly sued as master and servant.

Rule 10.3(1) CPR states that the general rule is that the period for filing a defence is 42 days after the date of service of the Claim Form. However, rule 10.3 (9) of CPR permits the defendant to apply for an extension of time for filing defence.

The Court clearly has a discretion to grant an extension of time to file defence.

History

Claim Form and Particulars of Claim were filed on 1st February 2006 and served on the defendant on 2nd February 2006.

Acknowledgment of service was filed on 20th February 2006.

By letter dated 21st March 2006 Taylor-Wright & Company, Attorneys for the defendant consented to an extension of the period for filing a defence for not more than 7 days from the 21st March 2006.

No defence was filed within the specified period.

On 5th April 2006, the claimants filed notice and affidavit in support seeking the permission of the Court to enter judgment in default of defence. On 27th February 2007, the Defendant filed Notice of Application to file defence out of time.

On the said date Mr. Jerome Spencer filed an affidavit in support of the said notice.

Mr. Spencer in his affidavit deponed that the defendant had a good explanation for his failure to file a defence in time.

Three letters to the Commissioner of Police dated 20th February 2006, 17th March 2006 and 25th April 2006 respectively from the Director of State Proceedings seeking instructions were exhibited.

Mr. Spencer submitted that the clear inference to be drawn is that in the absence of instructions, the defendant was not in a position to firstly ascertain whether he had a defence to the claim and secondly, file a defence to the claim.

He asserted that the failure of the defendant to receive instructions in time is a good explanation for the failure of the defendants to file a defence.

Mr. Spencer submitted that the defendant has a good defence to the claim.

In his affidavit Mr. Spencer deponed that he had been advised by Superintendent Derrick Knight that the extract of a Police report, submitted to the Claimants was prepared from the Police report

prepared by the investigating officer. He said that Superintendent Knight has advised him that the information in the police report and extract is not provided to prove as true and factual what is contained therein. Instead, it only goes to prove that a police report was prepared after an accident.

The defendant contends that neither the Superintendent of Police for South St. Andrew and/or his subordinates were under a duty to ensure that the information contained in the extract was true.

The defendant contends that such obligation is that of the recipient of the information.

Paragraph 4 of the draft defence states inter alia that the only duty of care owed by Superintendent of Police of St. Andrew South and/or his subordinates was to ensure that the extract of the police report accurately recorded the information collected by the investigating officer at the time of the accident, as was contained in the police report.

Mr. Spencer submitted that in exercising its discretion the court needs to consider that given the nature of the issues involved in the case, far overwhelming prejudice would be suffered by the defendant

if he was unable to defend the proceedings, in comparison to any prejudice that may be caused to the claimants in allowing the defendant to respond to the claim being made. The issues ought to be decided by a Court at trial.

The final limb of Mr. Spencer's submission was to the effect that the Court in exercising its discretion under part 10.3(9), is required to give effect to the overriding objective, which is to deal with cases justly. In doing so, the Court should ensure that parties comply with time limits stipulated in the CPR.

However, Mr. Spencer asserted that the Court must balance the need for parties to comply with time limits, with the need to ensure that a party who has a good defence to the claim, is not deprived of the opportunity of a hearing on the merits of the claim due to the non-compliance with the time limit in circumstances where the default:

(i) was unintentional and accounted for;

(ii) does not appear to have prejudiced the claimant (or has prejudiced him but this can be compensated by costs); and

(iii) has had no significant effect on the expeditious resolution of the claim.

Mrs. Taylor-Wright submitted that Rule 26.8 applies to these proceedings since the failure of a party to file his defence within the time provided by the rules result in the imposition of an automatic sanction from which the defendant must seek relief.

She said that the defendant has not sought to be relieved from sanction under Rule 26.8 and this is fatal to the application.

I do not share the view that Rule 26.8 applies in these proceedings.

Mrs. Taylor-Wright relied on Lambert Carr & Collen Carr v Dudley Burgess CL. 1997 C130 delivered on April 19, 2006. The decision in that case hinged on the acceptance of the Learned Judge that Rule 26.8 was applicable when considering applications to extend time for the filing of a defence after the period permitted under Rule 10 for filing a defence had expired.

The Court also held the view that Rule 26.1(2)(c) applied when considering such application notwithstanding the fact that Rule

10.3(9) expressly enabled a defendant to apply for an order extending the time for filing a defence.

Rule 26.8 applies where a sanction is imposed for failure to comply with any rule, order or direction.

Rule 26.7(2) states that:

> Where a party has failed to comply with any of these Rules a direction or any order, any sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 shall not apply."

The fact that a defendant cannot as of right file a defence under Rule 10.3(9) is not in my opinion a sanction as contemplated by Rules 26.7 and Rule 26.8.

In my view the provisions under these parts clearly contemplate circumstances where the rule, direction or order expressly states the consequences of failing to comply with a rule order or direction of the Court.

In my view Rule 26.8 and Rule 26.1 (2)(c) have no application in circumstances where an application is made to file a defence out of time under Rule 10.3 (9).

Rule 26.1(2) (c) applies in circumstances where there is no provision under any other rule for the extension of time for doing an act, and not to circumstances where a fortiori another rule expressively confers on the Court the power to extend the time for doing an act under the Rules.

In my view rule 26.1 (2) does not apply to this application because of the existence of rule 10.3 (9), which expressly empowers the court to extend time for filing a defence.

Rule 26.1.2 (c) is a general provision and cannot be used to override Rule 10.3 (9), which is a specific provision.

In respect to the failure of the defendant to apply promptly, Mrs. Taylor-Wright's response was that the defendant has not shown a good explanation for failure to comply with the rules.

She said that the evidence shows that the defendant is really the Government of Jamaica acting through the Attorney General. The Government and the Attorney General and the Police Force (who

are the Government agents) are institutions, which have human and administrative resources in abundance.

She asserted that it could not have taken almost 327 days to provide and/or obtain instructions that:-

(a) A police report does not purport to be accurate, but only records information and that the Superintendent or his subordinates were under no duty to verify the accuracy of the police report;

(b) That from the claimant's Statement of Case they were also negligent and in addition they have suffered no loss.

Mrs. Taylor-Wright submitted that the first limb (a) does not depend on instructions from the police department, that the defendant relied on the Superintendent to advise him on the legal nature and effect of a police report when in fact he should have been the one giving such legal advice.

She said that by no yardstick could the defendant have reasonably waited 327 days in order to have at its command information which could either have taken a telephone call, a letter of

response or been provided by himself or his department, since the major limb concerns matters of law.

She submitted that the 2nd limb (b) did not necessitate instructions from anyone. The Claimants position is to the effect that their own statement of case provided him with instructions. Absolutely no details of fact or complicated information were required by the defendant in order for him to file the proposed defence as exhibited.

Mrs. Taylor-Wright opined that a holding defence could have been filed, given the fact that the defendant is at liberty to amend same as many times as he wishes prior to the Case Management Conference.

She submitted that:

Whether the defendant has a good defence with a real likelihood of success does not arise under Rule 26.8.

However, she submitted that even on a cursory reading of the law concerning negligent misstatement, it is evident that in accordance with the Headley Byrne v Heller case, and cases following Headley Byrne that where a person gives information knowing that it

was likely that the recipient would rely on it in deciding whether to engage in a transaction in contemplation the provider of the information must take reasonable care to ensure the accuracy of the information.

She opined that it is downright ridiculous to suggest that the police who are entitled to carry out investigation into road traffic accidents with a view to perhaps instituting criminal prosecutions or warning offenders and keeping records of such accidents do not have a responsibility to take reasonable care to ensure:-

(1) that the records are accurate;

(2) that the information supplied to the citizen whom they serve is accurate;

She said that if no such responsibility exists, the police ought to put a disclaimer on these reports and indicate clearly that they ought not to be relied on.

Delay

I find that the defendant has not proffered a good explanation for failure to file defence in time. The reason given is a failure to receive instructions. The reason for this delay in receiving

instructions is unknown to the court. It is only on the basis of that information that the Court would be able to determine whether the explanation was good or not.

Does the defence have a reasonable prospect of succeeding?

The draft defence reveals the sole representation made by the Superintendent and/or his subordinates was that the police report was prepared after the said accident, and that the report contained the information contained in the extract, which was provided to the claimant.

The defendant contends that neither the Superintendent of Police for South St. Andrew and/or his subordinate were under a duty to ensure that the information contained in the extract was true. They were under no obligation to verify the information contained in the police report. Instead the defendant contends that the obligation to verify such information was that of the recipient of the information.

Additionally, the defendant does not admit that the claimants suffered loss, but that if any loss was suffered by them, the claimants themselves contributed solely or in part to the loss they have alleged

in that they failed to verify the information contained in the extract of the police report prior to suing Peter Sasso and Stephen Silvera.

The defendant also says that the Superintendent of Police and/or his subordinates did not know nor ought to have known that the first claimant intended to rely on the extract for the truth of the contents of the extract.

A representation means a statement of fact past or present not a statement of intention, or of opinion or of law.

I am of the view that the defendant has a defence with a reasonable prospect of succeeding. The person who signed the document containing the representations can only represent that this report was received at the time of the accident. The name of the owner, driver and insurer of the motor vehicle are not facts within his personal knowledge. Factually he can only say that this report was made.

I find merit in the contention that the person signing the extract report is not representing that the facts contained therein are correct; nor is there any duty on them to ensure that the information was true.

Liability for negligent statements depends upon the existence of a special relationship between the claimant and defendant.

In my view no special relationship existed between the person who requested the report and the police and there is no evidence that the defendant knew even in general terms the purpose for which the report was sought.

The defendant's non-admission that the claimants suffered no loss appears in my view to be unanswerable. The claimants have a valid and subsisting judgment against Peter Sasso; joint and several.

They are not saying that the judgment is unenforceable but that it cannot be recovered, because Peter Sasso cannot be found. They cannot now say that he was wrongly sued as agent as the matter is now res judicata. Sasso can take the point if he wishes to set aside the judgment, but he has failed to take any such step. Even if he was not servant/agent of the driver, he can be sued as driver.

If the claimants were to succeed in this suit, they would have two judgments, which could be enforced in relation to the same set of circumstances.

Finally Mr. Spencer in support of his application submitted that given the nature of the issues involved in the case, far overwhelming prejudice would be suffered by the defendant if he was unable to defend the proceedings in comparison to any prejudice that may be caused to the claimants in allowing the defendant to respond to the claim made.

Further if the claimants have been prejudiced this can be compensated by costs.

I find that any prejudice which may be suffered by the claimants can be compensated by costs.

I also find that the overriding objective of the Rules favours the grant of the order sought.

Permission granted to the defendant to file and serve his defence within 7 days of the date hereof.

Costs of this application to the claimants to be agreed or taxed.