[2017] JMSC Civ 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 02560

BETWEEN	**RUPERT HENRY**	**CLAIMANT**
AND	**BARGAIN RENT-A-CAR**	**1ST DEFENDANT**
AND	**ANDREA ALLISON**	**2ND DEFENDANT**

Mr. Lemar Neale for the Claimant

Ms. Nicosie Dummett for the 1st Defendant

Negligence – Vicarious Liability – Agency – Motor vehicle Collision – Summary Judgment-

IN CHAMBERS

November 25, 2016 and January 12 , 2017

CORAM: WINT-BLAIR, J (Ag)

[1] This matter concerns an application for summary judgment. The court was asked to make the following orders:

1. "Summary judgment against the claimant.
2. Costs to the ancillary defendant to be agreed or taxed.
3. Such further and/or other relief as this Honourable Court deems just grant [sic]."

[2] There were a number of issues raised for determination on the substantive matter. Both sides made submissions on the issues for determination on this application. These can be, distilled into two central issues which are:

i. Whether or not the 2nd Defendant was the servant and or agent of the 1st Defendant at the material time.

ii. Whether or not an authorized driver who is not the servant and or agent of an owner can cause the owner to become liable for his acts or omissions?

The claimant's counsel also argued that a decision on the legal issue will entitle the claimant to summary judgment.

The Civil Procedure Rules ("CPR") provides in Part 15.2:

> "*15.2 The court may give summary judgment on the claim or on a particular issue if it considers that -*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

[3] **<u>Submissions</u>**

Ms. Dummett argued that there is a difference between a policy of insurance which covers a vehicle and a policy of insurance which subjects the first defendant to liability. She argued that if the court found that there was an agency relationship between the first and second defendants then the first defendant would be liable in negligence. If not, then the first defendant would not be liable for the acts or omissions of the second defendant. The claimant is not precluded from bringing a suit against the second defendant directly. If the claimant wishes to invoke insurance coverage then he has to show a nexus between both defendants in terms of liability. The claimant is entitled to summary judgment on these issues at bar. She relies on the affidavit of Danya Dacres, Fleet Manger of the first defendant company which states at paragraph 9 that the second defendant was not an employee of the first defendant nor was she using the

vehicle for any purposes connected with the business of the first defendant as their servant and/or agent. Mr Neale submitted that whilst the applicant sought summary judgment on these issues there remain other triable issues joined between the parties. The evidence is to be found in the affidavit of Danya Dacres to which is exhibited a document purporting to be a rental agreement which contained several obliterations. These obliterations have not been identified in the affidavit and thus the court will not know what information lay beneath its murky depths. The document is therefore inadmissible.

[4] Whether the second defendant was an authorized driver under the policy of insurance of the first defendant to drive the vehicle, is not known as the relevant insurance policy was not produced to the court. He relied on the cases of **ED&F Man Liquid Products [2003] EWCA Civ. 472, Swain v Hillman and Ocean Chimo Ltd. v Royal Bank Jamaica Ltd. et al [2014] JMCC Comm. 7**. The court was to look at the evidence before it and ought not to conduct a mini-trial.

[5] Both sides agree that the motor vehicle belonging to the first defendant was being driven at the material time by the hirer. The purpose for hiring the vehicle is not in evidence. Mr. Neale submitted that, the agreement exhibited shows that there is no evidence of exclusive use by the hirer for his purposes. He argued that Liability flows to the first defendant by virtue of the policy of insurance.

The following orders were made when the matter came on for hearing before me on November 25, 2016:

1. The first applicant's counsel is to file and serve the original rental agreement no later than 7 days from the date of the order.

2. Bundles of authorities from the respondent are to be filed and served no later than November 28, 2016.

3. The applicant's counsel is permitted to respond in writing to the respondent's authorities filed.

4. Judgment on the application for summary judgment reserved.

5. Costs to be costs in the claim.

6. Applicant's counsel to prepare, file and serve the orders made herein.

[6] Counsel for the applicant filed a large bundle of authorities on November 30, 2016 in response to the case of **Ocean Chimo Ltd**. cited by the respondent's counsel. Absent from that bundle was a response to that authority. Ms. Dummett also failed to comply with orders one and six above.

The Law

[7] The definition of contract of insurance is found in **Prudential Insurance Company v Inland Revenue Commissioners [1904] 2 KB 658** in which Channell, J states:

> "a contract of insurance is one whereby one party (the insurer) promises in return for a money consideration (the premium) to pay to the other party (the assured) a sum of money or provide him with some corresponding benefit, upon the occurrence of one or more specified events."

[8] **The Motor Vehicle (Third Party Risks) Act**, defines owner to mean "in relation to a motor vehicle which is the subject of a hiring agreement or hire purchase agreement, the person in possession of the vehicle under that agreement."

[9] The question therefore is not whether insurance follows the car or the driver, but whether or not other drivers will be covered by the insured's policy of motor vehicle insurance. Unfortunately, there is no direct answer to this question, as it depends largely on the language of the policies involved, as well as the specific facts and issues which arise in each case. Permissive use is generally covered under the liability terms of a motor vehicle insurance policy. As always, however, there are exceptions.

[10] In **Avis Rent-a-Car v Maitland (1980) 32 WLR 294**, the appellant was a rental car company which hired a motorcar to the second defendant for weekly payments. The car was being driven by the second defendant, in the course of

his business as a private investigator when he crashed killing his passenger. The executrix of the deceased sued the appellant and second defendant. Judgment in default of defence was entered against the second defendant. At trial the appellant was found jointly liable with the second defendant in damages for the death of the deceased as the driving had been to the benefit of the appellant.

[11] The issue raised on appeal was whether the driver of the car was the agent of the appellant at the time of the collision. Zacca, P(Ag) (as he then was) held citing Morgans v Launchbury that:

> *"When a company or an individual in the course of its business hires a motor vehicle to a person on terms that during the period of hire the vehicle should be driven by the servant or agent of the owner, responsibility for the negligent driving of that motor vehicle will in ordinary circumstances devolve upon the owner: Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1. An entirely different situation arises in law when such a company or individual hires the motor vehicle on condition that the motor vehicle can be driven by the hirer for purposes exclusively determined by the hirer, in which the benefits of the venture accrue wholly to the hirer. In this second case there is no joint interest between owner and hirer in the outcome of the venture and the hire is not dependent upon or affected by the profitability or otherwise of the venture. Such is the position in the instant case where the owner retained an interest in its motor vehicle charging a fee for wear and tear and stipulating for adequate maintenance but was otherwise entirely disinterested in the purposes for which the motor vehicle was used. We accept the view on the law of vicarious responsibility expressed in Morgans' case as the correct principles to be followed."*

[12] **Morgans v Launchbury [1973] A.C. 127** is the leading case on this question. Lord Wilberforce stated at page 135:

> *"For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an*

interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability. And the appearance of the words in certain judgments (Ormrod v. Crosville Motor Services Ltd. [1953] 1 W.L.R. 409, per Devlin J.; [1953] 1 W.L.R. 1120, per Denning L.J.) in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. I accept entirely that "agency" in contexts such as these is merely a concept, the meaning and purpose of which is to say "is vicariously liable," and that either expression reflects a judgment of value - respondent superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the respondents' claim against the appellant."

[13] Lord Pearson described the nature of the agency relationship at page 140:

"For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent."

[14] Lord Denning in **Ormrod v Crossville Motor Services Ltd**. [1953] 1 WLR 1120 in describing the nature of the agency relationship between driver and owner said:

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes…

…The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or

hires it to a third person to be used for purposes in which the owner has no interest or concern: see Hewitt v Bonvin."

[15] In ***Hewitt v. Bonvin*** **[1940] 1 K.B. 188** Mackinnon L.J. stated the question for the court was whether the driver was or was not the servant of the owner. Du Parcq L.J., defined agency as follows:

> *"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty*."

[16] In **Island Car Rentals Ltd. v. Headley Lindo** 2015 JMCA App 2, Brooks, JA opens his judgment with these words:

> *"Avis Rent-a-Car Ltd v Maitland (1980) 32 WIR 294 has long been accepted as the authority for the principle that a person who lets a motor vehicle on hire, is not by virtue of that transaction, vicariously liable for the negligent driving of the person to whom he hires the vehicle."*

[17] He further states at paragraph 22 that:

> *An application for summary judgment requires the applicant to produce credible evidence which demonstrates that the respondent has no real prospect of success. As was said above, the overall burden lies on the applicant. It is when the applicant produces credible evidence to support its application that a burden is placed on the respondent to show that his case has a real prospect of success. This was pointed out at paragraph 15 of the judgment in ASE Metals NV v Exclusive Holiday:*
>
> > *"Once an applicant/claimant asserts that belief [that the respondent's case has no real prospect of success], on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case 'which is better than merely arguable' (see paragraph 8 of ED & F Man). The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success'." (Emphasis supplied)*

[18] At paragraph 14 and 15 of **ASE Metals NV v Exclusive Holiday of Elegance**, **[2013] JMCA Civ. 37**Brooks, J.A. pointed out that:

> "*The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant (in this case ASE). The applicant must assert that he believes that that the respondent's case has no real prospect of success. In ED & F Man Liquid Products Ltd v Patel and Another [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:*
>
> *'...the overall burden of proof rests upon the claimant to establish that there are grounds for. his belief that the respondent has no real prospect of success...'*

[19] In **Mecheck Willis v Globe Insurance Co. Ltd.** [2015] JMCA Civ 36. The claimant sued the Flynn's for allowing the sixteen year old unlicensed driver of their vehicle to cause him to suffer injuries and loss. The claimant failed to recover from the Flynns' and then filed suit against the respondent. There court considered the issue of whether or not the trial judge had given greater prominence to the insurance contract and lesser to the Motor Vehicle Insurance Act. The Court of Appeal held:

> *"It would be wrong to impose on an insurer a liability that the insurance policy did not purport to cover. In order for the appellant to benefit from the indemnity provided by the respondent, the liability must be one that is covered by the insurance policy. While Devar McFarlane, an unlicensed driver, was driving the Nissan Sunny motor vehicle that was owned by the Flynns they would have breached a fundamental term of the insurance policy, and as a result the respondent was absolved from all liability arising out of the accident on 27 January 2001."*

Analysis

[20] As was said above, by Brooks, J.A. in ASE Metals, the overall burden lies on the applicant. It is when the applicant for summary judgment produces credible evidence to support its application that a burden is placed on the respondent to show that his case has a real prospect of success. Ms. Dummett for the applicant relied upon the affidavit of Danya Dacres which avers that the claimant

was given possession of a rental car by the first defendant. The first defendant had no interest in the purpose for which the second defendant would be using his car. She merely paid the fees as agreed. She said at paragraph 9:

> *"That at the material time I can state affirmatively that the 2nd Defendant was not the 1st Defendant's employee neither was she using the vehicle for any purpose connected with the 1st Defendant's business as their servant and/or agent."*

[21] The claimant would have then become an owner in possession in his own right as defined by the Motor Vehicle Third Party Risks Act. This was the state of the evidence before the court. The first defendant having disclaimed any responsibility for the actions of the second defendant also denied liability therefor. There was then a burden placed on the respondent to show that his case had a realistic prospect of success.

[22] Mr. Neale failed to place any evidential material before the court on the issues of fact and law raised by Miss Dummett. The issue was whether there was on the evidence an agency relationship between both defendants. It has not been shown that the second defendant was connected to or had an interest in the first defendant's enterprise in respect of the hiring of the vehicle or that she was driving for the first defendant's purposes. There was no proof that he was their servant and or agent or in any way connected to the business of the first defendant. Without proof the insurer of the first defendant's vehicle cannot be made to accept liability.

[23] The affidavit of Mr. Vaughn Bignall, attorney-at-law, in response to the application contained submissions in law which did not respond to the evidence upon which the application was grounded. This means that the court had no evidence with which to weigh the merits of the claimant's contention that there were issues joined between the parties. There was no evidence from the claimant with which to balance the scales.

[24] **<u>The application for Summary Judgment</u>**

In **Celador Productions Limited v Melville and another and Conjoined Cases** [2004] EWHC 2362 (Ch), Sir Andrew Morritt V-C reviewed cases dealing with applications for summary judgment and said:-

> *"...The relevant test is laid down in CPR r 24.2. The court may give summary judgment against a claimant or a defendant if it considers that the claimant or defendant has "no real prospect of succeeding" on its claim or defence as the case may be and that "there is no other compelling reason why the case or issue should be disposed of at a trial". I have been referred to a number of relevant authorities …namely Swain v Hillman [2001] 1 All ER 91, 94-95, Three Rivers District Council v Bank of England (No.3) [2003] 2 AC 1, 259- 261, [2000] 3 All ER 1 paras. 90-97 and ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ. 472 paras. 8-11. In addition I was referred to the notes in Civil Procedure 2004 Vol.1 paras. 24.2.1, 24.2.3-24.2.5. [7] From these sources I derive the following elementary propositions: a) it is for the applicant for summary judgment to demonstrate that the respondent has no real prospect of success in his claim or defence as the case may be; b) a "real" prospect of success is one which is more than fanciful or merely arguable; c) if it is clear beyond question that the respondent will not be able at trial to establish the facts on which he relies then his prospects of success are not real; but d) the court is not entitled on an application for summary judgment to conduct a trial on documents without disclosure or cross-examination".*

a. **Has the applicant for summary judgment demonstrated that the respondent has no real prospect of success on his defence?**

[25] The application is based upon a question of law. The law has been succinctly stated by Edwards, J **(**as she then was**) in Ocean Chimo Ltd.** at paragraph 24 she states:

> "Rule 15 provides an applicant, whether defendant or claimant with two options. The first is to apply for summary judgment on the entire claim and the second to apply for summary judgment on a particular issue or issues in the claim. In my view the requirement for identification of issues in the notice only applies when the applicant is exercising the second option."

The case at bar is one in which the application for summary judgment is on a particular issue in the claim. There has been no complaint that the issues for determination on the application have not been properly identified in the notice.

[26] At paragraph 25, Her Ladyship further states:

> "The court has the power to give summary judgment on the whole claim or on an issue of fact or law in the claim."

[27] The approach has been laid down in the well trodden case of **Three Rivers District Council v Bank of England (No. 3)** [2001] 2 All E.R. 513 where Lord Hope delivering his speech in the House of Lords stated at paragraphs 94 and 95:

> *"For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is -- what is to be the scope of that inquiry?*
>
> *I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of*

the rule. It is designed to deal with cases that are not fit for trial at all.

[28] Lord Hope affirmed the case of **Wenlock v Moloney** [1965] 1 WLR 1238 in which the plaintiff's claim for damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

> *"…this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*

b. Has the application a real prospect of success, one which is more than arguable?

[29] **Swain v Hillman [2001] All E.R. 91** cited by Ms. Dummett, is oft cited as the law in aplications for summary judgment. It was enunciated by Woolf, LJ that the word "real" distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.

…

> *The power under [Part 15] is not meant to dispose with the need for trial where there are issues which need investigating at a trial. This does not involve the judge embarking on a mini-trial, but to enable cases where there is no real prospect of success either way, to be disposed of summarily."*

It would seem to me that this is a matter of law. The issue as outlined by both sides once determined will be dispositive of the matter before the court. The court has powers on an application for summary judgment to…

"give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

[30] Without proof of agency the claimant's case against the first defendant is bound to fail at trial. The legal presumption has been rebutted and the prima facie case displaced. The court will therefore exercise its powers to bring the proceedings against the first defendant to an end.

The court hereby orders as follows:

1. Summary Judgment is entered for the first defendant.
2. Costs to the first defendants to be taxed if not agreed.