[2015] JMSC Civ. 150

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008 HCV O4410

BETWEEN	**VICTOR HYDE**	**CLAIMANT**
A N D	**E. PHIL & SON A.S. LTD.**	**1ST DEFENDANT**
A N D	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

CONSOLIDATED WITH:

CLAIM NO. 2008 HCV O5945

BETWEEN	**MITSY STEWART**	**CLAIMANT**
A N D	**E. PHIL & SON A.S. LTD.**	**1ST DEFENDANT**
A N D	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Seyon Hanson, instructed by Seyon Hanson and Co., for the Claimants

Dale Austin, instructed by the Director of State Proceedings, for the 2nd Defendant

HEARD: March 11 and July 3, 2015

COURT'S CONSIDERATION AS TO WHETHER IT SHOULD MAKE A STRIKING OUT ORDER ON ITS OWN INITIATIVE – DISTINCTION BETWEEN APPLICATION TO STRIKE OUT ON GROUND THAT STATEMENT OF CASE OF DEFENDANT DISCLOSES NO REASONABLE BASIS FOR DEFENDING THE CLAIM AND AN APPLICATION FOR SUMMARY JUDGMENT ON GROUND THAT DEFENCE HAS NO REALISTIC PROSPECT OF SUCCESS – SUMMARY JUDGMENT CANNOT BE OBTAINED AGAINST THE CROWN – STRIKING OUT ORDER ONLY TO BE MADE IN PLAIN AND OBVIOUS CASES

ANDERSON, K. J

[1] Upon Case Management Conference in respect of these 'consolidated claims' having come on for hearing before Mr. Justice Pusey on February 25, 2013, it was ordered that this matter was set down for determination of the issues of law which seek to establish liability of the 2nd defendant – that being, in both claims, the Attorney General.

[2] Regrettably, it was not until these claims came on for hearing before me, in chambers, on March 11, 2015, that the parties and the court were ready to proceed with and did in fact then proceed with, the hearing of the issues of law which seek to establish liability of the 2nd defendant. Following on that hearing having then been held, this ruling and the reasons for same, are now being made known to the respective parties. Several trial dates previously scheduled have had to be vacated, because of this then, pending preliminary matter. By 'preliminary' here, I mean, 'preliminary' to trial.

[3] Clearly, the court is exercising its case management powers in setting down this preliminary issue to be decided upon. The court is clearly, authorized by rules of court, so to do. See **rule 26.1 (2) (j) and (o)** in that regard.

[4] Thus, no application has been filed by either of the claimants, in either of the consolidated claims, either to strike out the 2nd defendant's defence, or for summary judgment against the 2nd defendant, to be granted. This though, does not render this court powerless to make legally appropriate orders, following upon a 'hearing.' **Rule 26.2 (1)** provides that – *'Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.'* This court is thus, being requested now, by the claimants, following upon this court having scheduled a hearing to be held to determine the issues of law which seek to establish the liability of the 2nd defendant, to order that judgment be entered for each claimant in each claim, as against the 2nd defendant.

[5] This court could only, at best for the claimant and at worst for the 2nd defendant, enter judgment against the 2nd defendant, by, on its own motion, striking out the 2nd

defendant's defence. The entry of summary judgment against the 2nd defendant is not an option, since, **rule 15.3 (b) of the Civil Procedure Rules (CPR),** expressly precludes this court from granting summary judgment against the Crown.

[6] In both claims, it has been expressly alleged by each claimant, that their cause of action, which is founded on the tort of negligence, has arisen as a consequence of the 1st and 2nd defendants' negligence in carrying out certain road works along the Albany Main Road heading towards Port Maria, in the parish of St. Mary. It has been alleged that the Crown servant or agent which was conducting those works, at the material time, in conjunction with the 1st defendant, was the National Works Agency. As such, the Attorney General has been named as the Crown's legal representative for the purposes of each of these claims and thus, stands as the 2nd defendant in both claims.

[7] **Rule 26.3 of the CPR** sets out the circumstances in which this court may strike out a claim. The only one of those circumstances that is presently applicable for consideration by this court, in the particular circumstances of this particular case, is the one which states that this court may strike out a statement of case, or part of it, if it appears to the court, that *'the statement of case or part to be struck out, discloses no reasonable ground for bringing or defending a claim.'* Of course, a defendant's defence is at least, a significant part and parcel of that defendant's statement of case. See **rule 2.4 of the CPR** in this regard (for the definition of 'statement of case') and thus, as such, this court may strike out the 2nd defendant's defence, as a result of which, this court would then be obliged to enter judgment in favour of each claimant.

[8] From the onset of this court's consideration of whether or not the 2nd defendant's defence discloses, a 'reasonable ground' or 'reasonable grounds,' 'for defending' these consolidated claims, it must firstly, be carefully noted by all, that what this court is not now required to determine, is whether or not the 2nd defendant's defence has any reasonable, or realistic prospect of success. A defendant's statement of case, may not have even so much as a realistic prospect of success at trial, much less a reasonable prospect of success, but yet, this is not to be taken as automatically meaning or even

leading to the implication, that there existed, as far as that statement of case is concerned and more importantly, as far as is disclosed in and means of that statement if case, no reasonable grounds for defending the claim. The phrase – 'real prospect of successfully defending the claim,' as used in respect of applications for summary judgment (see **rule 13.3 of the CPR)**, ought not to be equated with a statement of case disclosing no reasonable grounds for bringing or defending a claim.' See: **Gordon Stewart and John Issa** – Supr. Ct. Civil Appeal No. 16 of 2009, on this point.

[9] **Jamaica's CPR 26.3 (1) (c**) is the equivalent of England's present **CPR 3.4 (2)**. There is no doubt that the court's jurisdiction to strike out a party's statement of case, is a jurisdiction which ought to be exercised sparingly. It makes no difference, in that respect, whether or not the court is minded to the possibility of making such an order, upon a hearing scheduled as regards same, as a matter of its own motion, or upon written application to this court. Striking out should be done, in respect of either a part, or the whole of a party's statement of case, only in plain and obvious cases. The law in that regard, pre- CPR and post – CPR, remains the same. This point is made in the text – **Blackstone's Civil Practice (2014**), at para. 33.6 (p. 527). As such, as was made clear in the case – **Wenlock v Moloney** – [1965] 1 WLR 1238, it is generally improper to conduct what is, in effect, a mini-trial involving protracted examination of the documents and facts as disclosed in the written evidence on a striking – out application. The case: **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 A.C. 1, esp. at paras. 96-97, has applied the aforementioned principles.

[10] If the court is hearing an application to strike out, pursuant to **CPR 26.3(1) (c) of the CPR**, it is to be assumed that the facts alleged by the respondent, are true. See: **Morgan Crucible Co. plc v Hill Samuel and Co. Ltd.** – [1991] Ch 295. In the circumstances, adapting that legal approach to the present legal scenario, it is this court's view that this court is not, at this time, entitled to disbelieve the 2nd defendant's statement of case. Indeed, it is equally, not entitled to disbelieve the claimant's statement of case. The issue as to whether either of same ought to be believed, is one which will have to be determined at a trial, if this court orders that these claims shall

proceed to trial. In any event though, it must not be forgotten, that whilst the 2nd defendant will have an evidentiary burden at trial – that being a burden to lead sufficient evidence capable of supporting its defence, the legal burden to prove their claims, rests squarely and solely on the claimants' shoulders.

[11] As long as the 2nd defendant's case herein, is therefore, one which raises some question fit to be tried by this court, then, striking out of their case, would neither be appropriate in law, nor warranted. See: **Chan U Seek v Alvis Vehicles Ltd.** – [2003] EWHC 1238. The test is one as to whether as far as the 2nd defendant's defence is concerned, that defence is not one which, as a matter of law, can properly constitute a defence to the claim instituted by the claimant against the 2nd defendant. Even if the 2nd defendant's case were to be perceived by this court, as being one which is, 'fraught with difficulty,' nonetheless, the 2nd defendant's statement of case should not be struck out, on that basis. See: **Smith v Chief Constable of Sussex** – [2008] EWCA Civ 39. As such, the apparent implausibility of a case on paper, is not in itself, a sufficient basis to justify striking out that case. See: **Merelie v Newcastle Primary Care Trust** – [2004] EWHC 2554. Also, it would be improper for this court to strike out a claim in circumstances wherein the central issues are in dispute. See: **King v Telegraph Group Ltd.** [2003] EWHC 1312. This is the legal difference in approach, between an application to strike out a claim, pursuant to **rule 26.3 (1) (c) of the CPR** and an application pursuant to **rule 15.2 of the CPR**, for summary judgment. This was made clear in para. 14 of the Court of Appeal's Judgment in the case - **Gordon Stewart and John Issa** – *op. cit*. It is not for this court, to divine what will be the outcome of a properly filed defence. Such should be the primary consideration for this court, if and when considering an application for summary judgment, since in that respect, it will be for this court to determine, as the case may be, whether the claim or defence, has a realistic prospect of success.

[12] The question now to be answered by this court, is, as clearly suggested by the wording of **rule 26.3 (1) (c) of the CPR**, whether the defendant's statement of case ('defence' for this purpose), discloses no reasonable grounds for defending this

particular claim. This is, as earlier stated, to be entirely distinguished from a consideration as to whether or not the 2nd defendant's defence is one which has a realistic prospect of success. A party's defence may disclose reasonable grounds for defending a claim, but yet, may be one which has no realistic prospect of success, such as for instance, if that defence cannot be supported by the evidence expected to be relied on by either party, during a trial of that claim, or, if, for example, that defence is expressly contradicted by documentary materials – **Blackstone's Civil Practice 2014**, at para. 34.25.

[13] Thus, a consideration as to whether a defendant to a claim has filed a defence which discloses reasonable grounds for defending that claim must, of necessity, be a consideration which would first have to be considered, if this court were to be simultaneously considering an application for summary judgment against that defendant, with an application to strike out that defendant's defence on the ground that said defence discloses no reasonable grounds for defending the claim. The latter would then have to be considered, prior to the former.

[14] This court has emphasized the distinction between this court's correct legal approach to an application for summary judgment and an application under **rule 26.3 (1) (c) of the CPR**, because, as it seems to me, both the claimants' counsel and the 2nd defendant's counsel have not recognized that distinction. As such, both of those counsel, made reference, in oral and written submissions to this court, to the evidence expected to be given at trial, by various witnesses. To my mind, it is not proper for this court, in considering whether to strike out the 2nd defendant's defence because it discloses no reasonable grounds for defending the claim, to consider whether the 2nd defendant will lead evidence at trial, such as would serve to satisfy this court, that the 2nd defendant's defence, is one which has a realistic prospect of success. As such, this court will, for present purposes, make no other reference in these reasons for ruling, to either party's proposed evidence at trial.

[15] The further amended claim form and particulars of the claim of the claimants, were both filed on July 15, 2011 and the amended defence of the 2nd defendant, was filed on August 12, 2011. It is these documents that this court has paid special regard to, in deciding as to whether the 2nd defendant's defence is one which 'discloses reasonable grounds for defending the claim.' In other words, this court has paid special regard to the issue as to whether, when considered in the context of the claimants' consolidated claims against them, the 2nd defendant's defence is one which can constitute, as a matter of law, a valid and reasonable defence to such claims. This is precisely the approach adopted by my brother Judge- Mr. Justice David Batts, in a similar legal context, in the case – **City Properties Ltd. v New Era Finance Ltd.** – [2013] JSC Civ. 23.

[16] The claimants' claims against the 2nd defendant, are for damages for negligence. It has been alleged that at the material time, the 1st defendant was a company carrying out construction work on the main road at Albany, in the parish of St. Mary and was engaged, 'as an 'Independent Contractor by or on behalf of the National Works Agency which is an Executive Agency of the Government of Jamaica and which was at all material time a servant or agent of the Crown…' See para. 3 of the claimant's further amended particulars of claim.

[17] The claimants are claiming from the 2nd defendant, damages for negligence, arising from that which they have alleged, is the negligent action taken, or the failure to take reasonably appropriate action – which they allege, also constitutes negligence, on the part of the 1st defendant, in relation to road works which were allegedly being carried out by the 1st defendant as an independent contractor, employed by or on behalf of the National Works Agency, 'which is an Executive Agency of the Government of Jamaica and which was at all material times a servant or agent of the Crown…' (See para. 3 of the claimants' further amended particulars of claim).

[18] The Attorney General is being sued, pursuant to the provisions of the **Crown Proceedings Act** and rightly so, since it has been alleged that at all material times, the

pertinent road work was being carried out by an independent contractor, that had been engaged by one of the government's servants or agents, that being the National Works Agency.

[19] The claimants have further alleged, in their further amended particulars of claim, that on or about May 18, 2007, the claimant – Victor Hyde, was driving his Nissan Sunny motor vehicle, along the Albany Main Road, heading towards Port Maria. The other claimant was then a passenger in that said Nissan Sunny vehicle.

[20] The essence of the claimants' claims against the 2nd defendant, is that which they allege was the negligence of the independent contractor (the 1st defendant), that had been hired by a Crown servant or agent – that being, the National Works Agency. Accordingly, it is essentially being alleged that in the particular circumstances of this particular claim, if this court were to conclude that the 1st defendant's negligence resulted in injury and/or loss to the claimants, then, the claimants are entitled to recover for such loss and/or injury, through this court, from the Crown, as represented, for the purposes of this claim, by the Attorney General (2nd defendant).

[21] What has been specifically alleged by the claimants, is that the 1st defendant's workers were 'grading out' 'what appeared to be an oil like substance with rollers on the road, the said substance being one of a combination of various substances used by the 1st defendant in its road works on the said Albany Main Road which was/or became slippery in nature after being applied to the said road surface. The said claimant Victor Hyde was directed by one of the construction workers acting as a flagman to drive, however, he was given no warning in relation to the state of the road. 'See para. 4 of the claimants' further amended particulars of claim.

[22] Paragraphs 5 and 6 of the claimants' further amended particulars of claim, read as follows: *'That the 1st defendant placed the said oil like or slippery substance being comprised of one or a combination of various substances used by the 1st defendant in its road works on the said Albany Main Road on or about May 18, 2007, or within the*

preceding weeks of the said month of May 2007 in furtherance of their road works project'. (Para. 5) 'Upon reaching a section of the road and whilst negotiating a right hand curve, and while driving at a moderate speed the car skid out of control, skid off the road and overturned in a river,' (para. 6).

[23] The claimants have alleged ten (10) particulars of negligence and have designated them as items a – j. They are as follows: '*Using construction material in repairing the road that would affect the road surface conditions, and failing to give adequate warning in relation to same; failing to place any signs and/or flagman warning motorists of the condition of the roadway; failing to place adequate signs to warn motorists that the road would be 'slippery when wet' or that the said road would be 'slippery;' failing in their duty of care to motorists using the roadway. Failing to ensure that it was safe for vehicular traffic to proceed based on the existing circumstances at the time. Causing the highway to become slippery; failing to warn the claimants as to the state of the highway; failing to remove the substance from the highway which caused the said highway to be slippery, in a timely manner or at all; failing to repair and/or conduct the roadwork on the highway in a manner where at least one lane of the said roadway would be available to be traversed by motor vehicles without the risk of same being slippery, of becoming slippery as a result of the application of a combination of one or a combination of the substances used by the 1st defendant in the said road works; failing to implement a detour in the event that the nature of the works as assessed would create a hazard and danger to users of the highway.'*

[24] The 2nd defendant's defence is, it seems to me, perhaps deficient in certain respects, about which this court does not believe it to be prudent to state anything more at this stage. This does not mean though, that the 2nd defendant's defence should be struck out, or that any part of it, should be struck out, as is desired by the claimants.

[25] This court has not only given careful consideration to the primary issue as to whether the 2nd defendant's amended defence, filed on August 12, 2011 should be struck out, but also, to the secondary issue as to whether any part thereof, should be

struck out. This court has given careful consideration to each of those issues, in accordance with the express wording and undisputable intendment of **rule 26.3 (1) of the CPR**, which is the rule that permits this court to strike out a statement of case or part of a statement of case. As such, even if this court were to accede to the claimant's submissions and while acting of its own motion, refuse to strike out the entirety of the 2nd defendant's statement of case, it would still be open to this court to strike out any part thereof which discloses no reasonable ground for defending the claims made by the claimants against them.

[26] There are various segments to the 2nd defendant's amended defence and these will be outlined herein. The first segment is that the 2nd defendant has put the claimants to proof that they were the persons who suffered injury and/or financial loss, in the circumstances as averred by them, in their further amended particulars of claim.

[27] This is not an unreasonable ground upon which, even if based solely on that ground alone, the 2nd defendant can properly seek to defend the claim. The 2nd defendant has no personal knowledge of the relevant alleged scenario which led to and ultimately resulted in the vehicle which was then owned by the 1st claimant and which was then driving with the 2nd claimant then having been a passenger therein, having skidded and slid off the Albany Main Road and overturned in a river (all as alleged).

[28] The 2nd defendant has properly and understandably, put the claimants to proof of that aspect of their overall allegations, since, the issue as to whether or not the claimants, or either of them, had suffered any injury and/or loss as a consequence of that alleged incident, is not one which either the 2nd defendant or for that matter, the 2nd defendant's servant or agent – that being the National Works Agency, would have any direct knowledge of. They would not have any direct knowledge of same, because, at the, material time, the relevant road work was being carried out by the 1st defendant and the claimants have alleged that it was, 'one of the construction workers' who was then functioning as a 'flagman', who had directed him to drive along Albany Main Road, this in the immediate vicinity of a section of the road, upon which, construction work was

then ongoing. In all likelihood therefore, based on that which has been specifically alleged by the claimants in their statement of case, there having, it seems, been at, most, very limited interaction, on the disputed occasion, as between any of the claimants and any of the construction workers, not even the construction company, on whose behalf, those workers would have been working at the material time, can confirm the claimants' allegations of injury and/or loss, or as to who was driving the vehicle at the material time, or as to whether anyone was a passenger in the vehicle at the material time, or if there was a passenger, the identity of that passenger. Moreover, it may very well be the case that not even the construction workers engaged by the construction company, can confirm that the relevant vehicle was even being driven on the Albany Main Road as alleged, or that it was being so driven, on May 18, 2007, or that it skidded into a river.

[29] The 2nd defendant has therefore, neither admitted nor denied, any of the aforementioned specific aspects of the claimants' allegations. The 2nd defendant was entitled to put the claimants to strict proof of same, as same would not be matters within their personal knowledge. The 2nd defendant had complied with **rule 10.5 (3) (c) and 10.5 (5) of the CPR** in that regard and has, by having so done, put forward a reasonable basis for defending the claim. Accordingly, the 2nd defendant's defence cannot and will not be struck out by this court.

[30] The part of the claimant's and 2nd defendant's statement of case, which has attracted counsel's greatest attention, for the purposes of the written and oral submissions which were submitted to the court and posited before me, respectively, is a part which will undoubtedly have to await resolution via trial, since, as earlier stated and now reiterated, Jamaica's CPR expressly precludes this court from granting summary judgment against the Crown.

[31] That part is as regards the claimant's allegation that the independent contractor, being the 1st defendant, that was employed to carry out and was carrying out construction works along the Albany Main Road, in the parish of St. Ann, at or about the

date and time when the pertinent motor vehicle accident, allegedly befell the claimants, did so, utilizing substances which were at that time, 'oil-like or slippery.' (See para. 5 of the claimant's further amended particulars of claim). It has, in that respect, for the purposes of the claimants' said written and oral submissions been contended, that said 'oil-like or slippery' substances made the work which was then being conducted by that independent contractor; one of an inherently dangerous nature and that as such, the duty to have carried out that construction work in a manner which was reasonably competent and safe for the members of the public-at-large who could reasonably have been expected to traversed same was a non-delegable one, for which the Crown should be held liable.

[32] Whilst that contention may not only be a legally sound and even factually supported one, at present, it is not only being legally disputed, but it is also being factually disputed and it is not for this court, at this stage, to resolve either of those disputes. Instead, those disputes will each have to be resolved by means of a trial, unless the parties are able, via negotiation and discussion, to settle this matter without the need for Judgment Order, following upon a disputed trial.

[33] This court will not strike out any part of the 2nd defendant's statement of case either. This claim should now proceed to a further case management conference.

Orders

1. The 2nd defendant's defence to these claims as consolidated shall stand in effect and is not to be struck out, in whole, or in part, on the ground that same discloses no reasonable basis for defending the claims.

2. These consolidated claims shall once again proceed to case management conference, upon a date to be scheduled by the Registrar in consultation with the parties and no sanction shall be applied to either party, arising from any failure to comply with any case management order made to date. At that further upcoming case management conference it shall be open to this court, either to make new case management orders, or extend the time for compliance with earlier case management orders, or to do both.

3. The costs of and pertaining to all aspects of this court's consideration as to whether it should exercise its inherent jurisdiction and strike out the 2nd

defendant's defence are, unless, in any respect, otherwise subject, whether wholly or partially, to any earlier order of this court, awarded to the 2nd defendant in any event, with such costs to be taxed, if not sooner agreed.

4. The 2nd defendant shall file and serve this order.

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Hon. K. Anderson, J.