IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV00523

BETWEEN	**CECILIA LAIRD**	**CLAIMANT**
AND	**AYANA CRITCHLOW**	**FIRST DEFENDANT**
AND	**KINDA VENNER**	**SECOND DEFENDANT**

Mr. David Henry and Mr. Garth Taylor instructed by Garth Taylor & Company for the claimant/respondent

Mr. David Batts instructed by Livingston, Alexander & Levy for the first defendant

Miss Catherine Minto instructed by Nunes, Scholefield Deleon & Company for the second defendant/applicant

Heard: July 30, October 9 and November 8, 2012

Practice and procedure - Application for Summary Judgment – Civil Procedure Rules, 2002 – Part 15.2 – Motor vehicle accident – Liability of owner – Inference from ownership

SIMMONS J

[1] This is an application by the second defendant for summary judgment pursuant to ***Part 15.2*** of the ***Civil Procedure Rules 2002 (CPR)*** on the ground that the claimant has no real prospect of succeeding in her Claim.

[2] In February 2004 the claimant and the first defendant were involved in a motor vehicle accident along Monterey Drive in parish of Saint Andrew. The first defendant was at the time, driving a motor vehicle which belonged to the second defendant.

[3] On the 8th February 2010 the claimant brought an action in negligence, in which it was pleaded that the first defendant was at the material time, the servant and/or agent of the second defendant. The second defendant has denied that any such relationship existed and has stated that the said vehicle was left in the custody of her sister who loaned it to the first defendant without her knowledge or consent.

[4] The application is supported by the affidavit of the second defendant Kinda Venner and that of Jemila Venner, her sister. The essence of both affidavits is that the second defendant's motor vehicle was loaned by Miss Jemila Venner to the first defendant without the knowledge or consent of the second defendant.

Applicant's submissions

[5] Miss Minto having outlined the principles which govern applications for summary judgment, submitted that judgment ought to be entered in favour of the second defendant for the following reasons:-

i. The claimant has filed no evidence which rebuts the affidavit evidence filed in support of the application;
ii. The first defendant in her defence denies that she was a servant and/or agent of the second defendant.

[6] Counsel relied on the well known authority of ***Swain v. Hillman*** [2001] 1 All ER 92 in which lord Woolf MR defined the words “real prospect of success” in the following terms:-

> *“The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is opposed to a 'fanciful' prospect of success…. It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible…. Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial”.*

[7] She submitted that based on the case of ***International Fund for Agricultural Development v. Ahmad Jazayeri*** [2001] All ER (D) 161, there must be some evidence which rebuts the applicant’s position at the time of the application for summary judgment in order for the other party to successfully defend the application. She stated that a respondent could not merely rely on the hope that evidence will emerge in his favour during cross

examination. In particular, counsel relied on the following passage at paragraph 5:-

> *"The evaluation of witnesses is essentially a matter for a judge at trial who has had the benefit of seeing them give evidence. Moreover, where contradictory accounts are given in the witness statements, any attempt to evaluate the competing accounts inevitably involves an exercise in the nature of a trial. Having said that, however, I reject Mr Freedman QC's suggestion that the court should take account of the possibility that additional evidence favourable to the defendant might come to light at trial. While recognising that a fuller picture may emerge at that stage, the court can only determine an application for summary judgment on the material before it. The defendant cannot ask the court to allow the matter to go to trial simply on the grounds that something unexpected might turn up to assist him".*

[8] Miss Minto also referred to paragraph 68 of the judgment of Mangatal, J. in ***Sanctuary Systems Limited and others*** Claim no. 2009HCV04344, delivered on the 13th January 2011. It states:-

> *"Mr. Manning also submitted that it is not only the emergence of evidence on cross-examination at trial that is important, but also the assessing of credibility. However, what these defendants have put forward to the Court in their quest to convince that summary judgment ought not to be granted, is to my mind wholly insufficient."*

[9] Counsel submitted that the claim in this matter is based on a rebuttable presumption of agency and the onus is on the claimant to refute the affidavit evidence which has been filed in support of the application.

She further stated that the release of the second defendant from these proceedings would save time and expense by reducing length of the trial.

Respondent's submissions

[10] Mr. Taylor submitted that the second defendant by virtue of her defence has placed the issue of agency in dispute. He stated that based on the case of ***DYC Fishing Limited v. The Owners of MV Devin and MV Brice*** Claim No. 2010 A 00002, delivered on the 8th October 2010 this matter is not suitable for summary judgment. Specific reference was made to the following passage in that judgment:-

> *"It is often said that the court is not entitled to embark on a mini – trial when assessing the prospects of success of a party's case. If the case is based on a point of law which is obviously bound to fail, or after relatively short argument proved to be so, then summary judgment may be granted. If, however, there are arguable points of law or issues as to fact which, depending on the resolution, would affect the outcome, then summary judgment ought not to be granted".*

[11] Counsel also submitted that the court's treatment of such applications differs depending on whether it is made by a claimant or a defendant. In the case of a defendant the issues that are joined before the court will depend on the defence that has been filed. In this matter the issue of agency is in issue and cannot be resolved by looking at the affidavit evidence which is before the court. He maintained that the matter is one that should be dealt with at a trial.

[12] Mr. Taylor also referred to the case of ***Eureka Medical Limited v. Life of Jamaica Limited and others,*** claim no. 2003HCV1268 (delivered on the 12th October 2005) and submitted that in application for summary judgment the pleadings determine whether the court should summarily dismiss the matter. He then proceeded to refer to paragraph 8 of the said judgment which contains a quotation from Lord Hope in ***Three Rivers DC v. Bank of England*** [2001] 2 All ER 513 at 542 in which he stated:-

> *"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 light of that evidence. To that rule there are some well-recognized 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 fanciful 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 to 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 MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all".

Counsel further submitted that the present case did not fall within any of the exceptions referred to by Lord Hope in the ***Three Rivers*** case.

[13] Reference was also made to ***Munn v. North West Water Limited*** [2001] C.P. Rep. 48 and ***ED & F Man Liquid Products Limited v. Patel & another*** [2003] EWCA Civ 472.

[14] Mr. Henry with whom Mr. Taylor appeared submitted that there is a presumption in law that the driver of a motor vehicle acts as the servant or agent of its owner. He stated that the issue of agency has been joined on the pleadings as the second defendant has denied that the first defendant was her servant or agent. He argued that any rebuttal of this assertion must be based on the court's assessment of the evidence relating to this issue having heard and observed the witnesses. He expressed the view that if the court was to adopt the course of action proposed by Miss Minto this would be tantamount to conducting a mini-trial of the matter. He also stated that any attempt to rebut the presumption of agency would be premature at this stage of the proceedings. In addition, he said that the first defendant's affidavit contains no information as to the arrangements between the parties.

Applicant's response

[15] Miss Minto submitted that the authorities do not support the position taken by Mr. Taylor that only the pleadings are to be considered in an

application for summary judgment. She referred to the cases of ***Eureka Medical Limited v. Life of Jamaica Limited and others, DYC Fishing Limited v. The Owners of MV Devin and MV Brice*** and ***ED & F Man Liquid Products Limited v. Patel & another*** in which she said, the court considered factual material in arriving at its decision.

[16] ***Part 15.2*** of the ***CPR*** provides as follows:-

> *"15.2 Grounds for summary judgment*
>
> *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 issue; or*
>
> *(b) The defendant has no real prospect of successfully defending the claim or issue."*

[17] In order to succeed in its application, the second defendant must satisfy the court that the claimant has no real prospect of proving the claim. The test as to whether there is a real prospect of success was examined in ***Swain v. Hillman*** in which it was stated that the defendant must have *"a 'realistic' as against a 'fanciful' prospect of success".* This, according to the court in ***International Finance Corporation v. Utexafrica S.P.R.L.*** [2001] EWHC 508 means that the case must be more than just arguable. However, this does not require a party to convince the court that their case must succeed as the prospect of success may be real even if it is improbable.

[18] The court in ***Swain v. Hillman*** also made it clear that the court is not required at the hearing of such an application to embark on a mini trial of the matter. The merits of the respondent's case are therefore only relevant to determine whether there is sufficient evidence to proceed to trial.

[19] In ***Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others*** [2006] EWCA Civ 661, the court seems to have appreciated that there may be some difficulty in making a determination as to whether there is a real as opposed to a fanciful prospect of success. In that case the claimant issued proceedings against the defendants alleging infringements of its trade mark. The Court of Appeal reversed the decision of the lower court which had granted summary judgment to the claimant. It was held as follows:-

> *"The decision whether or not an action should go to trial was more a matter of general procedural law than of knowledge and experience of a specialised area of substantive law…. In handling all applications for summary judgment, the court's duty was to keep considerations of procedural justice in proper perspective. Appropriate procedures had to be used for the disposal of cases, otherwise there was a serious risk of injustice. The court should exercise caution in granting summary judgment in certain kinds of case, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a trial where, even though there was no obvious*

conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".

[20] Mummery, L. J. also stated:-

> *"4. Summary judgment procedures, which are designed for the swift disposal of straight forward cases without trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no "real" prospect of success and if there is no other compelling reason why the case or issue should be disposed of at a trial: CPR Part 24.2. Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court's function is to decide whether the defendant's prospect of successfully establishing the facts relied on by him is "real", that is more than "fanciful" or "merely arguable." The test to be applied was summarised by Sir Andrew Morritt V-C. inCelador Productions Ltd v. Melville [2004] EWHC 2362 (CH) at paragraphs 6 and 7.*
>
> *5. Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually*

have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials".

[21] In ***Celador Productions Limited v Melville and another and Conjoined Cases*** [**2004] EWHC 2362 (Ch)**, Sir Andrew Morritt V-C in his examination of the principles which govern applications for summary judgment said:-

"[6] 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".

[22] The English rule which is referred to in the above case is slightly different from ***rule 15.2*** of the ***CPR.*** That rule provides for situations where although there is no real prospect of success it is felt that the case ought to proceed to trial. This does not however, affect the applicability of the relevant cases as to the principles which should guide the court in its consideration of whether or not there is a real prospect of success. The rule states:-

"24.2 Grounds for summary judgment
The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
(a) it considers that—
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other [compelling] reason why the case or issue should be disposed of at a trial".

[23] The issue of the burden of proof is not addressed in the ***CPR***. In the ***Celador*** case it was clearly stated that the burden is on the applicant to prove that the other party's case has no real prospect of success. A similar approach was adopted in the cases of ***International Fund for Agricultural Development v. Jazayeri*** and the Jamaican case of ***Sanctuary Systems Limited and another v. Constanzo and others.*** In ***International Fund for Agricultural Development v. Jazayeri*** , Moore-Bick, J. said:

"By attesting to the truth of the facts on which his claim is based and deposing to his belief that the defendant has no real prospect of successfully defending the claim the claimant puts the onus on the defendant to bring forward evidence in response in support of his defence".

[24] It would therefore appear that in this matter the onus would be on second defendant to put material before the court which supports her assertion that the claimant's case has no real prospect of success. The claimant would then have the evidential burden of proving that there is a real prospect of success.

[25] It should be noted that Moorebick, J. also stated, that where there are conflicting witness statements, the court should not embark on a *"mini trial"* of the matter. He also said that:

"……where the defendant's account appears farfetched but is not contradicted by independent evidence, the court should …..normally

hesitate long before rejecting it as incredible at a preliminary stage. The evaluation of witnesses is essentially a matter for a judge at trial who has the benefit of seeing them give evidence. Moreover, where contradictory accounts are given in the witness statements, any attempt to evaluate the competing accounts inevitably involves an exercise in the nature of a trial."

[26] In this matter, the second defendant is a party to the action based on the presumption that the driver of a motor vehicle is an agent or servant of the owner. In ***Morgans v. Launchbury and others*** [1972] All E.R. 606, it was held by the House of Lords that in order to fix liability on the owner of a motor vehicle for the negligence of its driver it must be proved that the driver was either the servant of the owner or was acting on the owner's behalf as his agent. In order to establish agency, the claimant would have to prove that the said driver was using the vehicle at the owner's request or on his instructions. It would also have to be proved that the driver was using the car to perform a task delegated to him by the owner. The court was of the view that it in order to ground liability it was not sufficient to only prove that the driver had the owner's permission to use the vehicle.

[27] In ***Rambarran v. Gurrucharran*** [1970] 1 All ER 749, it was stated that this presumption could be displaced by evidence that the driver had the owner's permission to use the vehicle. The court also stated that the issue of agency was a question of fact. In that case, the appellant's car which was being driven by his son without his knowledge or consent was involved in an accident. An action was brought against him on the basis that his son was acting as his servant or agent at the relevant time. Judgment was awarded in favour of the defendant. On appeal, that

decision was reversed and the matter taken to the Privy Council. Lord Donovan in his judgment stated:-

> *"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence".*

[28] The court clearly stated that any inference that the appellant's son was driving as the appellant's servant or agent on the day of the accident would be displaced by the appellant's own evidence, provided it were accepted by the trial judge. The court ultimately found that the respondent had failed to establish that the son was driving as the appellant's servant or agent.

[29] It is also important to note that the court was of the view that in order to rebut the prima facie evidence of service or agency*, 'the defendant who alone knows the facts must give evidence of the true facts'.*

[30] In this matter, as in the ***Rambarran*** case it is the second defendant who is in possession of the facts which are required to rebut the presumption of agency. The veracity of that evidence can only be tested by cross examination. This was accepted by the court in ***International Fund for Agricultural Development v. Jazayeri*** in which Moore-Bick, J. said that *"…in a case where the defendant's account appears farfetched but is not contradicted by independent evidence, the court should….normally*

hesitate long before rejecting it as incredible at a preliminary stage. The evaluation of witnesses is essentially a matter for a judge at trial who has the benefit of seeing them give evidence".

[31] Miss Minto sought to rely on the decision in the ***Sanctuary Systems*** case. I do not agree that it supports her argument that a case should not proceed to trial if the respondent/claimant in order to prove her case wishes to test the veracity of the evidence of the applicant/defendant. At paragraph 67 of the judgment Mangatal, J. said:-

> *"It was Mr. Manning's submission that the Defendants may well illicit (sic) answers that are favourable to them in cross-examination. That may well be true in relation to some matters, eg. Whether the Claimants and Mr. Trotter knew that Mr. Constanzo had had previous dealings with Mr. Wong.* ***However, not having denied in the pleadings that this loan took place in secret, I cannot see how cross-examination of the Claimants' witnesses or any other witnesses will help the Defendants on this issue****". [emphasis mine]*

[32] It is my view, that the learned Judge was not seeking to lay down any rule of general application that a party could not rely on the possibility of eliciting relevant information in cross examination in order to successfully defend an application for summary judgment. The decision of Mangatal, J. seems to be based on the fact that parties are bound by their pleadings. In the particular circumstances they could not rely on the possibility of their obtaining information on an issue that had not been addressed in the defence.

[33] In this matter, the issues are joined. The claimant has pleaded that the first defendant was either the servant or agent of the second defendant. It is on that basis that she seeks to establish liability in respect of Miss Venner. The latter defendant has denied the existence of any such relationship and has filed affidavit evidence in support of that assertion. As Lord Judge said in ***Swain v. Hillman*** said: *"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step".* This approach was accepted by Brooks, J. (as he then was) in the case of ***First Financial Caribbean Trust Company Limited v. Howell and others***, claim no. 2010CD00086 (delivered on the 5th May 2011). The learned judge also cited the following passage from the judgment of Potter, L.J. in ***ED & F Man Liquid Products Limited v. Patel & another***:-

> *"It is certainly the case under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see Lord Woolf MR in Swain v Hillman…However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court.* ***In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents.*** *If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save cost and delay of trying an issue the outcome of which is inevitable…"*

[34] At this stage there is no conflict of fact as the claimant has not filed an affidavit in response to that of the second defendant. However, as

Mummery, L.J. said in ***Bolton Pharmaceutical Co 100 Ltd v. Doncaster Pharmaceuticals Group Ltd and others*** the court should hesitate to grant an application for summary judgment if "*reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case".*

[35] I also bear in mind the view of Mantell, L.J. in ***Munn v. North West Water Ltd.*** [2001] C.P. Rep. 48 that the provisions in the Civil Procedure Rules relating to summary judgment were *"…never intended to drive a claimant from the judgment seat where there were issues of fact which, if determined in the claimant's favour, might result in a successful outcome".*

[36] Counsel, Mr. Henry in my view raised an important point when he said that the issue of agency must be resolved by an assessment of the evidence and the application of the relevant law. Such an assessment in my view must be based on an examination of the testimony as well as the demeanour of the witnesses. Their credibility is central to the determination of fault in respect of the accident and the question of agency. I am also of the view that it cannot be said at this stage, that it is inevitable that the issue of agency will be determined in favour of the second defendant. These are matters which ought to be determined by a tribunal of fact.

[37] In the circumstances the application for summary judgment is refused. Costs of this application are awarded to the claimant, such costs to be borne by the second defendant.