IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

C.L. S 178 OF 2002

BETWEEN	HERBERT SMIKLE	CLAIMANT
AND	PATRICK NUNES	FIRST DEFENDANT
AND	GARTH BANTON	SECOND DEFENDANT
AND	KEITH EVANS	THIRD DEFENDANT
AND	GLENVILLE KELLY	FOURTH DEFENDANT

IN CHAMBERS
Sylvester Morris for the claimant
Leroy Equiano and Symone Jarrett for the fourth defendant

January 31, February 16 and March 9, 2007

RULES 15.2, 25.1 (b) AND 26.3 (1) OF THE CIVIL PROCEDURE RULES, NO REASONABLE PROSPECT OF SUCCESS

SYKES J.

1. When this matter came before me for case management the issue was raised of whether the claimant had any reasonable prospect of success in his claim against the fourth defendant. The circumstances that led to this query are these.

2. Mr. Herbert Smikle, the claimant, is a farmer and higgler of Banana Grove in the parish of Manchester. On June 2, 1997, he was a passenger in a motor vehicle owned by Mr. Garth Banton, the second defendant, and driven by Mr. Patrick Nunes, the first defendant. Mr. Keith Evans, the third defendant, was the driver of a truck. Mr. Kelly, the fourth defendant, was the driver of a Nissan motor car.

3. The pleading of the claimant, despite the errors, stated that Mr. Kelly was driving down Spur Tree Hill in the parish of Manchester when it was struck in the rear by the truck driven by Mr. Keith Evans. It was agreed during the case management that Mr. Kelly's car was pushed across the road by the truck into the path of truck driven by Mr. Patrick Nunes.

4. On these allegations it is obvious that this claim was bound to fail and so was an appropriate case to be struck out at this stage. If it is said that that is stating the matter too highly, then it is safe to say that it had no real prospect of success. The

issue is whether the court should use its powers under rule 15.2 or rule 26.3 to deal with this matter.

5. Rule 15.2 provides:

> *The court may give summary judgment on the claim or on a particular issue if it considers that -*
>
> *(a) the claimant has not real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or issue.*

6. Rule 26.3 (1) (c) states:

> *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;*

7. Of these two rules the more applicable one is rule 15 to apply. This is so because in the instant the particulars of claim and defence are before the court. The pleadings are closed. On an examination of the claim the difficulty of succeeding is patent. The claimant has provided an explanation that does not establish that the defendant was negligent. This impression was confirmed during the case management conference. Under rule 25.1 (b) the court must further the overriding objective by actively (note the adverb) managing cases. This includes identifying the issues at an early stage. Once that is done then the court is able to say whether the claimant has a reasonable prospect of success.

8. Lord Hobhouse in ***Three Rivers v Governor and Company of the Bank of England (No. 3)*** [2003] A.C. 1 at paragraph 160 - 161 (pp 283 - 284) stated:

> ***160*** *The difficulty in the application of the criterion used by Part 24 is that it requires an assessment to be made in advance of a full trial as to what the outcome of such a trial would be. The pre-trial procedures give the claimant an opportunity to obtain additional evidence to support his case. ....*
>
> ***161*** *The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show*

that the party's case is hopeless. The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden--the balance of probabilities--but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial. This common sense proposition has recently been re-emphasised by the Court of Appeal in Medcalf v Mardell [2001] Lloyd's Rep PN 146, in which Peter Gibson LJ said, at paragraph 40: "The material evidence must be evidence which can be put before the court to make good the allegation." Evidence which cannot be used in court cannot be relied upon to justify the making of the allegation of dishonesty. I mention this because it shows the principle to be applied and not because there is any suggestion in the present case that there is any inadmissible material which would support allegations of dishonesty in the present case. It is normally to be assumed that a party's pleaded case is the best case he can make (or wishes to make). Therefore, in the present case, the particulars given provide a true guide to the nature of the case being made by the plaintiffs (claimants).

9. A number of points emerge from Lord Hobhouse's judgment. Some points were stated by him and others, although not explicitly stated, nevertheless are inevitable conclusions from his reasoning. Before making those points I need to say that rule 24. 2 (a) (i) and (ii) of the English Civil Procedure Rules are identical to rule 15.2 of the Jamaican Civil Procedure Rules. The observations made by Lord Hobhouse are quite logical and consistent with the overriding objective the rules and for these reasons I adopt them.

10. The first two points are those made by Lord Hobhouse. First, his Lordship stated that merely pleading a legally sufficient case is not the

end of the analysis. Second, pleading is based on legally admissible evidence. This second point cannot be over emphasized because some attorneys are resisting enquiries by the case management judge of the evidence they intend to call to support the case. They think that when the judge makes these enquiries they are giving away too much. However, as Lord Hobhouse is saying, a pleaded case assumes that the evidence is indeed available to make good the allegation and that can only be done if the proposed evidence is legally admissible. The pronouncements by Lord Hobhouse, logically, cannot be restricted to cases of fraud or dishonesty since all civil cases are required to be established by legally admissible evidence. Third, even if the evidence is legally admissible, a judge in clear and obvious cases may and should make a decision on the prospects of success. Fourth, when the judge is making this assessment the judge must consider whether the case can be strengthened by requests for information. Fifth, if after taking into account the pleaded case and the possibility of gaining further information if the judge concludes that there is no real prospect of success then the judge should act accordingly and give summary judgment for the other party. Summary judgment is not a device to avoid trial but one of the powerful tools of case management which is designed to eliminate hopeless cases.

11. This case is one such case. It is indeed a matter of regret that the defendant has been subjected to five years of legal expense and anxiety but happily, his ordeal has come to an end. When the difficulties were highlighted to counsel he agreed to discontinue the matter by filing a notice of discontinuance. Had he not agreed to do so I would have given summary judgment for the defendant.