[2015] JMSC Civ 119

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 05207

BETWEEN	**LENORIA TAYLOR**	**CLAIMANT**
AND	**HOJAPI LIMITED**	**DEFENDANT**

IN CHAMBERS

Danielle Archer instructed by Kinghorn and Kinghorn for the claimant

Keresa McKenzie instructed by Murray and Tucker for the defendant

June 17, 2015

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT STATEMENT OF CASE – WHETHER APPLICATION CAN BE TREATED AS SUMMARY JUDGMENT APPLICATION

SYKES J

[1] Miss Lenoria Taylor has lost the end of her right index finger, that is, from the last joint to the tip of the finger. In sophisticated medical terms, she has suffered an amputation of the distal phalanx. She received her injury while using a knife she

was not trained to use to cut frozen food. The knife slipped and she was injured in the manner just stated.

[2] Hojapi Limited ('the hotel') is not disputing her injury. Indeed it has accepted, by its defence, all that she has said about her injured finger. Its challenge to her is that she was never trained to use the machines or knives to cut frozen food because it was never part of her job to cut frozen food. It had other people for that and in any event it had a protocol for chefs who found that the frozen food was not cut up as required. The hotel says she failed to follow that protocol. The hotel is seeking to have the claim struck out.

The pleadings on how the distal phalanx came to be lost

[3] Miss Taylor was employed as a chef. The hotel provides accommodation and meals for its guests. As part of its hospitality package, it provides meals on demand or as is said in Jamaica, cooked to order.

[4] According to Miss Taylor on November 10, 2009, she was on the property in her capacity as a chef. Other than this assertion, the further amended particulars of claim are wonderfully vague. It simply says:

> *The claimant was lawfully in the execution of her duties as a chef upon premises under a contract of service with the defendant, when as a result of the negligent manner in which the defendant executed its operation in the course of its trade the claimant was exposed to the risk of injury and a consequence has sustained serious injury and suffered loss and damage. In particular, on the 10th day of November, 2009, the claimant was in the process of executing her duties when the knife she was in the process of using cut her finger on the right index finger.*

[5] The paragraph continues by alleging the following particulars of negligence:

a. failing to provide the claimant with requisite instruction in the use of the said knife;

b. causing the said knife to cut the claimant;

c. failing to provide a safe place to work;

d. failing to provide the necessary safety equipment and safety gear to the claimant in the execution of her duties causing hot water to burn claimant;

e. failing to provide the requisite warnings, notices and/or special instructions to the claimant and its other employees in the execution of its operations so as to prevent the claimant being injured;

f. failing to provide a safe system of work;

g. failing to provide a competent and sufficient staff of men;

h. failing to modify, remedy and/or improve a system of work which was manifestly unsafe and unlikely at all material times to cause serious injury to the claimant;

i. failing to take such care as in all the circumstances was reasonably safe in using the premises for the purposes of which she was invited or permitted by the defendant to be on the said premises.

[6] If that were not enough, she alleges, in the alternative, breach of contract with the breach being that the ‘defendant would take all reasonable care to execute its

operations in the course of its trade in such a manner so as not to subject the claimant to reasonably foreseeable risk of injury' (para. 6).

[7] It is not clear why the allegation of injury with hot water is in the particulars when no one has suggested that she was scalded with hot water.

The affidavits

[8] The affidavits filed in support of and in opposition to the application have revealed that this knife was a regular kitchen knife. The affidavits from the hotel say the following:

a. it was aware of the dangers that may arise from cutting frozen meat and fish products;

b. in light of this knowledge the task of cutting up frozen meat products was restricted to butchers who were trained in the use of the tools used to undertake this task;

c. the butchers used electrical cutting equipment and special butcher's knives;

d. the cook was never required, expected or authorised to cut frozen meat products;

e. cooks were not provided with the tools, equipment or training to undertake the cutting of frozen meats;

f. the system in place was that if the butchers had not cut up the meat the cook was to make a report to the supervisor in charge of the kitchen and in that event, the supervisor would direct that another menu item be prepared;

g. if the supervisor had not adequately addressed the issue, the cook could complain directly to the Sous Chef;

h. if the Sous Chef had not dealt with the matter satisfactorily, the cook may make a report to the Executive Chef either directly or through his secretary;

i. there was absolutely no protocol prescribed by the defendant whereby cooks was directed or even permitted to undertake the cutting up of frozen products where this was not done by the butchers.

j. the claimant was never trained to use a kitchen knife to cut frozen meat or fish products and neither was she provided with any safety guidelines or warnings in improvising in the use of the kitchen knife to cut up frozen meat and fish because this was not part of her duties.

[9] Miss Taylor swore to the following in her affidavit:

a. she was employed as chef between December 2007 and January 2010;

b. on November 10, 2009, she reported for work;

c. she noticed that the frozen fish was not cut up;

d. she knew that her supervisor would not be lenient with her if she did not prepare the meal on time and so she sought his instructions on what she should do;

e. he told her to go to the refrigerator and find something to prepare;

f. she did not oppose him ‘because as far as [she] was concerned it became [her] duty to cut the fish if the butchers had not done so’;

g. she used the kitchen knife which slid from the fish and injured her;

h. she never received any training from the hotel in the use of the knife to cut up frozen products;

i. she never received any safety guidelines or warnings in improvising by using the kitchen knife;

j. her supervisor told her to find something to prepare and to do so quickly so that the guests would be satisfied.

[10] As can be seen there is no difference on the facts indicating how Miss Taylor received her injury. Miss Taylor has not mounted any challenge to the accuracy or existence of the safety procedures spoken to by the hotel. From this narrative it is not clear why Miss Taylor thought that cutting up the frozen fish became her duty. That was not the procedure established by the hotel. Indeed, by all appearances, the hotel moved heaven and earth to dissuade cooks or chefs from even beginning to think that it was part of their function to fill the breach left by the butchers. So strongly did the hotel feel about this that it did not even give the cooks or chefs any instruction of any kind regarding cutting up frozen meats and fish lest they begin to think that it was part of their duty.

[11] The court accepts the following as an accurate statement of principles applicable to striking out applications. The passages are from Lindsay J in **Miller v Shires (a firm formerly known as Gartons) and another** [2006] EWCA Civ 1386:

> ***[8]*** *Ward LJ made no express reference to the application before him being for permission for a second appeal, but that is inescapably what it is and, for that reason, when the*

application came before us, we elected to hear the application for permission first and separately so that we could examine whether the relatively stringent test appropriate to second appeals was passed. However, before I move on to that test I need to say something briefly about the jurisdiction conferred by CPR 24.2. I have not understood Mr Hirst to dispute any of the following summary of that jurisdiction. In Three Rivers District Council and others v Governor and Company of the Bank of England (No 3) [2003] 2 AC 1, [2000] 3 All ER 1, [2000] 2 WLR 1220 - perhaps now to be seen as the high-water-mark of allowing cases to go forward - Lord Hope referred to the rule as a salutary power but one which had to be confined to its proper role. The court had to look to see what would happen were there to be a trial. Normally, parties are to be allowed to lead their evidence so that the trial judge can determine where the truth lies but, where the case being examined is so weak that it has no real prospect of success, then it should be stopped before great expense is laid out. The jurisdiction is not to be used to dispense with the need for a trial where there are indeed issues that should be investigated at trial. Hence there should be no "mini trial"; that would usurp the function of the trial judge and it would lead to conclusions being reached without cross-examination and on documents only. That would be an abuse of the power. But, even so, if the court can say with confidence on the material before it at the summary hearing that the factual basis asserted is entirely without substance then it may be just to use the power which CPR 24.2 confers - Three Rivers at para 95. Such a conclusion is more likely to be capable of being reached in a simple case but, I would add, the fact that

the case could be described as simple cannot, of itself, suffice to lead to summary relief.

[9]*The inappropriateness of "mini trials" at the summary stage had even earlier been commented on in this court, in Swain v Hillman & another in [2001] 1 All ER 91, [2000] PIQR P51 (CA) where, at p 95, Lord Woolf MR said:*

> *"Useful though the power is under Part 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. As [counsel] put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

[10] *The books are replete with similar warnings and it suffices to refer to two recent decisions of this court. The first is Sharpe v Addison [2004] PNLR 23, 426, another case of a road traffic accident and alleged professional negligence but where road traffic proceedings had been begun but were later discontinued. At p 434 in a passage which Mr Hirst draws to our attention, Rix LJ said of the judge below:*

> *"I fear that in these circumstances, although the judge was aware of and sought to apply the correct principles, he was tempted, perhaps by the very fact that the case was presented to him as an entirely documentary exercise, to*

conduct a mini-trial on paper. But the trial, if it had taken place, would not have been conducted on paper. The taxi driver and his passenger would have been challenged along the lines indicated by counsel's submissions and the possibilities adverted to in this judgment.

Nowadays, under the CPR regime a Defendant can apply to strike out a claim at its inception on the basis that it has no real prospect of success: see Part 24.2. The test of a worthless claim for loss of a chance purposes seems to me to be very similar to that modern test. If the question is asked in these terms, whether a case such as this would be struck out under CPR Part 24.2, it seems to me that it would not. To do so would have involved the court seeking to turn what is ultimately to be a trial on oral testimony into a paper exercise, something which modern authorities on CPR Part 24.2 repeatedly warn the courts against."

An even more recent authority in this court is The Bolton Pharmaceutical 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others [2006] EWCA Civ 661 in which on 26 May 2006 Mummery LJ at para 17 said:

"It is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of case. The classic instance is where there are conflicts of fact on relevant issues, which have

to be resolved before a judgment can be given (see Civil Procedure Vol 1 24.2.5). A mini-trial on the facts conducted under CPR Part 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice."

[11] *But none of these strictures, powerful as they are, amounts to saying that summary relief is only rarely to be available or is to be used only in exceptional circumstances or where the facts or the material facts are entirely free of dispute.*

[12] The court also refers to the discussion in **Three Rivers District Council and others v Governor and Company of the Bank of England** [2003] 2 AC 1 by Lord Hope of striking out applications and summary judgment applications. His Lordship observed that while the difference between the two tests is not easy to determine the court must seek to give effect to the overriding objective. His Lordship observed that the practical effect of an application under either head is the same, namely, termination of the proceedings at an early stage before significant sums of money are expended on a claim that cannot succeed or fanciful. There is not much to choose, his Lordship observed, between a test that asks 'whether the claim is bound to fail' (striking out) and one that asks, 'whether there is a real prospect of success' (summary judgment).

[13] Lord Hope also indicated that the court had a discretion to treat striking out applications as summary judgment applications and act accordingly. This court has elected to do that in this application by the hotel. This permits the court to look wider than the pleadings and look at affidavit evidence.

[14] The court also relied on the following passage from Lord Woolf MR in **Kent v Griffith** [2001] QB 36 at paragraph 38:

> ***38*** *In so far as the Osman case [1999] 1 FLR 193 underlined the dangers of a blanket approach so much the better. However, it would be wrong for the Osman decision to be taken as a signal that, even when the legal position is clear and an investigation of the facts would provide no assistance, the courts should be reluctant to dismiss cases which have no real prospect of success. Courts are now encouraged, where an issue or issues can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. There is no question of any contravention of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) in so doing. Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although a strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law.*

[15] Here Lord Woolf is advocating that it is perfectly in order for a judge to take on issues that have been defined sufficiently that an investigation of the facts would serve no useful purpose. The pleadings and affidavits from the hotel have laid out its defence in quite some detail. Miss Taylor has had more than ample to time to challenge these statements and she has omitted to do so. Consequently, there is no real dispute about the hotel's assertions and on that basis, the court is able to make an assessment of whether summary judgment for the hotel is appropriate.

[16] Miss Archer submitted, initially, that there were credibility issues to be decided. The court disagrees because the hotel has accepted that it did not provide Miss Taylor with the requisite training, tools and equipment because it was not part of her job. Miss Taylor in her affidavit has indeed accepted that the cutting up of frozen meat was the job of the butchers. There is no issue there at all. The hotel has laid out its procedures which Miss Taylor has not said is not accurate. Miss Taylor advances as the reason for attempting to the cut fish the belief that she felt it was her duty to cut the fish since the butchers had failed to do their job. She did not attribute this feeling to anything said or done by supervisor or any management level employee of the hotel. Regrettably, she could not point to anything said or done by the hotel that led her to this view. She has not said, for example, that the hotel's protocol was unclear or left her in a state of confusion about what to do in the circumstances which unfolded. Perhaps the most significant point is that she has never asserted that the supervisor told her to cut up meat or fish. She alleged that he told her to go the refrigerator and get something to cook. That statement is not sufficient to ground liability. What he said was quite consistent with the protocol: if the ordered meal is not available then prepare something else.

[17] Miss Archer next submitted that there should be an exploration at trial of the interaction between Miss Taylor and the supervisor in order to see whether or not she was acting in accordance with what she might have been told.

[18] Miss Keresa McKenzie took a different view. She submitted that even on Miss Taylor's pleaded case and affidavit she is not asserting that the supervisor gave her any instructions contrary to the protocol for cutting frozen meat. In fact, she has not said anywhere that she was not instructed on the protocol for managing situations where the frozen meat and fish were uncut. The court agrees with Miss McKenzie.

[19] At the end of the day the striking out and summary judgment procedures are directed at one objective: stopping cases that are so weak that there is no

reasonable prospect of success. They should be stopped before great expense is incurred. False hope should not be engendered. In this particular case, there is little or no conflict on the real important issues of fact. It is indeed unfortunate that Miss Taylor has lost the end of her right index finger but that cannot be laid at the feet of the hotel. They had a system in place. She knew this. She said as much when she said that it was the butchers who were to cut the frozen meat. Her affidavit has not provided any refutation of the system outlined by the hotel. There are no issues of fact to be determined. In these circumstances, the court has to apply the law and conclude that there is no real prospect of successfully prosecuting the claim. It should be stopped now. It has gone on far too long – nearly four years.

Disposition

[20] Application to strike out treated as application for summary judgment. Claim is struck out and judgment entered for the defendant. Costs to the defendant to be agreed or taxed.