



[2018] JMSC Civ 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV00888

BETWEEN	REYNARD CROSS	CLAIMANT
AND	LAWRENCE TULLOCH	1ST DEFENDANT
AND	CAROL CHIN	2ND DEFENDANT
AND	SHERINE GREEN-TRACEY	3RD DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

IN CHAMBERS

Mr. Kevin Williams, instructed by Grant, Stewart, Phillips & Co. for the Claimant

Ms. Tamara Dickens instructed by the Director of State Proceedings for the Defendant

Heard on September 20, 2017 and March 23, 2018

MASTER MASON (Ag.)

Introduction

[1] An application requesting an extension of time to file a Defence supported by affidavit from Vanessa Young was filed on July 18 2016, with the Defence exhibited thereto. The affidavit of Vanessa Young explained that after an

acknowledgement of service was filed a letter requesting instructions was sent to the National Land Agency (NLA) on April 19, 2016. That letter was sent to the wrong office and was redirected to the offices at 20 North Street on April 21, 2016.

- [2] The 4th Defendant received the instructions from the NLA in April 28, 2016 but they were not reviewed until May 18, 2016, “by reason of administrative oversight”. Further instructions were requested from the NLA which created an additional delay in a responding to the claim. The further instructions were received on July 11, 2016 and the Defence was later filed.
- [3] The Applicant claims that the delay was due to an administrative oversight and a delay in receiving instructions. The Affidavit of Vanessa Young claims further that the 4th Defendant is not liable as the 3rd Defendant, Ms. Green-Tracey was “on a frolic of her own and not a servant or agent of the Crown”.
- [4] This position was expounded upon further in the Affidavit of Carla Thomas who added that Ms. Green Tracey ‘was not in any way authorized to perform the alleged actions.’

Evidence

The Claimant’s Claim

- [5] It is Mr. Cross’ claim that in the year 2010 he was approached by the 1st Defendant, Lawrence Tulloch, who indicated to him that the National Land Agency (NLA) was selling property at a price of Four Million Jamaican dollars (\$4,000,000.00). Mr. Tulloch represented to Mr. Cross that he had previously purchased property from the NLA through the same process but at that point in time he could not engage in further transactions because of his depleted funds.
- [6] Mr. Cross acting upon the recommendations of Mr. Tulloch contacted the 2nd Defendant, Carol Chin, who, he claims, made false representations to him by confirming that the Government of Jamaica (GOJ) was in the process of selling

homes and that the price for the property in question was valued at Four Million Dollars (\$4,000,000.00). Mr. Cross contends that upon the recommendations of both Mr. Tulloch and Ms. Chin that this was a legitimate sale transaction, he paid One Million Jamaican dollars (\$1,000,000.00) on the 4th March 2010 towards the deposit of One Million Five Hundred Thousand Jamaican dollars (\$1,500,000.00). This payment, Mr Cross claims, was made to Ms. Chin at her home located at 18 Chalmers Avenue, Kingston 10, in the parish of St. Andrew. On the next day, Mr. Cross claims, he went back to the home of Ms. Chin to pay the balance of the deposit in the sum of Five Hundred Thousand Jamaican dollars (\$500,000.00).

- [7] The Claimant contends that Ms. Chin indicated to him that a further sum of Forty Thousand Jamaican dollars (\$40,000.00) was to be paid for a valuation of the property to be done. Mr. Cross relying upon Ms. Chin's recommendation went to her home on March 9, 2010 and paid the \$40,000.00 as requested.
- [8] Mr. Cross claims further that, a fortnight after the payment of the deposit, he was told by Ms. Chin that the transaction was almost complete and that he needed to pay the balance of the purchase price in the sum of Two Million Five Hundred Thousand Dollars (\$2,500,000.00). Upon enquiring on the speed at which the transaction was taking place, he claims that Ms. Chin indicated the property was already processed and the majority of the paperwork had already been completed. Acting upon the information of Ms. Chin, Mr. Cross went to her home on March 26, 2010 and made a final payment on the property.
- [9] When a period of approximately four months had elapsed, during which time Mr. Cross sought information from both Mr. Tulloch and Ms. Chin on the reason for the delay in completing the transaction and their failure to provide documentation on the property, both of which were not forthcoming, he was contacted by the 3rd Defendant, Ms. Green-Tracey. The Claimant claims that Ms. Green-Tracey identified herself as an employee of the NLA and as someone who was involved in the transaction and played some part in the process as a GOJ employee.

- [10] Mr. Cross contends that during the period within which he had dialogue with Ms. Green-Tracey, she informed him that the reason for the delay was due to the occupants of the property refusing to leave which had led to the GOJ commencing legal proceedings against them. He avers that she told him further that there were other purchasers similarly affected and that his transaction could be completed once he provided capital to refund the other purchasers their deposit.
- [11] Mr. Cross acting upon Ms. Green-Tracey's recommendation, went to the offices of the NLA located at 23½ Charles Street, Kingston where she is employed and paid to Ms. Green-Tracey the sum of Seven Hundred and Fifty Six Thousand (\$756,000.00) on November 3, 2010 and Three Hundred and Fifty Six Thousand (\$356,000.00) on November 5, 2010 for two additional properties. He was given a receipt for the payments by Ms. Green-Tracey.
- [12] The Claimant claims that after these payments he was not given any additional information on the transaction and in fact was given a string of excuses for the next two years. On or about June 8, 2010, Mr. Cross went to the Fraud Squad of the Jamaica Constabulary Force and made a report. Mr. Tulloch, Ms. Chin and Ms. Green-Tracey were charged and criminal proceedings were commenced against them in the Resident Magistrates' Court for the parish of St. Andrew (as it then was). The matter in the Resident Magistrates' Court (now Parish Court) is ongoing.

The 4th Defendant's Defence

- [13] The 4th Defendant, the Attorney General, filed its defence on July 18, 2016. In the Defence, the 4th Defendant denies that the actions of Ms. Green-Tracey was performed by her in her capacity as an employee of the NLA. The 4th Defendant contends that Ms. Green-Tracey was employed to the Corporate Services Division of the NLA as a Records Officer and that the scope of her duties only

extended to work of a clerical nature which included the opening of files, the recording and filing of correspondence and the retrieval of files.

- [14] The 4th Defendant contends further that her duties did not extend to interacting with members of the public, collecting money on behalf of the NLA or facilitating the process of disposition of property on behalf of the NLA. The 4th Defendant avers that Ms. Green-Tracey's actions ultimately were for her own benefit as she was on a frolic of her own and was not acting in the course of her employment as an agent of the Crown. The 4th Defendant, finally, denies all liability and puts the Claimant to the proof of all allegations.

The factors the Court is to consider on an application for extension of time

- [15] In determining an application for extension of time the provisions of Part 26 of the Civil Procedure Rules 2002 (CPR) is to be applied. Part 26.1(1) does not specify the approach to be taken by the court in assessing applications for extension of time. Rule 26.1(2)(c) only outlines the court's case management powers to extend or shorten the time for compliance with any rule even after the time for compliance has expired. The best course of action to be taken in such circumstances is to apply the overriding objective as in the case of **Raymond Lewis v Dr Eva Lewis Fuller and Others** [2016] JMSC Civ. 127. In the aforementioned case the court took into consideration seven factors which I consider to be applicable to this case. These factors are:

1. The length of the delay;
2. The explanation of the delay;
3. The prejudice occasioned by the delay;
4. The merits of the case of the party applying for the extension of time;
5. The effect of the delay on public administration;
6. The importance of compliance with time limits; and
7. In particular, where prejudice is alleged, the comparative resources of the parties.

The length of the Delay

[16] In the instant case, the length of the delay is two (2) months after the date of service of the Amended Claim Form and Particulars of Claim, filed on March 23, 2016 and served on the 4th Defendant on March 24, 2016. An Acknowledgment of Service was filed on April 12, 2016 and served on the Claimant the same day on behalf of the 4th Defendant. The 4th Defendant realising that time within which to file a Defence was running against them filed a Notice of Application for Extension of Time to file a Defence On April 25, 2016. The supporting Affidavit was filed on July 18, 2016 and served on July 19, 2016 because the 4th Defendant was awaiting further instructions from the NLA necessary to ground the application.

[17] I do not consider the delay to be unduly lengthy having regard to the fact that one of the parties involved is the Attorney General who deals with various departments and other state entities as is evident in the instant case. As such the Attorney General's Department is required to seek instructions from the relevant government department or state entities, which are fundamental to their ability to traverse a Claim. In seeking instructions, the Department may encounter delays and other trying circumstances which impede its ability to file its Defence within the prescribed time limit. Further, I do not think the delay would seriously impact the matter because as stated earlier, the delay was not for an extended period.

The Explanation for the Delay

[18] The Court finds that the explanation of Vanessa Young was sufficient in explaining the reasons for the 4th Defendant not filing a Defence within the required time as set by the CPR. Consequently, I am of the view that paragraphs 5, 6 and 7 of her Affidavit set out the reasons for the delay which I find are not frivolous or unsatisfactory bearing in mind that the Attorney General is a creature of instructions and such is obliged to request same.

- [19] Paragraph 5 of Ms Young's Affidavit states "that instructions were requested from the NLA by way of letter dated April 19, 2011 to the Office of the Titles at 93 Hanover Street. Upon communication with the Office of Titles, the request for instructions was redirected to the NLA's office at 20 North Street on April 21, 2016."
- [20] Paragraph 6 states "A Notice of Application for Court Orders was filed on April 25, 2016 requesting an extension of time for filing the defence, having regard to the impending expiration of the forty-two day period for filing the Defence."
- [21] Paragraph 7 states "that some instructions were received from NLA on April 28, 2016." The file indicates that these instructions were not reviewed until May 18, 2016 by reason of administrative oversight. Additional instructions necessary to respond to the Claim were then requested from NLA via e-mail on May 18, 2016 and via letter on June 6, 2016. Those instructions were received on July 11, 2016. The matter was then reviewed and the Defence was finalised and sent for filing and service on July 18, 2016."
- [22] I am of the view therefore, that there is sufficient evidence contained in the Affidavit of Ms. Young, which provide good reasons for the delay in filing the Defence.

In the circumstances, I conclude that the reasons proffered by the 4th Defendant for the delay are accepted by the Court as satisfactory.

Was there Prejudice occasioned by the Delay?

- [23] It is this Court's view that there is no prejudice to the Claimant in this case as the matter is not sufficiently advanced to affect the Claimant's chances of a fair trial. Rather, the Court finds it would be considerably unjust not to assess the Defence of the 4th Defendant having regard to the strict liability claim against the Defendant.

The merits of the case of the party applying for extension

[24] It is this issue this court considers the most significant as it asks the question of whether the Attorney General of Jamaica is liable for the alleged tortious actions of Ms Green-Tracey as the employee of the NLA. It's clear that the type of liability that the Claimant seeks the court to find against the 4th Defendant is not personal but vicarious liability.

[25] Submissions were made by Counsel for the Applicant/4th Defendant and the Respondent/Claimant. In light of the focus of the submissions of Counsel for the Claimant/Respondent, this Court will consider the cases of **Dubai Aluminium Co. Ltd v Salaam and others** [2002] UKHL 48, **Lister and others v Hesley Hall Ltd** [2001] UKHL 22, **Cox v Ministry of Justice** [2016] UKSC 10 and the recent case of **Mohamud v WM Morrison Supermarkets plc** [2016] UKSC 11.

[26] The doctrine of vicarious liability is rooted in public policy. It is based on the belief that a master is to be liable for torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on. The courts have settled the issue of intentional and non-intentional torts committed by an employee and have found that an employer can be liable in both circumstances. The House of Lords in the case of **Lister** found that the traditional "Salmond formula" is not the best approach to apply when considering intentional torts. The learned jurist Salmond in his text *Salmond on Torts* stated that a wrongful act is deemed to be done by a servant in the course of his employment if it is either:

- (a) *a wrongful act authorised by the master or;*
 - (b) *a wrongful unauthorized mode of doing some act authorized by the master.*
- He went on to state the Salmond Formula:*

"a master is liable even for acts which he has not authorized, if they are so connected with acts which he has not authorized, that they be rightly regarded as modes – although improper modes of doing them".

In the case of **Lister**, a warden of a school boarding house had systematically sexually abused the resident children under his care. The Claimants brought their claim against the Defendants who owned and managed the school. The House of Lords found that under the “Salmond formula” the Defendants could never be found liable for the acts of the warden as the sexual abuse of the children could not be considered as an unauthorised mode of doing an authorised act. The House reasoned that a different approach needed to be taken when considering intentional wrongs and modified the traditional test. Lord Clyde reasoned:

An act of deliberate wrongdoing may not sit easily as a wrongful mode of doing an authorised act. But recognition should be given to the critical element in the observation, namely the necessary connection between the act and the employment. The point is made by Salmond even in the first edition, at p 84, where he states; “On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible.” What has essentially to be considered is the connection, if any, between the act in question and the employment. If there is a connection, then the closeness of that connection has to be considered. The sufficiency of the connection may be gauged by asking whether the wrongful acts can be seen as ways of carrying out the work which the employer had authorised.

[27] It is under such considerations the court determined that the question to be asked is whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. The court held that the employers were vicariously liable as there was a close connection between the warden’s employment and his tortious act.

[28] The same test was applied in the house of Lords case of **Dubai** where the House held that ‘the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful act may fairly and property

be regarded as done... in the ordinary course of the firm's business or the employee's employment...' The court lauded the close connection test and considered its broad approach to vicarious liability to be the right direction for the courts to take. The court noted that:

This 'close connection' test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged...

This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negating vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard to the assistance provided by previous court decisions.

[29] What is also important to note from the **Dubai** case is that Lord Millett made a significant point on the fact that there is no difference between acts that are performed in an improper manner and acts performed for an improper purpose or by an improper means in the court finding an employer liable. Lord Millett posits;

If regard is paid to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform, or to the underlying rationale of vicarious liability, there is no relevant distinction to be made between performing an act in an improper manner and performing it for an improper purpose or by an improper means.

[30] The later case of **Cox** made its own contribution to the approach to be taken by the courts in determining vicarious liability. In this case the court took the opportunity to take stock of where the law on vicarious liability now stands. It indicated that the scope of the doctrine of vicarious liability can be answered in two questions. Lord Reed posited:

The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?

[31] In answer to the first question the court enunciated the relationships, other than that of a contract of employment, that give rise to vicarious liability. Lord Reed states:

[16] It has however long been recognised that a relationship can give rise to vicarious liability even in the absence of a contract of employment. For example, where an employer lends his employee to a third party, the third party may be treated as the employer for the purposes of vicarious liability. In recent years, the courts have sought to explain more generally the basis on which vicarious liability can arise out of a relationship other than that of employer and employee.

[17] The general approach to be adopted in deciding whether a relationship other than one of employment can give rise to vicarious liability, subject to there being a sufficient connection between that relationship and the tort in question, was explained by the court in the *Christian Brothers* case, in a judgment given by Lord Phillips with which the other members of the court agreed. That judgment was intended to bring greater clarity to an area of the law which has been unsettled by a number of recent decisions, including those of the House of Lords in *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366.

[32] The second question is an evolution of the traditional requirement that the wrongdoing had to be an improper mode of doing an authorised act. It is a broad approach that not only looks at authorised acts but acts not within the scope the duties of the employee but are incidental to the defendant's business. It was in answer to this question that Lord Reed analysed the judgment of Lord Phillips in the case of **Various Claimants v Catholic Welfare Society** [2012] UKSC 56. Lord Reed stated:

[24] Lord Phillips's analysis in the *Christian Brothers* case wove together these related ideas so as to develop a modern theory of vicarious liability. The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognisably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to the individual in question.

...

[29] It is important, however, to understand that the general approach which Lord Phillips described is not confined to some special cases, such as the sexual abuse of children. It is intended to provide a basis for identifying the special circumstances in which vicarious liability may in principle be imposed outside relationships of employment. By focusing upon the business activities carried on by the defendant and their attendant risks...

[33] Finally, I consider the dictum of Lord Toulson in the recent case of **Mohamud**. This case was decided after the **Cox** case. Lord Toulson made mention of having read the **Cox** case and being in agreement with the judgment of Lord Reed. The House took the opportunity in this case to evaluate where the law stands presently and whether it is in need of significant change. In his decision Lord Toulson notes past criticisms of the **Lister** decision, including in the **Catholic Welfare Society case**, which complains that it is not easy to deduce from the **Lister** case the precise criteria that will give rise to vicarious liability for sexual abuse, and that the test of 'close connection' does not elaborate on the connection. The court not wanting to refine the close connection test rather simplified the essence of the close connection test. It is upon these bases that Lord Toulson stated:

44. In the simplest terms, the court has to consider two matters, the first question is what functions or "field of

activities have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job.

45. Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice which goes back to Holt. To try to measure the closeness of connection, as it were, on a scale of 1 to 10, would be a forlorn exercise and, what is more, it would miss the point.

[34] I consider the test of Lord Toulson in the **Mohamud** case to be an extension of the test in **Cox**. Lord Toulson compressed the questions asked by Lord Reed in the **Cox** case into one while adding an additional limb to enable the court to determine the essential issue. This I find would mean that the question to be asked by this court is what functions or field of activities was Ms. Green-Tracey entrusted to do? What was her job at the NLA? The 4th Defendant admitted that the Ms. Green-Tracey was employed as a Records Officer at the NLA and that her functions or 'field of activities' were only clerical in nature and entailed the opening of files, the recording and filing of correspondence and the retrieval of files. There is no evidence before this court that Ms. Green-Tracey was entrusted with duties that included the collecting of money from the public for the purchase of property being sold by the GOJ or for the processing of sale of land transactions for the government. It would be a surprise to this court if Ms. Green-Tracey was entrusted with such duties having regard to the business of the NLA as a government agency with its primary function being the bringing together of the core land information functions of the Government, which include Land Titles; Survey Mapping; Land Valuation and Estate Management.

[35] The second limb of the test would lead this Court to question whether there is a sufficient connection between the position in which Ms Green-Tracey was employed and her alleged wrongful conduct to hold the Attorney-General liable for her wrongdoing? From the evidence presented Ms. Green-Tracey's job was

record keeping. The Claimant outlined in his Particulars of Claim the alleged wrongdoings of Ms. Green-Tracey as the following;

- (i) Inducing the Claimant to place reliance on fraudulent statements that property at 14 Geranium Path, Kingston 6, Mona, in the parish of St. Andrew was being legitimately sold by the GOJ;
- (ii) Inducing the Claimant to place reliance on fraudulent statements that properties located at Lots 2 and 5 Anthurium Drive, Kingston 6, Mona, in the parish of St. Andrew were legitimately being sold by the GOJ;
- (iii) Fraudulently representing to the Claimant that she was authorised to act for and on behalf of the GOJ in respect of the sales of property located at 14 Geranium Path, Kingston 6, in the parish of St. Andrew and Lots 2 and 5 Anthurium Drive, Kingston 6, Mona in the parish of St. Andrew.
- (iv) Knowingly and dishonestly causing the Claimant to believe that she was acting upon instructions from a agency (sic) of the GOJ to sell properties on its behalf;
- (v) Knowingly and dishonestly causing the Claimant to pay the sum of One Million One Hundred and Twelve Thousand Dollars (\$1,112,000.000) (sic).
- (vi) Deceiving the Claimant into believing that the purchase of the properties was legitimate.

[36] Having regard to the Defence of the 4th Defendant and the Particulars of Claim, there in there is no close connection between the alleged wrong-doings committed by Ms. Green-Tracey and the position in which she was employed. The Defence filed by the 4th Defendant has presented evidence that Ms. Green-Tracey had only clerical duties, which is a far cry from processing transactions and the handling of money for the purchase of land. In my view, there is sufficient

prima facie evidence to lead to a conclusion that the case of the 4th Defendant has sufficient merit to substantiate their position that they are not vicariously liable for the actions of the 3rd Defendant.

The effect of the delay on public administration

[37] In this case, the delay has not been detrimental as it has not affected the progress of the matter having regard to the short delay in the filing of the Defence. This has not, in my view, resulted in delays in the hearing of other cases or affected the court's ability to administer justice. Further, the allowing of this application is just having regard to the overriding objective Rule 1.1(2) of the CPR which provides:

- (2) Dealing justly with a case includes –
 - (a) *Ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;*
 - (b) *Saving expenses;*
 - (c) Dealing with it in ways which consider, the amount of money involved, the importance of the case, complexity of issues;
 - (d) Ensuring that the case is dealt with expeditiously and fairly and
 - (e) Allotting to it an appropriate share of the Court's resources.

The importance of compliance with time limits

[38] The CPR under part 26 allows for an extension of time to be granted even where time for compliance had passed. In this case, the applicants filed an application for extension within the period for filing a Defence. I find that the 4th Defendant complied with the CPR requirements, in so far as it relates to the filing of the Acknowledgment of Service and the Defence, given the circumstances of the 4th Defendant.

In particular, where prejudice is alleged, the comparative resources of the parties

[39] There was an indication to the Court that there was prejudice to the Claimant, in allowing this application. I do not share that view. On the contrary, if the Default Judgment is entered, the 4th Defendant would be severely prejudiced since there are issues to be tried.

[40] Therefore based on the above considerations I make the following orders:

1. Permission to enter Default Judgment against the 4th Defendant in Default of Defence is refused.
2. The Defence filed by the 4th Defendant on July 18, 2016 and served on July 19, 2016 is permitted to stand.
3. Parties to proceed to Mediation on or before July 13, 2018.
4. Case Management Conference is set for September 26, 2018 at 10:00a.m. for ½ hour.
5. Trial is set for three (3) days on November 8-10, 2021.
6. Costs of this application to the Claimant to be agreed or taxed.
7. The Claimant's Attorney-at-Law to prepare file and serve the Order made herein.
8. Leave to appeal refused.