[2022] JMSC Civ 201

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV04694

BETWEEN	**MARSHA FOSTER**	**CLAIMANT**
AND	**ADRIAN PRINGLE**	**1ST DEFENDANT**
AND	**SONIA PRINGLE**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Renee Freemantle instructed by Yushaine Morgan & Company for the Respondent/Claimant.

Ms. Marsha Freemantle instructed by Nigel Jones and Company for the Applicant/Defendant

Heard: October 13, 2022 and November 11, 2022

Application for Leave to Appeal- Real Chance of success, accord and satisfaction, unavoidable accident.

O. SMITH, J (AG)

[1] This is an Application for leave to appeal orders made in this Court on July 25, 2022. On August 4, 2022 the Applicants/Defendants, Adrian Pringle and Sonia Pringle filed a Notice of Application for Leave to Appeal. The main grounds on which they rely are:

1. Section 11 (1) (f) of the Judicature (Appellate Jurisdiction) Act
2. that the learned judge erred in failing to find that the claim is based on the same factual allegations covered by the agreement and failed to consider the law in relation to matters that re settled.
3. That the learned judge erred as a matter of fact and/or law and/or wrongly exercised her discretion in refusing to accept the Defendants'/Respondents position that the claim was settled as there was an agreement between the parties and it constitutes a bar to future proceedings or the continuation of the existing proceeding as there was accord and satisfaction according to the case of ***Alcan Jamaica Co. v Delroy Austin*** SCCA 106/2002

BACKGROUND

[2] On November 27, 2019, the Claimant, Marsha Foster, by way of Claim Form and Particulars of Claim claimed damages for negligence arising out of a motor vehicle accident that occurred on May 14, 2014. At the time of the accident Ms. Foster was a passenger in a motor vehicle. The 1st Defendant, Adrian Pringle, was the driver of the other motor vehicle which was owned by the 2nd defendant, Sonia Pringle.

[3] A defence was filed on January 30, 2020. In that defence the defendants assert that by letter dated February 22, 2019 their attorneys made an offer to settle to Claimant's attorney who also by letter dated February 22, 2019 accepted the offer. As such the claim was settled in the sum of $1M.

[4] On December 2, 2021, the Claimant filed a Notice of Application for Court Orders (NOA) seeking summary judgment against the Defendants or in the alternative that the Defendant's Defence, filed on January 30, 2020 be struck out.

[5] The application was made pursuant to Rules 15.2 (b), 26.3 (1)(c) of the Civil Procedure Rules, 2002 as amended. (CPR). An Amended Notice of Application for Court Orders (ANOA) was filed on behalf of the Claimant on July 8, 2022. They

inserted another paragraph seeking in the alternative “that paragraphs 4 to 8 of the Defendants’/Respondents’ Defence filed on 30th January 2020 be struck out.” In response to the ANOA the 1st defendant filed an affidavit on July 15, 2022.

[6] The application currently before the court cannot be properly considered without examining the evidence that was put before the court on July 25, 2022.

Affidavits of Ms. Foster in support of NOA

[7] Ms. Foster deposed to two affidavits in support of the NOA and ANOA filed on December 2, 2021 and July 8, 2022 respectively.

[8] In the December 2021 Affidavit Ms. Foster detailed her injuries resulting from the accident on May 29, 2014. More pertinent to this application, Ms. Foster indicated that she was aware that her then attorney, Mr. Keith Jarrett, by letter dated June 5, 2014, commenced negotiations with the Defendants’ insurance company. The insurance company in turn instructed Nigel Jones & Company to negotiate. During the negotiations Mr. Jarrett was informed that there was $400,000.00 remaining on the Defendants’ policy. An offer of $1M was made in full and final settlement, inclusive of the $400,000.00. Based on the advice of her attorney she formed the view that the sum was far less than she was entitled to given her injuries and as a consequence she instructed her attorney that she would accept the $400,000.00 remaining on the insurance policy as a partial settlement.

[9] In furtherance of this she signed the “Partial Third Party Release and Discharge”. She is adamant that she did not instruct her attorney to accept the offer of settlement in the letter dated February 22, 2019. Consequently, in October 2019 she retained an attorney to commence a claim for damages against the defendants.

[10] She also deposed that contrary to what the Defendants averred in their affidavit, in all the circumstances, on the night of the accident, the 1st Defendant had been

driving at too fast a speed and consequently failed to maintain control over the vehicle.

[11] In the July 2022 affidavit she went further to state that she signed no other release and discharge in relation to any other sums. However, she confirmed that her attorney received the sum of $400,000.00 from which he deducted his fees. She has not received any money from the Defendants.

[12] She further stated that there is no contract between the parties to settle the claim nor to state that the sum of $400,000.00 was paid as a partial settlement with the remainder to be paid in full and final settlement.

Affidavit of Adrian Pringle in Response to NOA

[13] In his affidavit filed on July 15, 2022, Mr. Pringle among other things, denied that he drove and or operated his motor vehicle in a negligent manner so as to cause it to collide with the vehicle in which the Claimant was a passenger.

[14] He asserts that he is aware that his attorney wrote to the Claimants' Attorney proposing to settle the matter in the sum of $1M. This sum included $400,000.00, which was the amount remaining on his policy. That on February 22, 2019, the Claimant's Attorney accepted this offer in a full settlement of the matter, as a consequence of which his insurance company prepared a Release and Discharge dated June 26, 2019.

[15] He further states that on the day of the accident it was drizzling and at the material time he was driving at a safe speed as the road was wet. However, the left side of the road on which he was travelling also had deposits of gravel and there were no street lights. As he approached the corner his car lost control and he ended up in the path of the car in which the Claimant was a passenger. He did all he could to prevent the accident by driving at a safe speed and by keeping a proper look out. In the circumstances, the accident was unavoidable.

[16] He ended by saying that in filing the claim, the Claimant has breached the agreement. As such he believes that he has a real prospect of success and as a consequence the Claimant's statement of case should be struck out.

[17] The written submissions filed in support of and in objection to the Application for Summary Judgment were substantially relied on for the Notice of Application for Leave to Appeal.

Submissions on behalf of Ms. Foster

[18] The claimant submitted that the Defence as pleaded has no reasonable prospect of success and or discloses no reasonable grounds for defending the claim. In addition to relying on Rules 15.2 (b) and 26.3 (1) (c) it was submitted that "taken at its highest the Defence does not satisfy the requirements of the defence of accord and satisfaction". They relied on the definition of accord and satisfaction as expressed in the judgment of Smith JA, in ***Alcan Jamaican Company v Delroy Austin & Another*** SCCA No. 106/2002.

[19] They submitted that the pleadings as filed by the Defendants show no agreement between the parties and no acceptance. Counsel stated that the issue of whether there is accord and satisfaction is a question of fact that is determined on an examination of the construction of the terms of the alleged agreement. As there is no executed agreement the court must examine the correspondence between the parties. Further, any document must be construed in accordance with the intention of the parties as articulated in the agreement. Reliance was placed on the cases of ***British Russian Gazette and Trade Outlook Ltd. V Associated Newspaper Ltd*** [1993] 2 KB 616 and ***Spanish Town Funeral Home Ltd. V Elaine Dotting*** SCCA No. 49 of 2007.

[20] Counsel pointed out that there was no dispute between the parties that there were negotiations between the Claimant's Attorney and the insurance company in an effort to arrive at settlement. In pursuance of those negotiations the letter of February 22, 2019 was sent to the Claimant's Attorneys from the attorneys

representing the insurers. Based on the words "we now await your response so that a Release and Discharge can be prepared". They argue that even if the Claimant had responded indicating that they accepted the offer this would not have released the Defendants from liability as this would be consequent on the signing of a release and discharge. Even if the Court found that the letter was sent, based on the principles espoused in ***Alcan Jamaica*** and based on the construction of the letters they did not rise to level of accord and satisfaction.

[21] They argued that Ms. Foster did not authorise her attorney to accept the offer in full and final settlement but rather that she would accept the $400,000.00 from the insurers as a partial settlement and this is borne out by the fact that she only signed a Partial Release and Discharge. The Partial Release and Discharge itself stated that it only released the insurance company from liability.

[22] Finally, they argued that it is quite telling that the defendants did not pay to the Claimant the sum of $600,000.00. This is also indicative of the fact that there was no accord and satisfaction. They went further and submitted that the alleged settlement is not binding as there was no valuable consideration.

[23] As it relates to the defence of unavoidable accident it was submitted on behalf of Ms. Foster that the pleadings do not satisfy the requirements and are insufficient to substantiate the defence of unavoidable accident. They relied on the case of ***Miriam Barrett v Frederick Truman*** Claim No.2014 HCV 01045, ***Lloyd Wisdom v Janet Johnson*** Suit No. C.L.1996/W-240 and ***Bolton v Henry*** et al {2012] JMSC Civ. 25.

[24] There is no dispute between the parties in relation to how the vehicles were travelling along the road on the night of the accident or that it was the 1st Defendants' vehicle that left its side of the road and collided into the car in which the Claimant was a passenger. However, the Defendants aver that the vehicle lost control when they rode over gravel on the wet road surface. In order to mount a successful defence, it was submitted that the Defendants have to demonstrate

whether the failed actions or precautions taken to prevent or avoid the accident were reasonable in the circumstances of the case. The pleadings of the Defendants, counsel concluded, do disclosure any measures taken to avoid the accident.

Submissions on behalf of the Pringles

[25] The submissions on behalf of the Defendants, for the most part, focused on what they described as the settlement. It reiterated the affidavit of Mr. Pringle and contended that the parties arrived at a settlement in the amount of $1M inclusive of the $400,000.00 paid out by the insurance company. In support of the submissions they relied on Rule 15.2 (1) (a) and (b), Rule 15.6 (1) (b), (c) of the CPR. They also relied on the authorities of ***Fiesta Jamaica Ltd. v National Water Commission*** [2010] JMCA Civ 4, ***Three Rivers District Council v Governor and Company of the Bank of England (No. 3)*** [2001] UKHL 16, ***Bolton Pharmaceutical Co. 100 Ltd v Doncaster Pharmaceuticals Group Ltd and Other*****s** [2006] EWCA Civ 661*,* ***Everoy Chin v Silver Star Motors Limited*** [2021] JMCC COMM 31, ***Alcan Jamaica Company*** and ***Florette Dan v Gladstone Bell and Sandra Bell-Prussia*** 2003HCV02063.

[26] Having considered the evidence and the submissions made on behalf of the parties the Court in the circumstances found that there was no accord and satisfaction and that based on the Defence as pleaded, the Defendants did not have a real prospect of successfully defending the claim. The following orders were made:

> *"1. The Amended Notice of Application for Court Orders filed on 8th of July, 2022 is granted.*
>
> *2. The Claimant is to file and serve an application for the Appointment of Expert Witnesses on or before the 30th of September 2022, to be heard at the Case Management Conference.*
>
> *3. Any objection or response to the application is to be filed and served on or before the 17th of October, 2022.*

4. Case Management Conference if fixed for the 12th of January 2023 at 11:30am for half an hour.

5. Assessment of Damages hearing is fixed for April 18, 2023, in open court before Judge alone for one day.

6.Costs of this application is to be costs in the Claim...".

Further Submissions on behalf of the Applicant/Defendant in support of Application for Leave to Appeal.

[27] Pursuant to Rule 1.8 of the Court of Appeal rules 2002, permission to appeal in civil cases will only be given if the court considers that an appeal will have a real chance of success. They relied on the case of ***Donovan Foote v Capital and Credit Merchant Bank Limited and Another*** [2012] JMCA App 14 in which the Honorable Mr. Justice of Appeal Morrison, as he then was, indicated that paragraph 40 that,

> *"[40] This court has on more than one occasion accepted that the words "a real chance of success" are to be interpreted to mean that the applicant for leave most show that, in the language of Lord Woolf MR in Swain v Hillman (at page 92), 'there is a realistic' as opposed to a fanciful prospect of success'. Although in that case Lord Woolf MR was speaking in the context of an application for summary judgment…this formulation has been held by this court to be equally applicable to rule 1.8(9)…*
>
> *[41] I therefore accept that, in order for leave to appeal to be granted in this case, the applicant must show but he has a real, and not a fanciful or unrealistic chance of success in the proposed appeal."*

Whether the Learned Judge erred in finding that there was no agreement between the parties.

[28] They relied, in the main, on the submissions filed in response to the application for summary judgment and highlighted the accepted fact that the parties had entered into negotiations with a view to settling the claim. Pursuant to the negotiations, the letter of February 20, 2019 was sent to Mr. Keith Jarrett who, they argue, responded by letter on the same day and expressed a willingness to accept the offer. This, they submitted is evidence that the parties arrived at a settlement

agreement and as such a contract was formed. The February 2022 letters as such demonstrated that there was an offer, an acceptance and an intention to create legal relations. See ***Cordell Green v Kingsley Stewart*** [2014] JMSC Civ. 26.

[29] They submitted that the defendants acted upon their agreement through the preparation of the release and discharge in the amount of $400,000.00 by their insurance company, Advantage General Insurance and that this release and discharge was executed by the Claimant. They argued, that in her July 8, 2022 affidavit, the Claimant admitted that her attorney had received the $400,000.00 from the insurance company but stated that she had not received any sums from the defendant. This they posited demonstrated that the Claimant acknowledged that there was an agreement and anticipated receiving the payment of $600,000.00 as the balance.

Whether the learned judge erred in not finding that their agreement constituted a bar to the claimant bringing a claim on the original cause of action.

[30] In light of their submissions that an agreement to settle had been reached, the Applicants/Defendants argued that it acted as a bar to the current proceedings. They relied on the case of ***Hubble Limited v Bank of Nova Scotia Jamaica Limited*** [2022] JMCC Comm 22, paragraph 15 in which Justice Cresencia Brown Beckford stated that:

> "When there is accord and satisfaction, the promissor is discharged from his original obligation. If the promissor fails to carry out his promise, he can be sued for breach of the promise, but he cannot be sued on their original obligation, as it has been discharged."

[31] They also relied on Simmons J (Ag) as she then was, in ***Florette Dan*** where at paragraph 36 she indicated that "the existence of a settlement agreement and a signed release are sufficient to satisfy the requirement that the defence has a real prospect of success…" As such the current action is in breach of accord and satisfaction.

Whether the Learned Judge erred in resolving the question of liability in which there is a triable issue as it relates to the defence of inevitable accident.

[32] They relied on the definition of inevitable accident adopted by Campbell J in ***Adassa Bolton v Maizie Henry et al*** [2012] JMSC Civ. 25 that an inevitable accident "… is an accident that is not avoidable by any such precautions as a reasonable man, doing such an act then and there could be expected to take".

[33] Counsel was of the view that in order for a trial judge to find that the Defence of inevitable accident was not available, the Judge must find that the Defendant was not driving at a safe speed; that the Defendant did not properly negotiate the corner and that the gravel and wet road were not the cause of the accident. As such these were matters that ought to be dealt with at the trial. See ***Melrose Finance Company Incorporated v Miguel Sutherland et al*** [2022] JSMC Civ 111.

Further Submissions on behalf of the Respondent/Claimant in support of Application for Leave to Appeal.

[34] The Respondent/Claimant also relied on the interpretation of real chance of success when considering an appeal as espoused by Morrison J in ***Donovan Foote.***

[35] They also relied on the submissions made in relation to the application for Summary Judgment. They are set out above.

ISSUES

[36] Having examined the issues highlighted by both parties I believe that the following issues will determine the application at hand:

1. Whether or not the case of the Respondent/Defendants has a real chance of success?
2. Whether the Learned Judge erred in finding that there was no agreement/accord and satisfaction between the parties.

3. Whether the defendants can rely on the defence of unavoidable accident.

[37] On my assessment, the answer to issue one will be seen in the resolution of issues 2 and 3.

Whether or not the case of the Respondent/Defendant has a real chance of success?

The Law

[38] I found it necessary to address this issue as the application before the court on July 25, 2022 was an application for Summary judgment. Moreover, the principles applied in determining whether or not the Defendants have a real prospect of success are similar to those considered in determining whether an appeal has a real chance of success.

[39] It is now accepted, without the need for explanation, that an application for summary judgment is an interlocutory application. Consequently, it is governed by section 11 (1)(f) of the Judicature (Appellate Jurisdiction) Act. It provides that there can be no appeal from an interlocutory judgment or interlocutory order without the leave of a Judge or the Court of Appeal.

[40] Rule 1.8 of the Supreme Court of Jamaica Court of Appeal Rules 2002, The Rules sets out how a party obtains permission to appeal. According to Rule 1.8(1),

> *"Where an appeal may be made only with the permission of the Supreme Court or the Court of Appeal, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought".*

[41] Rule 1.8 (9) speaks specifically, to how the court treats with civil appeals. It states that,

> *"the general rule is that permission to appeal in civil cases will only be given if the court below considers that an appeal will have a real chance of success".*

[42] The meaning of real prospect/chance of success has been explained in several cases most notably ***Swain v Hillman*** in which Lord Woolf said, "the words real prospect of succeeding…directs the court to the need to see whether there is realistic as opposed to a fanciful prospect of success".

[43] The cases in relation to the definition of real prospect of success have made it clear that the words mean 'realistic as opposed to fanciful'. Counsel for the Defendant used ***Fiesta Jamaica*** and ***Three Rivers*** in that regard. They also relied on the case of ***Bolton Pharmaceutical****,* in which Lord Justice Mummery in summarising the decision of the court said,

> *"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 specialized 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 cases, particularly where there were conflicts of facts on relevant issues which had to be resolved before 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 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 at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add or alter the evidence available to a trial judge and so affect the outcome of the case."*

[44] In ***Three Rivers*** at paragraph 95 of the judgment, Lord Hope of Craighead also said;

> *"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 factual basis for the claim is fanciful because it is entirely without substance. "*

[45] In ***Gordon Stewart et al v Merrick Samuels*** SCCA no. 2/2005, Harrison JA, at page 94 stated:

"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning".

[46] Finally, in ***Donovan Foote v Capital and Credit Merchant Bank Limited and Another*** [2012] JMCA App 14, the Honorable Mr. Justice of Appeal Morrison, as he then was, indicated that paragraph 40 that,

"[40] This court has on more than one occasion accepted that the words "a real chance of success" are to be interpreted to mean that the applicant for leave most show that, in the language of Lord Woolf MR in Swain v Hillman (at page 92), 'there is a realistic' as opposed to a fanciful prospect of success'. Although in that case Lord Woolf MR was speaking in the context of an application for summary judgment…this formulation has been held by this court to be equally applicable to rule 1.8(9)…

[41] I therefore accept that, in order for leave to appeal to be granted in this case, the applicant must show but he has a real, and not a fanciful or unrealistic chance of success in the proposed appeal."

[47] I bear in mind that in carrying out this assessment the court should not embark on a mini-trial. The accepted principle of civil law is that he who asserts must prove. This rule also applies to interlocutory applications. The Claimant must therefore satisfy the court that there is no substance to the Defendants' case. The Defendants must in turn show that their case is more than fanciful and has a realistic prospect of success. In order to make this determination, an assessment of the issues in the case in necessary. I have attempted to do this below. See ***Miriam Truman.***

Whether the Learned Judge erred in finding that there was no agreement/accord and satisfaction between the parties.

The Law

[48] The case of ***Alcan*** has been relied on by both parties as correctly outlining the law of Accord and Satisfaction. In that case Smith JA, having consulted the text, **Clerk**

& Lindsell on Torts 17th edition (30-06 pg. 1559) on page 8 of his judgment stated;

> *"Any man who has a cause of action against another may agree with him to accept in substitution for his legal remedy any consideration. The agreement by which the obligation is discharged is called Accord and the consideration which makes the agreement binding is called Satisfaction…Thus Accord and Satisfaction is the purchase of a release from an obligation arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself.*
>
> *When the satisfaction agreed upon has been performed and accepted, the original action is discharged and the Accord and Satisfaction constitute a complete defence* to any further proceedings upon that right of action."

[49] The case of ***British Russian Gazette*** offers guidance on how the document in question must be construed by the court. In his judgment Scrutton L.J. stated;

> *"The document constituting the agreement as to an accord and satisfaction is to be construed in accordance with the intention all the parties as expressed in it, and if there is doubt, as Parke B says in one of the cases cited, the construction which makes it effective to carry out that intention prevails."*

Once the Court finds that there has been an Accord and Satisfaction then the promisor is released and is no longer liable on the original obligation. If, he however, breaches the agreement the only recourse open to the promisee is to sue. Gilbert Kodilinye and Maria Kodilinye, ***Commonwealth Caribbean Contract Law*** page 242 and **Cordell Green.**

[50] In ***Hubble Limited***, a case relied on by the Claimants, Brown-Beckford, J referenced a quotation in ***Foskett, The Law and Practice of Compromise 7th Ed*** which summarized the salient law pertaining to Accord and Satisfaction:

> *"1) The evidence must show that a definite offer has been made to settle on a "full and final" basis. Without this, no question of an equivalent acceptance on that basis can arise.*

2) An objective construction must be placed on the material events. The presentation for payment of a cheque tendered "in full and final settlement" of a dispute, without demur or qualification, will be taken as an objective manifestation of an intention to accept the offer of settlement thus made.

3) The manifestation of an intention not to accept the proceeds other than as part payment may negate the inference of acceptance, but a significant delay between the receipt of and/or the payment in of the cheque and the subsequent manifestation of such an intention will give rise to the inference of acceptance.

4) As noted above, from Stour Valley Builders, it would be artificial to draw a hard and fast line between cases where the payment is accompanied by immediate rejection of the offer and cases where objection comes within a day or a few days."

Analysis

[51] In applying the principles distilled from the foregoing cases it is necessary to examine the February 22, 2019 correspondence and the Partial Release and Discharge. The letter from Nigel Jones and Company states specifically,

"Our clients final offer is JMD $1,000,000 inclusive of the JMD $400,000 remaining on their insurance policy as full and the final settlement of this claim.

We now await receipt of your response, so that our release and discharge can be prepared."

[52] There is no doubt that an offer was made nor is it being disputed that an offer was made. What is in dispute is whether Ms. Foster accepted the offer in full and final settlement of the matter. Counsel for the Claimant is further arguing that the letter on which the Applicants/Defendants are relying is unsigned as such its genesis is unknown as it has no cover email and as such cannot be proof of acceptance. Further, it is argued that Ms. Foster did not instruct her attorney to accept any such offer. I believe I will answer the question of whether or not the letter can be considered as an acceptance first.

[53] The letter purporting to come from Attorney-at-Law, Keith Jarrett is short. It states;

"My client is willing to accept your offer of One Million Dollars as full settlement of this matter.

I await your earliest response."

[54] From all indications there was no response from Nigel Jones and Company to this February 22, 2019 letter. If the letter is to be construed in terms of the intention of the parties, then on my reading of the letter, it seems to indicate that Mr. Jarrett was waiting to hear from the Defendant's Attorneys, he was expecting something more. For example, there is nothing said about when the sum was to be paid, how it was to be paid or to whom. Therefore, as I see, it whatever offer was made by the Defendant's Attorney and the subsequent expression of a willingness to accept from the Claimant's Attorney were both dependent on something more happening in the future. (See ***Cordell Green*)** Until that was done, it is my view that no contract existed between the parties. There is no evidence that that something more was done. Up to the date of the filing of the Claim in November 2019, some nine months later, it is quite apparent that no follow up letter was sent to Mr. Jarrett by the Defendants' Attorney. Neither did the Defendants make any effort to pay over the remaining amount. No such evidence has been presented. I go further, the Claimants' Attorney did not receive a Release and Discharge in relation to any sums other than the $400,000.00. This, on the letter from Nigel Jones and Company signalled the finality of the agreement.

[55] The second February 2019 letter could not therefore represent an acceptance without demur or qualification as it was awaiting something else before any acceptance could be concretized.

[56] On the other hand, the claimant denies instructing her attorney to accept the offer. What she accepted was the $400,000.00 remaining on the Defendant's insurance, thereby releasing the Insurance Company from liability. The Partial Release and Discharge, the Claimant's Attorney argued, is proof of this. The document specifically states that the payment of the $400,000.00 releases Advantage General Insurance Company Limited "from all claims and demands whatsoever arising directly or indirectly out of said accident". More importantly, the penultimate paragraph of the Partial Release and Discharge states that acceptance of the

$400,000.00 in “no way prejudices the ongoing suits against the insured Sonia Ruth Pringle AND Adrian Kevaun Pringle.” So the very document which the Applicants/Defendants is saying is evidence that there was a contract between the parties does not recognise the alleged February 22, 2019 agreement. In fact, it is described as a Partial Release and Discharge and specifically preserves the right of Ms. Foster to pursue any and all ongoing suits. Albeit, at the time there was none. I also take note that neither the Defendants or their attorneys were signatories to the Partial Release and Discharge. This supports Ms. Fosters contention that they were not a party to this agreement.

[57] In addition, in the first February 22, 2019 letter, the Defendant’s Attorneys stated that they were awaiting a response from the Claimant’s Attorney so that they could prepare a release and discharge. No such release and discharge was prepared, this, in my mind, is demonstrative of the fact that there was no agreement between the parties.

[58] The Defendants submitted that Ms. Foster’s July 2022 Affidavit is proof that she was aware that there was an agreement between the parties. However, I do not agree with that assessment of her affidavit. On the contrary, I find that she was reiterating that her only agreement was for the $400,000.00 which was paid by the Insurance Company and any mention of not receiving money from the Defendants was in an attempt to underscore the fact that there was no agreement.

[59] In the circumstances of both the February 22 letters, was there a breach when what I consider to be very important terms, had not been agreed on? To this I say no. In **Green v Stewart** Edwards J at Paragraph 26 said,

> *“Public policy dictates that men of full age and capacity, advised by learned counsel should be left to contract freely and on such terms as they devise and that such contracts should be held sacred and be enforced by the courts. But where the elements of a binding contract do not exist there is nothing to enforce. The settlement must embody a concluded agreement amounting to a contract between the parties.”*

In the circumstances an appeal would not have a real chance of success.

Whether or not the Defendants can rely on the defence of unavoidable accident.

[60] In ***Vinnett White v Sandra Brown and Paul Stephen Grey*** [2021] JMSC Civ. 151 Pettigrew-Collins J had to consider the defence of inevitable accident. In so doing, at paragraphs 19 - 21 she looked at the case of ***Administrator General for Jamaica (On behalf of the Near Relations and Dependents as Representative Claimant for the Estate of Mark Henry, Deceased) v Lloyd Lewis and Urline Lewis (also known and referred to as Eriene Lewis***, [2015] JMSC Civ. 116. I will quote the relevant paragraphs from her judgment in their entirety for ease of reference. In that case,

> *"F. Williams, J. examined the defence and its applicability to that particular case. He relied on the following excerpt from **Charlesworth & Percy on Negligence**, seventh ed. page 196 paragraph 3-84 to 3-85 "Generally, in an action, based on negligence, it is open to a defendant to establish that there was no negligence on his part, in which event he will then succeed in defeating the claim. Where the facts proved by the plaintiff raise a prima facie case of negligence against the defendant, the burden of proof is then thrown upon the defendant to establish facts, negativing his liability, and one way, in which he can do this is by proving inevitable accident.*
>
> *Meaning of inevitable accident. Inevitable accident is where a person does an act, which he lawfully may do, but causes damage, despite there having been neither negligence nor intention on his part."*

[61] In the case of ***The Schwan v The Albano*** [1892] P 419 Lord Esher stated

> *"What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence – that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill."*

Analysis

[62] The cases clearly establish that in response to a claim in negligence it is for the defendant to demonstrate that he was not negligent. In the case at bar the 1st Defendant received two opportunities to provide proof to support of his assertion

that the accident was unavoidable. Those opportunities being in his Defence and in his Affidavit in Response to the Notice of Application for Court Orders filed on behalf of the Claimant. It is this courts view, that it is not enough to state that evidence will be adduced at trial. The rules allow for applications of this nature to be made at this stage of the proceedings and as such the responding party is bound to present his case in such a manner that the court can make an informed determination. To do anything else would render the relevant provisions of the CPR irrelevant.

[63] I do not believe that this is a case that requires a debate on the ingredients needed to establish negligence. After all, there is no dispute that the Claimant was a passenger in a motor vehicle which was impacted by the vehicle being driven by the 1st Defendant as a result of which the Claimant sustained injuries.

[64] The Particulars of Claim state that the negligence of the 1st Defendant was the cause of the accident. The particulars of negligence are set out as follows:

1. Causing the said motor vehicle to collide into motor vehicle PG 2774
2. Driving in a dangerous and/reckless manner;
3. Driving without any sufficient consideration for other users of the road;
4. Driving too fast a rate of speed in all the circumstances
5. Failing to maintain sufficient control over the said motor vehicle
6. Failing to maintain sufficient control over the said vehicle
7. Failing to stop, slow down, turn aside or in any other way so as to avoid the accident."

[65] In specific response, Mr. Pringle has claimed unavoidable accident, in that, there was gravel on the road, the road was wet and there was no light. In those conditions he picked up a skid when he drove over the gravel thereby causing him to end up in the path of the vehicle in which the claimant was travelling. He has

therefore admitted that there was an accident with the motor vehicle in which the claimant was a passenger in circumstances where he has not alleged any fault on the part of the driver of the other vehicle.

[66] In his Supplemental Affidavit filed in response to the Notice of Application filed on July 15, 2022, Adrian Pringle avers that,

> *"… I did all that I could to prevent the accident by travelling at a safe speed, maintaining control over the vehicle and having kept a proper look out."*

Yet his evidence that he lost control of the vehicle while approaching the corner belies that assertion. Can the 1st Defendant reasonably argue that because the road was damp and had on gravel, that in exercising all reasonable care and skill, the accident was unavoidable? In my view, the fact that the road surface was wet, had on gravel and did not benefit from lights are conditions that demanded that the 1st Defendant take every precaution in manoeuvring his vehicle on the road. To state that he took every precaution is an androgynous statement that takes his case no further. Despite this, I will go further and state that it is unlikely that any one travelling at safe speed in all the circumstances outlined by the defence would have skidded.

[67] If I were to accept that those conditions rendered the accident inevitable then every such situation should lead to an accident. To prove that an accident was unavoidable, the defendant must indicate exactly what precautions he took to avoid the accident. He must also demonstrate that even if he had taken every reasonable precaution and exercised all reasonable skill and care, something outside of his control caused the accident.

[68] In ***The Albano*** the accident, occurred when the defendant who was on her correct side of the road, in an attempt to avoid a head-on collision with a motorist who, approaching from the opposite direction, overtook a line of traffic and was on her side of the road, swerved and struck the truck of the now-deceased. I have outlined the facts of ***The Albano*** to demonstrate the kind of scenario the Court had to contemplate. The situation outlined by the defence in the case at bar does not,

in my view, meet the high bar set. I take note of the fact that motorists in this country, on a regular basis, travel on our roads in similar, if not more severe, conditions without accident. Taken at its highest, even if the defendant proved all that he wanted to prove at trial, the defence of unavoidable accident would not be available to him. I have come to this conclusion well-aware that I have not heard any evidence.

[69] I make bold to say that this is exactly the scenario contemplated by the Rules. This is a Court of Pleadings; the Rules specifically provide that an application for summary judgment cannot be made before an Acknowledgment of Service has been filed. Rule 15.4 (2) goes further to state, that if a claimant applies for summary judgment before a defence is filed the time for filing a defence is extended until 14 days after the application has been heard. I believe subsection (2) was deliberately drafted in that fashion as a deterrent to reduce the likelihood of an application for summary judgment being made before a defence was filed. After all, how can one reasonably argue that a defence has no reasonable chance of succeeding without knowing what the defence is. A defence is the defendants answer to a claim, it should set out the material facts on which a defendant intends to base his case. As such the defence, similar to a Claim Form and Particulars, is a defendants' way of informing the Court and Plaintiff about their case to set the framework for how the court should proceed.

[70] The Applicants/Defendants as previously stated, did not include in their Defence or in the affidavit filed on their behalf in response to the Notice of Application filed by the Respondent /Claimant, any measures that were employed to prevent the accident. As stated previously, now is the time to outline those measures. A party who is dilatory in this regard may find at the end of the day, that his statement of case is struck out or that summary judgment is granted on an application from the other party, on the basis that their case has no real prospect of success.

[71] In the premises I do not believe that the Applicants/Defendants appeal has a real chance of success.

[72] The application for leave to appeal is denied. In the circumstances, orders 2 and 3 of the orders made on July 25, 2022 are amended as follows:

1. Time is extended for the Claimant to file a Notice of Application for Court Orders for the appointment of Expert witnesses on or before the November 26, 2022.
2. Any objection or response to the application filed on or before November 26, 2022 is to be filed on or before December 12, 2022.
3. Cost of this Application is to be cost in the claim.
4. The Applicants attorney is to prepare file and serve the orders herein.

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O. Smith J (Ag.)