[2013] JMSC Civ. 114

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2011 HCV 06643**

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|---|---|---|
| **BETWEEN** | **JEVENE THOMAS** | **CLAIMANT** |
| | **(An infant who sues** | |
| | **by his mother and next friend** | |
| | **ANNETTE INNERARITY)** | |
| **AND** | **MCINTOSH CONSTRUCTION** | **DEFENDANT** |
| | **COMPANY LIMITED** | |

**IN CHAMBERS**

**Dale Staple instructed by Kinghorn and Kinghorn for the claimant**

**Georgia Hamilton instructed by Georgia Hamilton & Co for the defendant**

**July 1 and 31, 2013**

**APPLICATION FOR WASTED COSTS ORDER AGAINST COUNSEL FOR CLAIMANT – RULES 64.13 AND 64.14 – PRINCIPLES GUIDING WASTE COSTS**

**SYKES J**

**[1]** Miss Georgia Hamilton has urged this court to make a wasted costs order against the claimant's attorney on the basis that the conduct of the claim was unreasonable and negligent to the extent that it forced the defendant to incur costs needlessly. She submitted that had the claimant's counsel gone about the prosecution of the claim appropriately, he would have discovered or realised that the wrong defendant was sued. Learned counsel further submitted that even after the error was discovered the claim was not discontinued.

**[2]** Miss Hamilton is claiming wasted costs from the time of service of the defence to the date of hearing of the defendant's application for summary judgment.

**[3]** Mr Dale Staple has valiantly resisted this application by submitting that while there was an unfortunate error in not discontinuing the claim against the defendant when the error was discovered, the circumstances are not so egregious as to attract a wasted costs order.

**The claim**

**[4]** On October 25, 2013, Mr Jevene Thomas filed claim against McIntosh Construction Company Limited '(MCCL'). He alleged that on March 1, 2011, he was lawfully crossing the Ewarton main road when a motor vehicle licensed 5119 FW struck him. It was alleged that this vehicle was owned by MCCL and driven by one of its employees. The particulars of claim spelt out the details of the alleged negligence. The claim is obviously relying on the rebuttable presumption that arises when a vehicle owned by a defendant was driven in negligent manner and caused damage to the claimant. The presumption is that at the material time the motor vehicle was

being driven by an employee or agent of the defendant in circumstances that were sufficiently closely connected with his employment so as to make it fair and just that the employer should be held vicariously liable.

**[5]** The defence was filed on January 12, 2012. The defence denied ownership of the motor vehicle. The defence went further to say that it had no dealings whatsoever with any vehicle bearing the registration plates indicated in Mr Thomas' pleadings.

**[6]** By January 19, 2012, MCCL moved from a defensive position to an all-out attack. It filed an application for summary judgment. It was supported by an affidavit of Mr Horace McIntosh Jnr, a director of MCCL. The affidavit says among other things that 'searches at the Collector of Taxes have revealed that registration plates bearing numbers and letters 5119 FW were assigned to Lorna Webley of 59 Fourth Street, Kingston 13 in the parish of St Andrew on the 15$^{th}$ day of December 2010.' However this application with supporting affidavit was not served until May 2013 because despite the efforts of counsel, including several visits to the court and written correspondence, it was not until May 1, 2013 that a hearing date was received. It would have been helpful if the defendant's counsel had passed on this information to the claimant's counsel at the earliest opportunity rather than wait for the summary judgment application to be heard. This would be consistent with the objectives of the new culture of litigation being fostered by the Civil Procedure Rules ('CPR'). The defendant's counsel has a duty (as does the claimant's counsel) to further the overriding objective and see to it that the court's resources are not expended on cases which have no prospect of success. It is not just the responsibility of the claimant's counsel to assist the court but if the defendant's counsel knows of some fact (taking account of legal professional privilege) that makes the claim unlikely to succeed then it would be brought to the attention of the other side at the earliest opportunity. The information uncovered here was not privileged information and could easily have been passed on. The defendant's counsel is not entirely blameless in what has happened. Active cooperation between counsel could have resolved this matter within weeks of the claim being filed.

**[7]** The summary judgment application and supporting affidavit were served on the claimant on May 2, 2013. It is this application that prompted the claimant to file a notice of discontinuance. The claimant filed a notice of discontinuance on May 15 and served it on the defendant on May 17, 2013. The response of the defendant was to file this application for a wasted costs order.

**[8]** The claimant's counsel wrote to the defendant's counsel by letter dated May 14, 2013 in the following terms:

> *We refer to the captioned matter and to your Application for Summary Judgment. Inadvertently a Notice of Discontinuance was not filed in this Claim. We have done so now as we have long filed suit against Ms. Lorna Webley and that matter is far advanced."*

**[9]** It is important to complete the narrative. In August 2012, the claimant asked the defendant to agree to mediation and to set a time for that to occur. The defendant refused. On November 12, 2012, the claimant commenced an action against Miss Lorna Webley, the owner of the registration plates 5119 FW.

**The legal principles**

**[10]**The legal foundation for the exercise of judicial power to make a wasted costs order is found in section 28E of the Judicature (Supreme Court) Act, specifically subsections (1), (4) and (5). The subsections read:

> *(1) Subject to the provisions of this or any other enactment and to the rules of court, the costs of and incidental to all civil proceedings in the Supreme Court shall be in the discretion of the court.*
>
> *(2) ..*
>
> *(3) ..*

*(4) In any proceedings mentioned in subsection (1), the Court may disallow, or (as the case may be) order the attorney-at-law concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.*

*(5) In subsection (4) "wasted costs" means any costs incurred by a party*

*(a) As a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of the attorney- at-law; or*

*(b) Which, in the light of any such act or omission occurring after they were incurred, the Court considers it is unreasonable to expect that party to pay.*

**[11]**This provision was added by an amendment in 2003. The legislation is the foundation on which the relevant rules of the CPR rest.

**[12]**The relevant rules of the CPR are found in rule 64.13 and 64.14. The rules state as follows:

*64.13 (1) In any proceedings the court may by order –*

*(a) disallow as against the attorney-at-law's client; and/or*

*(b) direct the attorney-at-law to pay, the whole or part of any wasted costs.*

*(2) "**Wasted costs**" means any costs incurred by a party –*

*(a) as a result of any improper, unreasonable or negligent*

*act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; or*

*(b) which, in the light of any act or omission occurring after they were incurred, the court*

*considers it unreasonable to expect that party to pay.*

*64.14 (1) This rule applies where - (a) an application is made for; or (b) the court is considering whether to make without an application, an order under rule 64.13(1).*

*(2) Any application by a party must –*

*(a) be on notice to the attorney-at-law against whom the wasted costs order is sought; and*

*(b) be supported by evidence on affidavit setting out the grounds on which the application is made.*

*(3) If the court is considering making such an order without an application it must give the attorney-at-law notice of the fact that it is minded to make such an order.*

*(4) A notice under paragraph (3) must state the grounds on which the court is minded to make the order.*

*(5) A notice under paragraph (2) or (3) must state a date, time and place at which the attorney- at-law may attend to show cause why a wasted costs order should not be made.*

*(6) 7 days' notice of the hearing must be given to the attorney-at-law against whom the wasted costs order is sought and all parties to the proceedings."*

**[13]**Rule 64.13 (1) empowers the court to make a wasted costs order against a litigant's attorney-at-law. Wasted costs are those costs which are incurred because an attorney-at-law or his employee has behaved improperly, unreasonably or negligently. The other part of the definition of wasted costs is not necessary for this case.

**[14]**Rule 64.14 (1) sets out the procedural requirements which are to be met depending on whether the application is made by counsel for the other party or the court. In this case, the application has been made by counsel for the defendant. No issue has been taken with the procedural steps.

**[15]**It is to be noted that section 28E (4) and (5) are virtually the same as rule 64.13 (1) and (3). The rule came into effect in 2002 but the enabling legislation was not passed until 2003.

**[16]**Section 28E of the Jamaican statute, with immaterial changes, is identical to section 51 (1), (6) and (7) of the Supreme Court Act, 1981, (UK). The English provision was interpreted by Court of Appeal of England and Wales in **Ridehalgh v Horsefield and another** [1994] 3 All ER 848. In particular the court had to decide the meaning of the words 'improper, unreasonable or negligent.' This court agrees with Sir Thomas Bingham MR's interpretation and adopts it.

**[17]**The Master of the Rolls stated the purpose of the provision at page 860:

*There can in our view be no room for doubt about the mischief against which these new provisions were aimed: this was the causing of loss and expense to litigants by the unjustifiable conduct of litigation by their*

*or the other side's lawyers. Where such conduct is shown, Parliament clearly intended to arm the courts with an effective remedy for the protection of those injured.*

**[18]** In the judgment his Lordship gave an indication of the meaning of the important words 'improper, unreasonable or negligent.' His Lordship held that 'improper' covers but was not confined to conduct which would justify disbarment, striking off, suspension from practice or other serious professional penalty (p 861). Unreasonable means conduct that was designed to harass the other side rather than advance the resolution of the case. Even if the harassment arose from 'excessive zeal' and not 'improper motive' it would still fall within the definition of unreasonable (pp 861 – 862). Negligent should be understood as failing to act with 'competence reasonably to be expected of ordinary members of the profession' (p 862). To succeed under this head the applicant would have to prove that the conduct was such that 'no member of the profession who was reasonably well-informed and competent would have given or done or omitted to' do what was done (p 862).

**[19]**Sir Thomas made the important observation that conduct is not unreasonable because it leads to an unsuccessful result or because more cautious counsel would have gone about the matter in another way (p 862). The critical question is whether the conduct permits of reasonable explanation. If it does, then counsel should receive the benefit of the doubt. Sir Thomas Bingham also indicated that the three heads should not be kept in water-tight compartments. There may well be overlap between the three.

**[20]**Mr Dale Staple reminded the court that the wasted costs jurisdiction of the court should not be the first port of call if the court forms the view that something has gone awry in the conduct of the case. Learned counsel submitted that mere error of judgment is not sufficient. For this he relied on Megarry J in **Mauroux v Sociedad Comercial Abel Pereira da Fonseca SARL** [1972] 2 All ER 1085. This court does not disagree with these submissions. They are readily acknowledged and it is the

view of the court that they are consistent with **Ridehalgh** and other cases such as **Harley v McDonald** [2001] 2 AC 678 PC.

**[21]**The Master of the Rolls emphasised that there must also be a causal link between the conduct complained of and the costs wasted. If the conduct is proved but there is no causal connection then the order should not be made. It may be a disciplinary matter but not one for a wasted costs order (p 866).

**[22]**The Master of the Rolls developed a three-question test to be applied when considering wasted costs applications. The three questions are:

a. has the attorney-at-law acted improperly, unreasonably or negligently?

b. if yes, did the conduct of the case cause the applicant or any other party unnecessary costs?

c. if yes, is it in all the circumstances just to make order?

**[23]**The learned Master of the Rolls did indicate that the hearing should be conducted without discovery and should be more in the nature of summary procedure without elaborate pleadings and such like. In a previous matter under this jurisdiction this court had said that two additional questions may be added (**Catherine Nerissa Gregory v Aubrey Erlington Gregory** Suit No. HCV 1930 of 2003 (unreported) (delivered July 23, 2004)). In that case the additional questions were:

a. whether the enquiry can be done without breaching legal professional privilege;

b. are the circumstances such that the facts necessary to establish the attorney's conduct has caused unnecessary expense to any party to the proceedings immediately and easily verifiable?

**[24]**The purpose of these additional questions is to ensure that the court considers carefully whether counsel in order to meet the charge is able to mount a fair defence without breaching legal professional privilege. Of course, if the accuser is counsel's client then it is taken that the client has waived legal professional privilege. If the accuser, as in this case, is opposing counsel, then the matter of legal professional privilege must be given careful consideration.

**[25]**The second question, on reflection, should be phrased differently. It should be, whether the enquiry can be conducted without significant additional expense for any of the litigants, counsel or other persons and are the facts easily verifiable. The wasted costs jurisdiction is not intended to be a major civil trial but a quick, efficient and fair enquiry into allegations suggesting that counsel has fallen significantly short of the expected mark and that the conduct has caused additional expenses that would not have been incurred had counsel met the standard of the reasonably well-informed and competent practitioner.

**The analysis**

**[26]**The court will proceed using the five questions. The last two questions will be answered first since the outcome may determine whether the court should proceed to examine the other three questions.

**Whether the enquiry be done without breaching legal professional privilege?**

**[27]**In this case, the answer is yes. The response to this application does not require counsel to seek permission of his client to use information subject to legal professional privilege. Mr Staple sought to suggest that any enquiry into why the claimant did not immediately discontinue the claim against the defendant necessarily involves disclosure of privileged information. The fact of the matter is that counsel for the claimant at some point knew that the wrong person was sued. To continue a claim knowing that the wrong person was sued is necessarily an abuse of the process of the court. If counsel knows he has sued the wrong person, then the client must be advised and action taken to rectify the situation.

**Whether the enquiry can be conducted without significant additional expense for any of the litigants, counsel or other parties and are the facts easily verifiable.**

**[28]**In the present case, the core facts are in the documents filed in court. From these facts reasonable inferences may be drawn. There is no need for any additional evidence and the basic facts are not in dispute. The enquiry can now proceed using the three questions suggested by Sir Thomas Bingham.

**Has the attorney-at-law acted improperly, unreasonably or negligently?**

**[29]**The evidence is that a collision took place between Mr Thomas and a motor vehicle. The claim was filed identifying the vehicle by registration number. In the absence of evidence showing otherwise, the reasonable inference is that counsel had instructions indicating that MCCL was indeed the owner of the vehicle involved in the collision.

**[30]**MCCL filed its defence. It denied being the owner of the vehicle and denied having anything to do with the vehicle. This was followed up by an application for summary judgment filed in January 2012.

**[31]**The claimant's pleadings did not seek to identify by name or any other means a specific person who was alleged to be the driver of the offending vehicle. This would suggest that counsel did not have those instructions. It is the absence of this specific information which explains why the fact of being owner of the registration plates assumed such great importance in this case. Whomever owned the plates, the theory would be, also owned the vehicle. The case theory of the claimant was based on presumption that the driver of the vehicle at the time of the collision was the employee or agent of the owner who in this case would be identified by way of ownership of the registration plates. The law permits the claimant to rely on the rebuttable inference that the driver of the vehicle was the employee or agent of the owner and was driving the vehicle in such a capacity at the time of the collision. On this premise the owner is held accountable by way of vicarious liability.

**[32]**In November 2012, the claimant began a new claim against Miss Lorna Webley the alleged owner of the registration plates. This suggests that at some point counsel for the claimant knew for certain that the wrong person was sued. In other words, the case against MCCL fell apart. The claim against MCCL was not discontinued when the error was discovered. It was not discontinued when the second claim was filed. Indeed, it was not discontinued until MCCL served its application for summary judgment May 2, 2013.

**[33]**This court understands quite well that counsel must act on instructions from the client. The court also appreciates that a robust denial from a defendant does not mean that the claimant discontinues the claim. However, if information comes to the knowledge of counsel that means that his claim against a defendant is sinking rapidly then he should not allow the claim to continue. He must act expeditiously to bring it to an end.

**[34]**The court was informed that it is now standard procedure for attorneys to check with the Collector of Taxes to see who is the owner of registration plates of any vehicle alleged to be involved in a collision. The information on who to sue was readily available and not costly or difficult to obtain. Regrettably this court has to conclude that the omission to check before the claim was filed and then failing to discontinue the claim when the checks confirmed the defendant's assertion is unfortunate. It has not been contended that counsel's conduct is improper or unreasonable in the sense of designed to harass the defendant. The remaining question is whether it could be described a negligent as explained by Sir Thomas Bingham.

**[35]**While each case is different, this court has looked closely at the facts in the cases dealt in **Ridehalgh** and an underlying theme that comes out is whether in all the circumstances of the particular cases the attorney's conduct could be described as negligent. In all the cases the wasted costs order was set aside. One of the factors that emerged from the cases in **Ridehalgh** was that in all the cases the conduct of counsel had a reasonable explanation. For example, in **Ridehalgh** the legislation

governing the tenancy in question was so complex that the judge at trial, after a trial and submissions, confessed openly that she did not understand the statute. Even very experienced members of the Court of Appeal concluded that the statute did not readily lend itself to paraphrasing – a polite way of saying that the statute was convoluted. Thus while counsel had made an error in law it was the kind of error that a reasonably well-informed and competent attorney could make. In **Allen v Unigate Dairies Ltd**, the claimant sought compensation for loss of hearing because of a noisy workplace. The claim failed and the trial judge made a wasted costs order against the claimant's lawyers. The order was set aside on the ground that the lawyers acted on their client's instructions and had obtained proper legal advice as well as sound expert advice. Additionally, there was nothing in the pleadings or any of the documents that showed foreshadowed the crucial fact relied on by the defence to resist the claim. In **Roberts v Coverite (Asphalters) Ltd**, a solicitor was found not to be negligent because he failed to act in accordance with the statute governing legal aid. What he did was in fact the practice of other solicitors although it was not in accordance with the statute. In **Philex plc v Golban**, a crucial fact in setting aside the wasted costs order was the fact that the solicitors were acting on the advice of counsel. In **Watson v Watson**, a wife found out that the point which she pursued, having received legal advice on the issue, had no merit. The sin of the solicitor was said to be failing to respond adequately to a point raised by the other side which, as it turned out, was determinative of the matter against the wife. The Court of Appeal was able to find that 'the conduct of the wife's solicitor in regard to the answering of the letter, we regard it as conduct which, although undeserving of praise, does nevertheless permit of a reasonable explanation' (p 890). The second basis for setting aside the order was that there no causal connection between the solicitor's conduct and the costs wasted. Finally, in **Antonelli and others v Wade Gery Farr (a firm),** a barrister was exonerated by the Court of Appeal because the trial judge failed to take account of the cab-rank rule applicable to barristers. The judge also failed to take into account that the barrister could not have known how inadequate her instructions would be at the time she accepted the brief.

**[36]**All these cases reviewed by the Master of the Rolls in **Ridehalgh** show how fact-sensitive each case is and how careful the judge must be before acceding to a wasted costs application.

**[37]**It is the view of this court that continuing the claim when it was known that the wrong person was sued is not mere oversight. One of the first principles of civil procedure is that the correct person to be sued is to be identified. The circumstances here were not particularly difficult. It did not involve a complex area of law substantively, procedurally or evidentially. The negligence in this case is not the initial claim against MCCL. The negligence is continuing the claim after knowing that the wrong person had been sued. It is difficult to see what reasonable explanation could be advanced for this occurrence.

**[38]**There is a direct causal connection between counsel's acts and the costs imposed on MCCL. It was forced to defend a claim that had no factual foundation. It was forced to take steps to rid itself of the claim. Even after the claimant's attorney became aware of the error (the precise date or approximate time period is not stated), he did nothing to correct until he was served with the striking out application.

**[39]**The defendant's refusal to attend mediation changes nothing. That would have involved additional costs.

**[40]**The court concludes that a wasted costs order should be made. The court has decided (somewhat arbitrarily) to use November 1, 2012 as the date when counsel had information that the wrong person was sued. The date the claim against Mrs Lorna Webley was filed is November 13, 2012. The notice of discontinuance was filed on May 15, 2013 and served two days later on MCCL.

**Disposition**

**[41]**The orders of the court are:

a. Wasted order made against counsel for the claimant for the period November 1, 2012 to May 17, 2013.

b. Costs against the claimant up to October 31, 2012.

c. Costs of wasted costs application to defendant.

d. All costs to be agreed or taxed.

e. Counsel for defendant to prepare, file and serve order.