IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Civil) Appeal No. 12 of 2022
(G0189 of 2013)

VIRGELINA HAWKINS

Proposed Appellant

AND

HECTOR ACOSTA

AND

PROGRESSIVE DISTRIBUTORS LTD.

Proposed Respondents

Before: **The Rt Hon Sir John Goldring, President**
The Hon Sir Richard Field, Justice of Appeal
The Hon C. Dennis Morrison, Justice of Appeal

Counsel: **Mr. Rupert Wheeler of KSG for Proposed Appellant**
Ms. Natasha Partos of Campbells for Proposed Respondents

CERTIFICATE OF ORDER OF THE COURT

UPON the application of the Proposed Appellant filed on 14th June 2022 for leave to appeal out of time

AND UPON the matter coming on for hearing on 26th April 2023 before the full court

AND UPON hearing from Counsel for the Proposed Appellant

IT IS HEREBY ORDERED THAT for the reasons set out in the attached judgment, the application for leave to appeal out of time is refused.

Given under my hand and the Seal of the Court this 14th day of July 2023

JBSimpson

Jenesha Simpson
Registrar, Court of Appeal

JUDGMENT

The Rt Hon Sir John Goldring, President

Introduction

1. On 26 April 2023 following oral submissions, the court refused the applicant's application seeking leave out of time to appeal the order of McMillan J of 12 May 2020 striking out her claim. This judgment sets out the reasons.

2. On 12 June 2010 the applicant was injured in a motor accident. Following two 'unless orders' her claim for damages for personal injury and loss of earnings was on 12 May 2020 struck out by Justice McMillan sitting in the Grand Court. On 9 June 2022 the applicant filed a notice of appeal seeking to overturn that judgment and have her claim re-instated. On 14 June 2022 she filed a summons seeking an extension in which to appeal the order. It is that application for an extension with which the court is concerned.

3. As will quickly become apparent, the history of this case makes unhappy reading.

The background

4. To keep this judgment within bounds, I shall only refer to more significant matters within the chronology of events. More detail is set out in the first affidavit of Mr Hendrikse, the attorney who acted on behalf of the respondents during the proceedings.

5. On 11 June 2013 (the day before the expiry of the limitation period), the writ was filed by the applicant's then attorneys, Broadhurst LLC. On 15 August 2013 the Statement of Claim was served. Although it claimed special damages, the Statement of Claim said nothing about loss of earnings. On 16 September 2013 the respondent admitted liability. On 20 May 2015 there was a consent order by which, among other things, the applicant was to provide a schedule of past and future losses. On 6 July 2016 the applicant filed a notice of change of attorney from Broadhurst to McKinney Reid and Company. On 7 July 2015 the applicant served her list of documents for discovery.

6. On 1 September 2015 the respondents issued their first unless order summons. The applicant had failed to serve her witness statement and medical evidence as required by the consent order. In the event, the documents were served before the summons was due to be heard.

7. Little appears to have happened as far as progressing the action between 29 November 2015, when the applicant filed and served her medical evidence, and 12 January 2017. On that date Campbells, the respondents' attorneys, advised Ms Reid that if within 7 days she did not contact

them, they were instructed to have the claim struck out. In her response, Ms Reid referred, among other "*factors*," to difficulties with Legal Aid for the applicant. She suggested the matter could be listed for trial.

8. In October 2018 the applicant was medically examined on behalf of the respondents.

9. The case was listed for trial for 11-13 December 2019.

The first unless order

10. On 12 November 2011, before the proceedings had begun, the applicant had provided to the respondents a report from Mr RA Thomas, a chartered professional and certified management accountant, who had for several years prepared the financial statements for Cayman Shoe Ltd, the company which the applicant and her husband (until their separation) operated. His report covered the years 2007-2011. In a statement dated "*November 2019*," Mr Thomas said he was not able to locate for the purposes of the letter of 12 November 2011 all the documents which enabled him to complete the financial statements. However, he had attached some of the financial statements to his report, although they apparently were not forwarded with the report to the respondent. In his witness statement, Mr Thomas said the financial statements were based on "*financial records of the company such as Point of Sale tapes, cash payment records, bank deposits and daily summaries, expenditures and many other documents and information. I used standard accounting evidence methods and analysis to complete each year's financial statement…Based on my analysis, the business did well for many years, but was in decline leading up to 2015 when all stores were closed. It was obvious to me that the business was run as a "Mom and Pop*" *store where income was used by Mrs Hawkins (and her ex-husband when he was part of it) to pay the shop expenses as well as personal and home expenses. My analysis showed that funds were clearly available to support Mrs Hawkins stated average income…I can say that I ensured that my statements were properly supported by the business records and documents as well as from bank records. I was aware that many of the transactions were done in cash in addition to cheques and bank cards*."

11. As at 26 November 2019 the only reference to a possible loss of earnings claim appears to have been in Mr Thomas's report. On that date there was to be a preliminary hearing of the action, then about a month away. In an email on the morning of 26 November Mr Hendrikse informed Ms Reid that,

> "*We will be requesting this afternoon that if your client's schedule of loss is not served by close of business tomorrow 27 November 2019 her claim be struck*

out. Further, we will be requesting the same in respect of your client's underlying documents in support of Mr RA Thomas' report dated 12 November 2011.

For the avoidance of doubt, we have the report of Mr Thomas it [sic] is the underlying documents as to how he came to his findings that we require including but not limited to (i) annual financial statements (which he states are available but were not included in her list of documents); and (ii) documentation in respect of Cayman Shop that corroborates the income and expenditure set out in the report."

12. Carter J (Acting) presided at the preliminary hearing. She ordered (among other things) that:

> "*1. Unless by 4pm 28 November 2019 the Plaintiff files and serves her schedule of loss her Statement of Claim be struck out, her claim be dismissed and the Defendants awarded their costs.*
> *2. Unless by 4pm 28 November 2019 the Plaintiff files and serves all of the evidence on which she intends to rely in support of her claim her Statement of Claim be struck out, her claim dismissed and the Defendants awarded their costs.*
> *3. Unless by 4pm 28 November 2019 the Plaintiff gives discovery by list and inspection of all accounting documentation relating to all her businesses for the period 2008-2019 her Statement of Claim be struck out, her claim dismissed and the Defendants awarded their costs*."

13. The trial dates were vacated to the "*first available date after 31 January 2020*."

14. On 28 November 2019 a Schedule of Loss was served. As to past loss of earnings, it claimed a sum of $1,644,479. The Schedule stated that,

> "*Information from the plaintiff's accountant indicates that for the 4 2/3's years [sic] prior to 12th November 2011 her salary was CI$125,919 on average*."

15. Also on 28 November 2019 there was served the applicant's list of documents. The "*business and accounting documents*," were said to be:

> "*1. Report dated November 11, 2011 by RA Thomas.*

II. Cayman Shoe Shop Ltd Financial Statements from 2009-2015, 2011 (part)

III. Financial Projections for Cayman Shoe Shop Ltd 2011-2014

IV. Various and numerous Cayman Shoe Shop Ltd. Bank Statements and banking documents

V. Various Cayman Shoe Shop record books and sheets

VI Various Banking statements for Mr. & Angel and Virgelina Hawkins for 2007 and 2008."

The second 'unless order'

16. The respondent instructed Mr Robinson, an accountant, to prepare a report dealing with the claim for loss of earnings. Mr Robinson indicated to the respondent that he was unable to produce a proper report for the court on the information disclosed. On 28 January 2020 the respondent applied to strike out the claim. As it was put in the summons:

> "*1. The Plaintiff's claim be struck out on the ground that it is in breach of…Justice Carter's Unless Order dated 28 November 2019…or*
>
> *2. The Plaintiff's claim for past and future loss of earnings be struck out…[on the basis that] it may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court; and/or…*
>
> *…4. The Plaintiff disclose the documents in her List of Documents filed 29 November 2019 in the same order as enumerated in the List of Documents within 7 days…; and/or*
>
> *5. The Plaintiff provide the following information:*
>
> *a. Copies of all import and export certificates for the Plaintiff's business for the period 2008-2019 (including an itemised lists [sic] of goods imported;*
>
> *b. If the management salaries in the financial statements for the years 2009-2015 are for solely the Plaintiff and/or her then husband;*
>
> *c. If the Plaintiff had an employment contract with the company;*
>
> *d. Evidence of the Plaintiff's day to day role in managing the business…*"

17. On 24 February 2020 Mr Robinson produced a preliminary report in which he stated he was "*unable to assess/review, based on reliable financial analysis techniques, the true income and trading performance of CSS and ultimately the drawings/earnings of the Plaintiff based on the financial statements of CSS*." Among other things, he questioned the reliability of the gross

sales shown in the financial statements for 2007-10. He noted the difference between the sales claimed and the bankings, which he described as not plausible. He noted an apparent absence of payments to suppliers. In order to provide a formal report for the court, Mr Robinson set out a list of documents ("*if available*") which he would need.

18. On 17 April 2020 Ms Reid submitted an affidavit for the purpose of the hearing. In that affidavit, she stated that number of documents were lost following foreclosure of the business, although she was provided with "*a large amount of documents*" [8]. She said [15] that "*every effort*" had been made to comply with Carter J's order. At [18] Ms Reid stated that the "*The Plaintiff is of the view that the order was complied with in regard to documents related to the evidence of finances of the business and the report of Mr Thomas*." At [19] Ms Reid referred to a large quantity of documents available for inspection, as the respondent knew. At [22] Ms Reid referred to the fact some documents were no longer available. At [23] she submitted that there was sufficient evidence to enable a judge to rule on quantum. In her skeleton argument of 17 April 2020 Ms Reid referred to the "*supreme effort*" to comply with the order.

19. In what appears to be an unsigned draft affidavit from April 2020, the applicant stated that she had provided her attorneys with all the documents in her possession and control as requested under the order. That amounted to a large number of documents. Due to Covid-19 restrictions it was not possible to obtain or provide all the documents required from banks and other institutions.

20. On the 20 April 2020 McMillan J did not strike out the claim. He granted relief from sanction in respect of paragraphs 2 and 3 of Carter J's order. He varied the terms of paragraph 3 of that order to require the applicant, by 4.00PM on 30 April 2020:

> "*…[to give] discovery by list and inspection of all accounting documentation relating to all her businesses for the period prior to 2008 and the period 2008-2019, including but not limited to, the documents requested on page 2 of Mr Graham Robinson's preliminary report dated 24 February 2020…*
> *…her Statement of Claim be struck out, her claim dismissed and the Defendants awarded their costs, subsequent to the Consent Order dated 16 September, 2013 on the indemnity basis*."

21. The order set out the copious list of documents identified by Mr Robinson.

22. The applicant did not seek to appeal McMillan J's order.

23. Although by paragraph 3 of McMillan J's order a failure by the applicant to comply with its terms could have been dealt with administratively by the respondents writing to the judge for approval of a strike out in the terms of the order, there was a further hearing on 12 May 2020 at which the parties were present and submissions made. The applicant argued that following

substantial and genuine efforts, the order had to a great extent been complied with, albeit there were documents which had been sought, but were not then immediately available. It was submitted the case could fairly be tried.

24. McMillan J did not agree. He ordered that the "*Plaintiff's statement of claim is struck out and her claim is dismissed*." He also ordered that she pay the respondent's costs from the date of the consent order of 16 September 2013 on an indemnity basis. The minute of McMillan J's order states:

> "*Upon considering administratively the Application by Counsel for the Defendants to dismiss the Plaintiff's Statement of Claim and enter Judgment for the Defendants and having taken into account the letter submissions of Ms Portos [for the defendant]…and the letter submissions of Ms Reid…the Court grants the Order as requested.*
>
> *The Court notes and takes into account that the Plaintiff in these proceedings has failed to comply with the "Unless Order" of Carter Acting J Dated 26 November 2019 and the further "Unless Order" of McMillan J…*
>
> *In addition, the Court notes and takes into account the admission of Ms Reid in her said letter submissions not all documents required were provided on 30 April as stipulated by this Court, notwithstanding broad and ample time to provide documentation since 26 November.*
>
> *Finally, the Court notes and takes into account the inevitable prejudice caused to the Defendants by the manner in which these proceedings progressed*."

25. It is that order which the applicant seeks to appeal.

Events following McMillan J's Order

26. The applicant had fourteen days in which to seek to appeal (Court of Appeal Act s.19). Instead of doing so, she complained to Chief Justice Smellie. There was considerable correspondence between the Chief Justice's office and the applicant. Ms Reid provided the Chief Justice with her account of events in a detailed letter of 13 October 2020. As to a possible appeal, Ms Reid stated:

"*The plaintiff and I were devastated and she stated she would write to the Chief Justice. I advised that she could, but that the proper route would be to appeal. I advised her…that she should seek the services of another attorney for the appeal, based on the fact we were at odds as to the prosecution of the appeal and more so because I was emotionally shattered by the order and did not feel I could properly represent her…*"

27. Mr Wheeler told the court what Ms Reid set out to the Chief Justice is not disputed. In short therefore, the applicant was advised to seek to appeal the order. She chose instead not to do so but to contact the Chief Justice.

28. On 23 June 2020 Ms Reid confirmed to the respondents that she had instructions to have the case go to taxation.

The law, argument and conclusion

29. By s.24(a) of the Court of Appeal Act (2011 Revision) the court may extend time within which a notice of appeal may be served. S.25, upon which Mr Wheeler on behalf of the applicant placed considerable emphasis, states:

"*The provisions of this…[Act] conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such a right…*"

30. The parties agreed that the three criteria to be considered for leave to appeal out of time were recently set out by this court in *AB v C* CICA (Civil) 1 of 2022, where at [20] Beatson JA, giving a judgment with which Field JA and I agreed, said that the criteria were:

i. The merits of the proposed appeal.
ii. The potential for prejudice to the proposed respondent.
iii. The length and reasons for delay.

31. Mr Wheeler laid particular weight on that part of [20] of *AB* in which the court, cited the decision of Smellie CJ in *Streeter & K Coast Development v Immigration Board* [1999] CILR 264 to the effect that:

"*…that the court should not, purely on procedural grounds, prevent an appeal which has a realistic prospect of success from being heard…*"

32. Mr Wheeler also drew attention both in his submissions and skeleton argument to extracts from the fifth edition of Disclosure, in which, at Chapter 17, the authors set out the approach of the court to strike out applications. It is not necessary to refer to them in detail. I am prepared to accept for present purposes, that in the absence of a reasoned judgment, it may be argued that the judge failed to turn his mind to a number of considerations. Among other things, Mr Wheeler relied upon the extent of the disclosure which had been made, the fact this was not a deliberate and continuing refusal to comply with the order, the extensive efforts made in good faith to do so, the fact many documents no longer existed, the extent to which a fair trial was possible in all the circumstances. To them might be added whether the loss of earnings claim might be struck out, but the trial proceed on the basis of the rest of the claim (as [2] of the strike out summons appeared to contemplate as a possibility).

33. I am in short prepared to accept for present purposes that an appeal would not be without a degree of merit, albeit that given the woeful history of non-compliance by the applicant, to overturn the strike out would be an uphill struggle.

34. Mr Wheeler submitted that the respondents will suffer minimal prejudice were a trial to take place, albeit it would have to do so some 13 years after the accident. Such prejudice as there might be is as nothing, he submitted, when compared to striking out the claim. The court should concentrate on the period between the expiry of the time limit to appeal and the notice of appeal. There was never an application by the respondents to apply to dismiss the action for want of prosecution. If it were to prove necessary to obtain fresh medical evidence, that too is not significant when weighed against the strike out.

35. On any view, resurrecting this case would be seriously problematic. There would undoubtedly be real prejudice as far as the respondents are concerned. Their medical evidence would have to be brought up to date (as would that of the applicant). One of the respondents' doctors has since retired. Fresh instructions might well be necessary. It would not be surprising, given what are said to be its serious consequences, if the nature of the accident might be relevant. Any issues related to that would be difficult fairly to resolve after these many years. And the respondents would be required to defend a claim which has been conducted in a manner contrary to the Grand Court's overriding objective.

36. All that said, the most difficult of the three criteria set out in *AB* is posed by the third criterion, namely the length and reasons for the delay.

37. As Mr Wheeler realistically accepted, the delay was very significant. He made a number of points. Ms Reid was not willing to take the case on appeal. By what the applicant communicated

to the Chief Justice she demonstrably intended to dispute the strike out. There was correspondence with the Chief Justice between September 2020 and 16 April 2021 in which the applicant was seeking to resolve her complaint. It was not unreasonable for her, a lay person from overseas, to await the outcome of the correspondence. The applicant had no funds to instruct a lawyer. There was some delay pending receipt of the file from Ms Reid.

38. Having regard to the merits of the appeal and the absence of serious prejudice, the delay, submitted Mr Wheeler was not such as should result in the extreme sanction of a strike out.

39. I bear in mind all the points Mr Wheeler made. However, as it seems to me, the fundamental problem the applicant faces is that immediately after her action was dismissed, she was advised what she should do, namely appeal. She took the decision, in the face of the views of her attorney, to reject that advice in favour of seeking the intervention of the Chief Justice. It was that decision which led to the substantial delay in filing the notice of appeal. In the light of that, and having regard to the merits of the proposed appeal and the issue of prejudice, and in spite of the draconian consequences of the strike out, the court was driven to conclude that the length and reasons for the delay are such that it would not be right to extend time.

40. Moreover, the court cannot ignore the general conduct of this litigation. As Field JA pointed out in argument, there is a public interest in litigation being conducted in a manner to secure efficient determination of the dispute in question. That that did not happen here is overwhelmingly clear, albeit responsibility for that runs considerably wider than the applicant herself.

41. It is for these reasons that the court refused the application.

The Hon C. Dennis Morrison

42. I agree.

The Hon Sir Richard Field

43. I also agree.