Hillary Term

[2019] UKPC 3

Privy Council Appeal No 0102 of 2016

JUDGMENT

Meyer (Appellant) v Baynes (Respondent)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lord Reed

Lord Carnwath

Lady Black

Lady Arden

Lord Kitchin

JUDGMENT GIVEN ON

21 January 2019

Heard on 20 November 2018

Appellant	Respondent
David Dorsett PhD	Andrea L Smithen
(Instructed by Simons Muirhead & Burton LLP)	(Instructed by Marshall & Co)

LORD KITCHIN:

1.
This appeal gives rise to two issues:

i)
whether the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda) erred in finding that the defence advanced by the appellant, Mr Meyer, to the claim by the respondent, Mr Baynes, did not amount to exceptional circumstances within the meaning of rule 13.3(2) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the "CPR") which warranted the setting aside of a default judgment which Mr Baynes had obtained against Mr Meyer for damages to be assessed; and

ii)
whether Mr Meyer had an appeal to the Board as of right under section 122(1)(a) of The Antigua and Barbuda Constitution Order 1981 (the "Constitution Order"), and the Court of Appeal therefore erred in refusing him leave to appeal.

2.
On 25 July 2011 Mr Baynes was involved in a road traffic accident when the vehicle he was driving collided with a vehicle driven by a Mr Luis Hernandez. Mr Baynes was at that time 73 years old and he suffered a number of injuries. On 30 January 2014 Mr Baynes began these proceedings, not against Mr Hernandez, but against Mr Meyer. He contended that the accident had been caused by Mr Hernandez's negligent driving and that Mr Meyer was liable for the injuries he had suffered on two bases: first, Mr Meyer was the owner of the vehicle and, in contravention of section 3 of the Motor Vehicles Insurance (Third party Risks) Act Cap 288 ("the Act"), had permitted Mr Hernandez to drive it when he was not insured against third party risks; and secondly, Mr Hernandez was Mr Meyer's employee and had been acting in the course of his employment when he caused the accident.

3.
On 30 May 2014 Mr Baynes served on Mr Meyer an amended claim form and statement of claim. However, despite serving an acknowledgment of service on 10 June 2014 stating that he intended to defend the claim, Mr Meyer failed to serve a defence and on 4 July 2014 Mr Baynes secured judgment in default of defence against him under Part 12 of the CPR.

4.
On 3 October 2014 Mr Meyer applied to have the judgment set aside under Part 13 of the CPR. This reads in material part:

"13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

(a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered:

(b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) Has a real prospect of defending the claim.

(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances."

5.
Mr Meyer's application came on for hearing before Master Glasgow. He found that Mr Meyer had not acted as soon as reasonably practicable after finding out that judgment had been entered against him and so, in order to succeed on his application, he had to satisfy the court that there were exceptional circumstances within the meaning of CPR rule 13.3(2).

6.
Master Glasgow went on to find that there were indeed exceptional circumstances in this case. He addressed first the claim for breach of statutory duty. In this connection he directed himself by reference to the decisions of the House of Lords in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 and X (Minors) v Bedfordshire County Council [1995] 2 AC 633 and concluded that Parliament

did not intend that a breach of the duty imposed by section 3 of the Act should be actionable by an individual harmed by that breach. It is important to note at this point that Master Glasgow did not refer to the decision of the Court of Appeal in Monk v Warbey [1935] 1 KB 75 or the decision of the House of Lords in McLeod v Buchanan [1940] 2 All ER 179 which proceeded on the basis that Monk v Warbey was correctly decided; nor is there any indication that his attention was drawn to these authorities.

7.
Master Glasgow turned next to the claim that Mr Meyer was vicariously liable for the negligence of Mr Hernandez. Here Mr Meyer prevailed on a pleading point. Master Glasgow found that nowhere in his pleadings had Mr Baynes alleged that Mr Hernandez was at the material time employed by Mr Meyer and, in and of itself, this was fatal to the claim.

8.
Mr Meyer also advanced a further argument which he claimed went to both limbs of the claim against him. He contended that he was not at the time of the accident the owner or in control of the vehicle because, although it was originally owned by a company trading under the name of The Sugar Mill Shop, of which he was managing director, it had been sold to Mr Hernandez in April 2011. The Master considered with care the evidence Mr Meyer had filed to support this contention but was not satisfied it established that The Sugar Mill Shop had ever owned the vehicle or that it had been sold to Mr Hernandez by the time of the accident. Indeed, he thought it was, in a number of important respects, inconsistent with the case Mr Meyer was advancing.

9.
Nevertheless, Master Glasgow considered that the deficiencies in the two limbs of Mr Baynes' case were so fundamental that they would in all likelihood result in the dismissal of the claim and amounted to a compelling reason to allow Mr Meyer to defend it. He therefore acceded to Mr Meyer's application and set the default judgment aside.

10.
Mr Baynes then appealed to the Court of Appeal. Pereira CJ, with whom Thom JA and Webster JA agreed, held that Master Glasgow had fallen into error in his reasoning in respect of each limb of the claim. In relation to the claim for breach of statutory duty, he ought to have found that, on its proper construction, the Act did by implication create a civil liability in favour of any one of the limited class of persons whom the statute was intended to protect, namely third party users of the road who it could reasonably be foreseen would be likely to suffer injury or damage by the negligent use of a motor vehicle by another driver. She continued that, had she been in any doubt about the proper interpretation of the Act, her doubt would have been allayed by the decision in Monk v Warbey.

11.
As for the claim in negligence based upon vicarious liability, Pereira CJ explained that the Master had overlooked the amended claim which stated expressly that it was made against Mr Meyer in respect of the personal injury and loss Mr Baynes had suffered as a result of the negligence of "the Defendant's servant, one Luis Hernandez, while acting in the course of service to the Defendant". This could not be ignored and was, at least for the purposes of the appeal, an adequate pleading.

12.
Therefore, Pereira CJ continued, each of the pleaded claims provided a sufficient basis for a judgment in default of defence, and Master Glasgow's errors in relation to them were such that it was necessary to revisit his decision. Then, after referring briefly to the dispute about ownership of the vehicle, a

matter on which she expressed no disagreement with the Master, Pereira CJ turned to the question of exceptional circumstances. She explained at para 26 of her judgment that what amounts to exceptional circumstances must be decided on a case by case basis and expressed her full agreement with the view of Bannister J in Inteco Beteiligungs AG v Sylmord Trade Inc (BVIHCMAP 2013/0003, unreported) (para 31) that there must be something amounting to "a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained". She continued that "exceptional circumstances" are not the same as a "realistic prospect of success", and that rule 13.3(2) is reserved for those cases where the circumstances are truly exceptional and warrant depriving a claimant of his judgment where a defendant applicant has failed to satisfy rule 13.3(1). In her view exceptional circumstances would include those cases where it was shown that a claim was not maintainable or a defendant had a "knock out" point, or where a remedy sought by a claimant was not available.

13.
In all these circumstances Pereira CJ concluded that Master Glasgow had erred in principle in holding that Mr Baynes had no sustainable cause of action, and, she continued, nothing relied upon by Mr Meyer amounted to exceptional circumstances which could justify setting aside the judgment against him. The appeal was therefore allowed.

14.
Mr Meyer thereupon applied to the Court of Appeal for leave to appeal to the Board pursuant to section 122(1)(a) of the Constitution Order. He contended that the Court of Appeal had given a final decision and that under the terms of the Constitution Order he was entitled to appeal as of right. The Court of Appeal disagreed and refused his application. So, on 30 May 2016, Mr Meyer made an application to the Board for permission to appeal. That application was successful and on 13 December 2017 Mr Meyer was granted the permission he sought.

15.
Upon this further appeal Mr David Dorsett, for Mr Meyer, submitted that the Court of Appeal fell into error in two respects. First, the court failed to recognise that Mr Meyer did indeed have a knock out point, namely that he was not the owner of the vehicle at the time of the accident, and he had not caused or permitted Mr Hernandez to use it. Secondly, the court erred in refusing to grant Mr Meyer permission to appeal to the Board as of right.

16.
In elaborating his first submission, Mr Dorsett accepted that the Court of Appeal had interpreted the phrase "exceptional circumstances" in CPR rule 13.3(2) correctly and that in considering whether such circumstances exist it is relevant to ask whether the defendant has identified a compelling reason why it should be permitted to defend the proceedings. Mr Dorsett also accepted that exceptional circumstances will include a knock out point in relation to the claim or, put another way, circumstances that go to the bases of the claim and, if correct, will result in the dismissal of most of it. However, Mr Dorsett continued, the Court of Appeal ought then to have found that Mr Meyer's defence that the vehicle had been sold to Mr Hernandez before the accident did indeed amount to such exceptional circumstances and a knock out point for, had it prevailed, it would have been a complete answer to the claim. Further, ran Mr Dorsett's submission, the Master evaluated the evidence and made a finding that there were exceptional circumstances, and the Court of Appeal had no proper basis for interfering with that evaluation.

17.

The Board can see no reason to question the approach taken by the Court of Appeal to the meaning of the phrase “exceptional circumstances” in the context of rule 13.3(2) of the CPR. The structure of the rule suggests that the phrase calls for something more than a real prospect of success and the Board respectfully endorses the reasoning of Pereira CJ at para 26 of her judgment as to its meaning in this context. The question for the Court of Appeal was therefore whether, as Mr Dorsett submitted, Mr Meyer’s contention that he had sold the car to Mr Hernandez before the accident constituted a knock out blow or in some other way constituted a compelling reason for setting the judgment aside.

18.
The Board has no hesitation in concluding that it did not. It must be remembered that Master Glasgow’s finding that Mr Meyer had established the existence of exceptional circumstances in this case was not based upon the evidence before him that the vehicle had been sold to Mr Hernandez by the time of the accident. Indeed, he found that evidence to be unsatisfactory. It was founded instead upon his view that a breach of the statutory duty imposed by section 3 of the Act did not give rise to any private law cause of action, and that Mr Baynes had failed to plead that Mr Hernandez had been acting in the course of employment by Mr Meyer at the time of the accident. He fell into error in both respects as the Court of Appeal correctly found, and there has been no effective challenge to that finding upon this further appeal.

19.
Turning now to the question whether the vehicle had been sold to Mr Hernandez by the time of the accident, Mr Dorsett submitted that Mr Baynes had accepted this was so in his submissions to the High Court. However, the passage on which Mr Dorsett relied is confused and far from a clear admission to that effect. Mr Dorsett’s primary submissions were therefore directed to the evidence before the Master. The Board has considered this with care but is entirely satisfied that the Master was entitled to find it unsatisfactory. The Board is prepared to accept that it established that Mr Meyer had a defence to the claim for breach of statutory duty which had a realistic prospect of success, but it certainly did not amount to a knock out blow or constitute a compelling reason to set the default judgment aside. What is more, it was, at best, only peripherally relevant to the claim based upon vicarious liability and either claim was sufficient to provide a basis for the default judgment.

20.
In all these circumstances the Board cannot accept that the Court of Appeal fell into error in relation to the first issue in the manner for which Mr Dorset contends. To the contrary, the Board has no doubt that the Court of Appeal was both entitled and right to find that the defence advanced by Mr Meyer and the evidence he relied upon to support it did not constitute exceptional circumstances within the meaning of CPR rule 13.3(2).

21.
It will be appreciated that the second issue cannot affect the outcome of this appeal. Nevertheless, it raises a question of some importance and the parties have asked the Board to address it. Section 122(1) of the Constitution Order provides that an appeal shall lie to the Judicial Committee of the Privy Council as of right against final decisions in cases such as the present which involve a claim concerning a right which has a value in excess of a prescribed threshold. Both parties accept that the decision of the Court of Appeal was final and that the threshold requirement was met. The question, therefore, is whether the Court of Appeal retained any control over a further appeal.

22.

This issue has arisen in a number of appeals to the Board from Courts of Appeal in different jurisdictions, but for present purposes it is only necessary to refer to the recent decision of the Board in A v R (Guernsey) [2018] UKPC 4, in an appeal from the Court of Appeal of Guernsey. Lord Hodge, giving the judgment of the Board, explained that an appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. He continued (para 8):

"Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court has power to make sure there is a genuinely disputable issue within the category of cases which are given leave to appeal as of right. Thus in Alleyne-Forte v A-G [1997] 4 LRC 338 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (at 343):

'An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case …'"

23.
The Board considers that this reasoning is also applicable to appeals from the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda). Mr Meyer made an entirely proper application to the Court of Appeal by notice of motion for leave to appeal. But the Court of Appeal has a right to police applications of this kind and to consider whether any proposed appeal raises a genuinely disputable issue. In this case the Court of Appeal exercised that right, refused leave to appeal and dismissed the application. In so doing, it did not exceed its jurisdiction, and it made no error in approaching the application in the way that it did.

24.
For all of these reasons, the Board will humbly advise Her Majesty that the appeal should be dismissed. Subject to any written submissions received within 14 days of the delivery of the Board's judgment, the appellant should pay the respondent's costs of this appeal to the Board.