



[2019] JMSC Civ. 131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV02780

**IN THE MATTER OF AN APPLICATION FOR
BREACH OF RENT RESTRICTION ACT**

AND

**IN THE MATTER OF AN APPLICATION FOR
TRESPASS TO LAND**

BETWEEN	PAUL BURKE	CLAIMANT
AND	RICHARD LAKE	1ST DEFENDANT
AND	CARIBBEAN RESOURCES LIMITED	2ND DEFENDANT

IN CHAMBERS

Mr. Gordon Robinson instructed by Ms. Winsome Marsh Attorney-at-law for the First Defendant & Second Defendants/Applicants.

Mr. Leonard Green and Mr. Makane Brown instructed by Chen Green & Co Attorneys-at-law for the Claimant/Respondent.

Ms. Deniesha Buchanan, Legal Counsel and representative for second Defendant.

Heard: 20th March and 27th May 2019

Civil Procedure - Application to strike out claim for non-compliance with Court Orders and for abuse of Court process - Civil Procedure Rule 26

HENRY-MCKENZIE, J (Ag)

- [1] On May 27, 2019, I delivered an oral judgment in this matter and promised to give my reasons in writing. This I now do.
- [2] There are three applications before me – two filed by the first and second defendants on January 28, 2019 and February 6, 2019 respectively and one made orally by the claimant on March 20, 2019. The first and second defendants by Notice of Application for court orders filed January 28, 2019, seek the following orders:
- (a) That the claimant's statement of case be struck out.
 - (b) Cost of the Application and of the claim be paid by the claimant to the defendants on an indemnity basis.
 - (c) That the time for service of the Application be abridged, if necessary.
- [3] The grounds upon which the Application is made are:
- (a) The claimant has failed to comply with the order of the court given on October 4, 2018.
 - (b) The claimant's statement of case discloses no reasonable ground for bringing the claim and/or is frivolous and vexatious and an abuse of the process of the court.
 - (c) The overriding objective favours the grant of the orders herein.
- [4] The Notice of Application for court orders filed February 6, 2019, seeks the following:
- (a) A declaration that the court declines to exercise its jurisdiction to try this claim.
 - (b) The Claim Form and Particulars of Claim filed on behalf of the Claimant on February 4, 2019, be struck out.

(c) Costs of the Application and of the claim be paid by the claimant to the defendants on an indemnity basis.

[5] The grounds upon which the Application is made are:

(a) The Claim Form and Particulars of Claim are irregularly filed in breach of the order of the court given on October 4, 2018, without leave of the court.

(b) The Claim Form and Particulars of Claim disclose no reasonable grounds for bringing the claim and/or are frivolous, vexatious and an abuse of the process of the court.

(c) The overriding objective favours the grant of the orders.

[6] The claimant's application was made orally on the date the first and second defendants' applications were heard by this Court on March 20, 2019 and in response to the submissions made on behalf of the first and second defendants.

[7] The claimant's application is made pursuant to rule 26.1 (2) (c) of the Civil Procedure Rules (CPR) for an extension of time to comply with the orders of the court, made on October 4, 2018 by Glen Brown J.

[8] The applications concern a claim made by the claimant against the first and second defendants seeking a declaration that the claimant is a legal tenant at the property he occupied with civic address at 1 Waterloo Road, Kingston 10, that was leased to him by Alexander House Inc. Limited. The claimant also sought other orders, to wit: a declaration that a Notice to Quit dated May 7, 2018 which was served on the claimant was not valid and was unenforceable. Further, that the removal of the claimant from the premises was illegal and a trespass on the land in the possession of the claimant; a declaration that the removal of the vehicles from the property by the defendants' servants and/or agents was illegal and amounted to a conversion of the claimant's property. Further, that the

defendants and their agents and servants vacate the said property at 1 Waterloo Road, Kingston 10.

- [9]** The claim was brought by way of Fixed Date Claim Form which was supported by evidence on affidavit of Paul Burke. There was also an application for an injunction supported by an Affidavit of Urgency. The chronology of events is set out accurately and succinctly in the submissions prepared by Mr Gordon Robinson on behalf of the first and second defendants, filed as a part of a bundle of documents on March 19, 2019. I therefore do not have to regurgitate that detail, but will focus instead on the critical aspects that are related to the applications before me.
- [10]** By order of Glen Brown J on October 4, 2018, the injunction sought was dismissed, the Fixed Date Claim Form was converted to a Claim Form (which means that there was no need for the claimant to attempt to file a Claim Form) and an order was made for the claimant to file and serve Particulars of Claim within 21 days of the date of the order. On my count, that order should have been complied with on or before October 25, 2018. This order was not complied with. Consequently, Orders 5 and 6 made by Glen Brown J which required the defendants to file and serve their defence within 21 days thereafter and for mediation to take place within 90 days of the service of the defence, were also not complied with.
- [11]** The failure of the claimant to comply with the orders of the court is what prompted the first and second defendants' first application, filed on January 28, 2019. When this application came before the court on February 4, 2019, the matter was adjourned to March 20, 2019. On February 4, 2019, the claimant went ahead without the permission of the court to file a Claim Form and Particulars of Claim. As mentioned above, the filing of the Claim Form was, in my view unnecessary. As it relates to the Particulars of Claim, it was filed out of time. I do not believe however, that I have to make an order to strike out the

Particulars of Claim as until there is an order allowing it to stand, the Particulars of Claim is irregular and no notice will be given to it by the court.

[12] I must now consider whether I should strike out the claimant's statement of case for failure to comply with orders of the court. It is well established law that striking out is a last resort, but if the court finds that a party is abusing the process of the court so that the overriding objective is not met, then the court is entitled to exercise its discretion in a manner adverse to one of the parties. Parties are reminded that justice is not just for one party or the other but for all parties concerned in the matter and while the claimant will be prejudiced in that he will not be able to bring his case, the defendants will also be prejudiced when the claimant does not honour his obligations to the court and to the first and second defendants in a timely manner. I rely on the cases of **UCB Corporate Services Ltd v Halifax (SW) Ltd** [1999] The Times, 23 December and **Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd** [1998] 1 WLR 1426 in support of my position. In the former case, it was held that it was appropriate to strike out an action as an abuse of the process of the court where there was a wholesale disregard of the CPR or an order of the court and it was just to do so. The judge regarded the flouting of the rules and court orders as sufficiently serious to justify striking out. He went on to say however, that striking out was meant for more serious offences and that lesser sanctions should be applied in less serious cases.

[13] The first and second defendants also contend that the Claimant's case discloses no reasonable cause for bringing the claim. I am guided by the decision of Sykes J (Ag) (as he then was), in the case of **Jamaica Youth Development Foundation v Portfolio International Jamaica Ltd** (unreported), Supreme Court, Jamaica, Claim No. 2004HCV02305, heard on November 22, 26, December 1 and 10, 2004 in relation to the tenancy. Nevertheless, even if the arguments advanced by the defendants in relation to the tenancy were to succeed, the issue of the conversion of property will have to be considered.

There is no evidence from the first and second defendants dealing with the issue of conversion in relation to the purported removal of the vehicles from the property or the basis for the alleged retaining of those vehicles in their possession. This is an issue which should be determined by a judge at trial.

[14] The claimant has asked that the time to file and serve the Claim Form and Particulars of Claim be enlarged. While there is no Particulars of Claim before the Court, there is a Claim Form in keeping with Order 3 of Glen Brown J dated October 4, 2018. The document headed Claim Form that was filed on February 4, 2019 and served on the first and second defendants on the same day, is then to be considered an Amended Claim Form. No permission is required for this as it appears to have been amended prior to the case Management Conference (CMC), and the extent of the amendment is that damages are being sought instead of mere declarations. I will therefore focus my attention on the Particulars of Claim which was filed on February 4, 2019.

[15] I reiterate that the claimant's application to enlarge the time to file and serve the Particulars of Claim was made orally. Mr Green has submitted that the application need not be made in writing. He relies on CPR 26.1(2) to support his position. My understanding of that rule however, is that it sets out the Court's case management powers, not the procedure which is to be followed in making an order to extend time to comply with a rule, practice direction or order of the court. Throughout the CPR, applications that are made for the extension of time to comply with a rule, practice direction or court order are done in writing. Part 11 of the CPR deals with notices of applications in general and Part 11.6 provides that the general rule is that applications are to be made in writing. Part 11.7 provides that the application must (a mandatory requirement) set out the orders being sought, the grounds on which the orders are being sought and the estimated time the hearing will last. Part 11.8 also provides that the general rule is that notice of the application is to be given to each respondent.

[16] An oral application made in the course of submissions would therefore not satisfy any of the requirements set out in Parts 11.6 - 11.8. I would go further to say that in this type of application, evidence in the form of an affidavit would be useful to set out an explanation as to why the Particulars of Claim or the written submissions were not filed in time. This evidence would certainly be of assistance to any court sitting in properly exercising its discretion. There are questions raised in respect of this oral application: Was the delay prior to making the application unreasonable? Was there was a good explanation for not filing the documents in time? The answers to these questions would have been helpful to this Court. Those answers ought properly to be in the form of evidence and not in submissions to the court from counsel for the claimant. In fact, the submissions made by Mr Green on either question was simply:

“The Rules contemplate that an application be made, even now, which I do now.”

[17] Counsel for the claimant would also have had several opportunities to make this application, the first being on the CMC date which was scheduled for February 4, 2019. In fact, that was the most appropriate time to make the application and the claimant would have known at that point in time that he needed to make that application, as he filed the Particulars of Claim on that day. Counsel for the claimant could also have prepared the written application, so that he could properly make it on March 20, 2019, but he did not. I must therefore agree with counsel Mr Robinson, that the claimant has acted in manner which would suggest that he has little or no regard for the orders of the court or shows any intention to comply with the CPR.

[18] I have taken into consideration the history of the case and I thank Mr Gordon Robinson for his assistance in this regard. It is very clear to me that the claimant either by himself or through his attorneys has acted in a less than acceptable manner. Nevertheless, even though the claimant has given no explanation for the failure to file the documents in time, I have taken notice of the fact that the

delay between the order, of Glen Brown J dated October 4, 2018 and this hearing at which time the application was made, is not inordinate. Also, I have come to the conclusion that there is a claim that is before the court, which has a real prospect of succeeding and which I think should be heard and determined on its merit. This is what has formed the basis for the orders which I now make:

ORDERS

- (a) The first and second defendants' application to strike out the claimant's statement of case in applications filed on January 28, 2019 and February 6, 2019 are refused.
- (b) The Claim Form filed and served on February 4, 2019 is to be considered an Amended Claim Form.
- (c) The claimant's Particulars of Claim filed and served on February 4, 2019 is allowed to stand.
- (d) The first and second defendants are to file and serve their defence to the claim on or before July 9, 2019.
- (e) The parties are to attend mediation within 90 days of service of the defence.
- (f) Should mediation be unsuccessful, the parties are to attend Case Management Conference on January 7, 2020 at 11:00 am for one hour. There shall be no further adjournments of the Case Management Conference. All parties, and in the case of the second defendant, its representatives are to attend the Case Management Conference.
- (g) Leave to Appeal is granted
- (h) Costs in the application, is awarded to the first and second defendants, to be taxed if not agreed.

(l) The claimant's attorney-at-law is to prepare, file and serve the Formal Order.

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Hon. G. Henry McKenzie, J