[2021] **JMSC Civ 105**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 05907

BETWEEN	**ANGELA CLARKE-MORALES**	**CLAIMANT**
AND	**SUNSWEPT JAMAICA COMPANY LTD**	**DEFENDANT**

IN CHAMBERS

Mr. Lijyasu Kandekore for the Claimant/Respondent

Miss Stephanie Williams instructed by Henlin Gibson Henlin for the Defendant/Applicant

Heard: **July 27, 2017, August 10, 2017, November 4, 2019, January 15, 2020 and June 16, 2021**

Application to strike out – Whether the statement of case discloses no reasonable grounds for bringing the claim – whether the claim amounts to an abuse of process of the court

STAMP J

BACKGROUND

[1] Due to oversight on my part there has been a long delay in the delivery of this judgment. My sincere apologies to the parties.

[2] This is the decision on the defendant's application to strike out the claim for an equitable interest in a resort property known as Windswept in St. James. In the

Fixed Date Claim Form the claimant avers that she is entitled to Windswept on account of her expenditure on the property over a period of more than 20 years which significantly improved the property and increased its value. The defendant company which is the registered proprietor of Windswept applies for the claim to be struck out on the following grounds:

1. Pursuant to r. 26.3(1)(b) the Claim amounts to an abuse of process of the Court;

2. The Fixed Date Claim Form filed herein discloses no cause of action;

3. Pursuant to r. 26.3(1)(c) the statement of case discloses no reasonable grounds for bringing or defending a claim;

4. The Claimant instituted the claim on the 9th day of December 2015 in relation to "an equitable interest in and is entitled to possession and continued occupation of all that piece or parcel of land with building thereon owned by the Defendant and known as "Windswept" in the parish of Saint James ...";

5. The current claim is against the same Defendant and is in relation to the same facts and premises that have already been decided in Claim No. 2010 HCV 04115 whereby the Honourable Mr. Justice Glen Brown granted possession to the Defendant by order dated the 23rd day of July 2015;

6. The Claimant and Nadia Nadiak-Parchment filed Claim No. 2010 HCV 04155 claiming a joint interest in property called Windswept through adverse possession on 2nd day of November 2010;

7. The Claimant discontinued her claim in claim no. 2010 HCV 04115 and filed a Notice of Discontinuance on the 29th day of May 2015;

> ... 13. The Defendant is prejudiced by the prolonged continuation of this matter that has caused them to expend significant resources and expenses;
>
> ...

[3] The genesis of the dispute is business relations from as far back as the 1980s between one Ms Nadia Nadiak-Parchment and the defendant company regarding the management of Windswept. Under circumstances that are not entirely clear but need not be resolved now, Ms Nadiak-Parchment came into occupation of Windswept and some years later in about 1999 the claimant joined her in occupation of the property. From about 1990 the defendant company has been in litigation with either one or both of them regarding their occupation and interest claimed in the property. It is necessary only to give a brief chronological history of the litigation from the year 2010.

[4] In 1989 Ms Nadia Nadiak-Parchment lodged caveat no. 102036 with the Registrar of Titles to bar dealings with the registered title to Windswept. On 20 July 2010 the Registrar of Titles issued a Notice to Caveator under the Registration of Titles Act ("RTA") warning the caveat.

[5] In response to the warning (and clearly to prevent the lapse of the caveat upon the expiration of the 14 days limited in the notice) proceedings were brought *ex parte* for an injunction which was granted. The injunction was later discharged on 10 December 2010 at the *inter partes* hearing. This meant that the caveat no.102036 lapsed. Following that, on 31st December 2010 the claimant lodged solely in her own name caveat no. 1683338 forbidding dealings with the registered title to Windswept.

[6] Further to the proceedings for the injunction, on 2nd November 2010 Fixed Date Claim Form no. 2010 HCV 04115 was filed ("the first claim"). The parties were: Nadia Nadiak-Parchment, first claimant; Angela Clarke-Morales, second claimant

(i.e., the claimant in the instant case); Sunswept Jamaica Company Ltd., defendant (i.e., this defendant company in the instant case).

[7] The first claim as pleaded in the Further Amended Fixed Date Claim Form filed 17th August 2011 was for a declaration that the claimants had acquired absolute title to Windswept under the Limitation of Actions Act and several ancillary declarations to give effect to this; alternatively, declarations that the claimants had acquired an equitable interest in Windswept, or alternatively, compensation for sums expended by the claimants for repairing and improving the property. The first claim was supported by an affidavit sworn to by the present claimant.

[8] The defendant company filed a Defence to the first claim and, it is important to keep in mind, counterclaimed for recovery of possession of Windswept and mesne profits. Nadia Nadiak-Parchment was the first ancillary defendant and this claimant was the second ancillary defendant to the Counterclaim.

[9] On 3rd April 2013 the defendant company applied to the court for orders to strike out the first claim and to enter judgment for the defendant on the Counterclaim. The matter was fixed for hearing on 25th July 2015. However, prior to the date fixed for the hearing, on 29th May 2015, the second claimant herein (i.e. this claimant) filed a Notice of Discontinuance of her claim and withdrew her Defence to the Counterclaim.

[10] At the hearing of the defendant's application on 25th July 2015 G. Brown J struck out the first claim and entered judgment against both ancillary defendants on the Counterclaim in these terms:

> 1. The Further Amended Fixed Date Claim Form herein filed on August 17th 2011 be struck out.
>
> 2. Judgment be entered for the Applicant against the Defendants to the Counterclaim as follows:

> a. That the Ancillary Defendants quit and deliver up all that parcel of land known as "Windswept" …
>
> b. That mesne profits for use and occupation of the property from June 18, 1989 until possession is delivered up be paid to the Ancillary Claimants'
>
> …

[11] The second claimant/second ancillary defendant in those proceedings (this claimant), did not attend and was not represented at the hearing. As stated above, she had earlier discontinued the claim and withdrawn her Defence to the Counterclaim.

[12] The judgment entered on the Counterclaim against the Ancillary Defendants has not been set aside, neither has any appeal against it been filed.

[13] Following upon the judgment in the first claim, the defendant company obtained a writ of possession and evicted the present claimant from Windswept. It seems that by then the first claimant, Ms Nadiak-Parchment, had already relinquished possession and had left Jamaica. Somehow, on 2nd December 2015, the present claimant (who earlier had discontinued her claim to an interest in Windswept and withdrawn her Defence to the Counterclaim) obtained a stay of execution of the judgment and orders of G. Brown J and re-entered the property. On 17th December 2015 Carol Edwards J (as she then was) denied her application for an extension of the stay of execution and the defendant company recovered possession of the property. As far as I am aware, apart from issues of costs, assessment of mesne profits and an application for contempt orders against the present claimant (on which nothing turns in relation to the matter before me and I have had no submissions on its relevance) that is the end of the first claim.

[14] I move now to the present claim. The Fixed Date Claim Form was filed on 9th December 2015. The next day the claimant filed *ex parte* a Notice of Application

for an injunction, seeking among other things an order that 'the Claimant is authorized to take immediate possession of the property known as "Windswept"'. It does not appear that that application was heard. Later I will examine the grounds of this claim and the remedy sought. At this point I note that the filing of the present claim coincided with a time when, as regards the first claim, the defendant company was seeking to enforce G. Brown's J order for possession and the second claimant there was seeking to extend the stay of execution of that order. So at that stage the claimant was pursuing a two pronged endeavour to assert an interest in and recover possession of Windswept: a stay of execution of the judgment in the first claim and instituting the present claim for an interest in the property and consequential orders.

Preliminary Issues

[15] Before summarising the submissions of the parties I shall record briefly a couple of procedural and substantive issues that were strongly contested during the course of argument. Over very intense objection from counsel for the claimant, the Court permitted the defendant to amend the application to strike out by adding a request for an alternative order under Civil Procedure Rules ("CPR") 37.6 and 37.7, that the present claim be stayed pending the claimant paying the defendant's costs in the discontinued first claim. The claimant submitted that this application was too tardy. However, I permitted the application as I found that it would be convenient in saving time if the applications were heard together and that this would cause no prejudice to the claimant.

[16] The claimant also benefited from dispensations from the Court. At the commencement of the hearing, I noticed that the Fixed Date Claim Form was not filed in compliance with the CPR: the Certificate of Truth was signed by Mr. Kandekore as the attorney-at-law on behalf the claimant without complying with CPR rules 3.12 (4) and (8) which require him to state the reasons why it was impractical for the lay party to give the certificate and the certificate was given on the lay party's instructions. Further, the affidavit in support of the Fixed Date Claim

Form was sworn to by counsel and so was the affidavit in response to the defendant's application to strike out. It is inappropriate in my view for counsel who appears to argue before a court in a contested case to also vouch as an affiant (and more so, the sole affiant) to material facts in that case. Counsel was directed to correct this and the matter proceeded without any sanctions. On 2nd August 2017 the claimant filed an Amended Fixed Date Claim Form, Affidavit in Support, and Affidavit in Response to the Application to Strike Out, all signed by the claimant. They repeat the contents of the documents earlier sworn to by counsel.

Submissions on Abuse of Process

[17] Ms. Williams submitted on behalf of the defendant company that the claimant was seeking to re-litigate the matter as judgment had already been entered for the defendant in the first claim and a writ of possession had been issued and executed. Both claims concern the possession and ownership of Windswept, are based on the same fact and the same documents, and the claimant seeks the same or substantially the same reliefs that she previously sought in the first claim. It is therefore an abuse of process to institute the present claim after having discontinued the first.

[18] Counsel referred to ***JMMB Merchant Bank limited v Gerogics Investment Limited et al***[1]**,** in which Sykes J (as he then was) reiterated that ***Johnson v Gore Wood (A Firm)***[2] is authoritative in Jamaica on the issue of abuse of process in this area. In ***JMMB Merchant Bank Limited v Gerogics***, the claimant had discontinued its claim during trial in order to avoid an imminent adverse judgment and subsequently filed another claim relying on the same facts as those relied on in the discontinued claim. Sykes J struck out the later claim as an abuse of process.

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[1] [2016] JMSC COMM 12
[2] [2002] 2 AC 1

[19] Counsel also relied on dicta of Straw J in ***Ken Sales & Marketing Ltd v Earl Levy et al***[3] where, after reviewing the relevant authorities, she opined that persistent and habitual litigation may amount to an abuse of process and that the reason or purpose for the discontinuance of an earlier action must be considered in determining whether a subsequent action is an abuse of process.

[20] Mr. Kandekore for the claimant submitted that the issues in the first claim were never litigated as the case was terminated. There was no hearing on the merits and no judicial determination of the facts in that case. He did not dispute the defendant company's contention that the same documents and receipts were used in support of both the first and the present claims but maintained that the first claim is different in nature from the previous claim. This action, he said, is an action for money, for a declaration that the claimant is entitled to an equitable interest and compensation for expenditure on the land while the previous action was a claim for title to land on the grounds of adverse possession.

[21] He submitted that the court needed to have a high degree of confidence that the claim would not succeed before striking it out as an abuse of process and that the application should not develop into a mini-trial in order to determine this. He relied on ***Three Rivers District Council v. Governor and Company of the Bank of England***[4] *and* ***Barrett v Universal-Island Records Limited et al***[5] in support.

[22] He also cited dicta in ***Johnson v Gore Wood*** and asked the court to note the distinction that was drawn: it is one thing to refuse a party to re-litigate a question which had already been decided but it is quite another to deny him the opportunity of litigating the matter for the first time. The court, he submitted, should bear in mind that the claimant had a constitutional right to bring her action.

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[3] [2012] JMSC Civ 29
[4] [2001] UKHL 16.
[5] [2003] EWHC 625 (dicta of Laddie J at paragraph 43)

[23] He submitted that the cases relied on by the defendant company did not assist it. In ***Ken Sales*** the application to set aside was dismissed as Straw J held that the matter was one appropriately for trial and she would not conduct a protracted examination of the issues to be resolved in order to decide the matter at that stage.

[24] He further submitted that ***JMMB Merchant Bank Limited v Gerogics*** was distinguishable from the instant case. In that case the matter was discontinued after the trial had already commenced unlike the instant case where the first claim was terminated long before any trial commenced. In addition, he said, unlike ***JMMB Merchant Bank Limited v Gerogics,*** the cause of action in the present claim for an equitable interest is completely different from the cause of action in the first claim which was based on adverse possession.

[25] Mr. Kandekore also placed strong reliance on the decision of Batts J in ***Sunswept Jamaica Company Limited v The Registrar of Titles and Angela Clarke-Morales***[6]. He described it as 'a companion case' between the same parties with identical grounds all of which were decided against this defendant who was the claimant there. This was a claim brought by the defendant company against the Registrar of Titles and the present claimant seeking removal of caveat number 1683338 which the present claimant had lodged on 31st December 2010 forbidding dealings with the registered title to Windswept and a declaration that the Registrar of Titles had wrongly refused to remove the caveat. Counsel argued that Batts J dismissed that claim on the grounds that there were no reasonable grounds for bringing it and in coming to this conclusion Batts J necessarily found that the claimant's caveat was valid and was not an abuse of process. He submitted that the parties (except for the Registrar of Titles) were the same and the issues were the same as in the present case and accordingly the principles of *res judicata* apply

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[6] [2016] JMSC Civ 126

to the present application; Batts J's decision he maintained is dispositive of the issue in this matter and the defendant is prohibited from re-litigating it.

[26] In reference to the judgment of G Brown J, counsel referred to paragraphs 5-9 of the claimant's Affidavit in Response and stated that the claimant challenged the judgment as the claimant was never served with any court process after the discontinuance and was unaware of the hearing of 23rd July 2015.

Submissions re Inadequate Pleading

[27] The two grounds that the claim discloses no cause of action and the statement of case discloses no reasonable ground for bringing the claim pursuant to rule 26.3(1)(c) may conveniently be treated under the rubric of Inadequate Pleading. Counsel for the claimant was very pithy in her submissions. She said that the Fixed Date Claim Form discloses no cause of action and does not state the basis of the claim for a beneficial interest in Windswept. She did not develop the argument or cite any law or authorities in her written submissions.

[28] Counsel on behalf of the claimant submitted that the claimant sought no more than to convert the interest protected by the caveat and recognized by the Registrar of Titles into an actionable claim. According to him, 'the judgment of Batts J decided that the Claimant had a proper claim when he held that the caveat was in order and the Registrar of Title properly accepted the caveat to be lodged'. He maintained that the defendant now seeks to have the issues decided by Batts J re-litigated.

Preliminary Observations re Arguments and Facts

[29] There are some preliminary factual and legal issues that must be settled so that the basic factual and legal framework on which this decision is based and the relevant issues are clearly defined.

The applicability of the decision in 2016 JMSC Civ 126

[30] The claimant submitted that the decision of Batts J in favour of the defendants in **Sunswept Jamaica v Registrar of Titles and Angela Clarke-Morales** is dispositive of this matter as the issues and parties were the same. In that case the defendant here, Sunswept, brought a claim against the Registrar of Titles and the claimant here, Angela Clarke-Morales, for an order to compel the Registrar of Titles to substantiate the grounds for her refusal to remove caveat 1683338, a declaration that she had wrongly refused to remove the caveat and an order that the Registrar of Titles remove the caveat. The defendants there successfully applied to strike out the claim. Batts J held that the formalities required and stipulated for in section 156 of the Registration of Titles Act that the proceedings be "issued under the hand of a Judge" had not been complied with by that claimant, Sunswept. This was sufficient for the claim to be dismissed. See paragraph 9 of the decision. He further held that in any case there was no merit in the substantive application as there is no power provided in the Registration of Titles Act for the Registrar to remove the caveat that had been lodged. See paragraph 11. In that case the claimant Windswept contended that the caveat no. 1683338 was a renewal of the first caveat no. 102036 and therefore the Registrar was wrong to accept it. Batts J held that, although section 140 precludes renewal of a lapsed caveat by the same person in respect to the same estate or interest, there was nothing to suggest that a request for renewal was being made as the caveators were different. In the earlier caveat no. 102036 it was Ms Nadiak-Parchment while the caveator for caveat no. 1683338 is Ms Angela Clarke-Morales. The Registrar had acted in accordance with the law and not in error to give the latter a number and lodge it. See paragraphs 19-20.

[31] As regards the second defendant, Angela Clarke-Morales, Batts J held that, as there was no relief claimed against her, that part of the claim should be dismissed.

[32] Those were the issues adjudicated by Batts J. As he put it: "The issue concerns the construction of the Registration of Titles Act and in particular the power of the

Registrar as it relates to caveats." See para. 2. This is quite different from the issues presently before me which are firstly, whether it is an abuse of process for the claimant to bring this claim after having discontinued the first claim and secondly, whether the pleadings of this case are insufficient and bad for not disclosing a cause of action.

[33] I do not accept the submissions that Batts J decided, directly or by necessary inference, that the claimant has a valid claim to an interest in Windswept, that his decision is dispositive of any of the issues before me, and that the defendant's application to strike out is an attempt to re-litigate his decision. That decision is only marginally relevant here.

The nature of the first claim and remedies sought

[34] I turn now to the issue of whether the present claim is substantially the same as or different from the first claim. The claimant declared in her affidavits and counsel submitted that they are totally different; the first claim was for title to land by virtue of the operation of the Limitation of Actions Act while the present claim is for compensation for money spent by the claimant on the defendant's property (see paragraph 19 of submissions filed 31st July 2017) or an equitable interest resulting from the expenditure incurred to improve the property (see paragraph 13 of the claimant's affidavit filed 2nd August 2017). However, one needs only to read the Further Amended Fixed Date Claim Form filed in the first claim on 17th August 2011 to see that these assertions are incorrect and the submissions lack a factual basis. In paragraphs 1 to 8 it does set out remedies sought relating to title to the property arising by virtue of the Limitation of Actions Act. It then goes on in the following paragraphs 9 to 12 as follows:

> *The Claimants seek the following remedies:*
>
> *…*
>
> *9) Further or alternatively, an order that the Claimants, having over the years significantly improved the premises and increased the*

value of the property, the Claimants have therefore acquired an equitable interest in the property and the Defendant is estopped from seeking possession of the said property.

10) Further or alternatively, an order granting the claimants relief from any recovery of possession.

11) Further or alternatively, the sums incurred by the Claimants in repairing and improving and increasing the value of the premises over the years.

12) Further or alternatively, the value of the improvements made by the Claimants to the premises.

13) Interest

[35] It is readily seen that both claimants in the first claim sought an equitable interest in Windswept on the basis of improvements to the property or alternatively, compensation for the sums expended or the value of the improvements. As in the present claim, the Certificate of Truth in the first claim was signed by this claimant.

[36] Additionally, the Affidavit in Support filed 2nd November 2010 sets out in great detail the expenditures which form the basis of the claim and exhibits numerous receipts and documents in support. The claimant does not dispute these are the same documents relied on in lodging the caveat and in support of the equitable interest claimed in the case now before me.

[37] I hold that the present claim for an equitable interest is substantially the same as the claim made in paragraphs 9 to 12 of the Further Amended Fixed Date Claim Form filed on 17th August 2011 in the first claim. A notable exception is that in the first claim it was made jointly whereas now in the present claim it is made solely by the claimant.

Relevant Law

[38] The CPR provides:

> ***Sanctions - striking out statement of case***
>
> *26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> *(a) …*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;*
>
> *(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;*

Abuse of Process

[39] I am guided by the essential principles enunciated in the several cases cited including ***Three Rivers, Barrett*** and ***Johnson v Gore Wood***. A court that dismisses a party's case without adjudication on its merits must act on strong grounds whether it is striking out under rule 26 or by way of summary judgment. Such a decision ought not be made lightly and the court must be on sure footing before taking this draconian step. Although the court should not proceed to hold a mini trial, there must nonetheless be a scrupulous examination of all the circumstances before a litigant is denied his right to bring his claim to trial.

[40] In ***Gilham v Browning***[7] this guiding principle was stated in this way at page 689:

> *"It is of course important to recognise on the one hand that the court uses a jurisdiction to strike out for abuse sparingly and in plain cases where there has been misuse of the court's process, and on the other*

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[7] [1988] 1WLR 682

> *that the court is not constrained by fixed categories of circumstances in which the court has this power."*

[41] In ***Johnson v Gore Wood*** Lord Bingham of Cornhill who delivered the leading opinion said

"Abuse of process

The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581 at 590 *per* Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. Attorney-General for Queensland* [1979] AC 411 at 425 *per* Lord Wilberforce, giving the advice of the Judicial Committee). This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in ***Hunter v. Chief Constable of the West Midlands Police***,[8] an

> *"inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the*

[8] [1982] AC 529 at 536.

> *court has a duty (I disavow the word discretion) to exercise this salutary power."*[9]

[42] Lord Millett in concurring also sounded the caution:

‘However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon.’ This latter (though not the former) is *prima facie* a denial of the citizen's right of access to the court conferred by the common law and guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4th. November 1950). While, therefore, the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression. In ***Brisbane City Council v. A.-G. for Queensland*** [1979] AC 411 at p. 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in ***Henderson v Henderson*** is abuse of process and observed that it

> ". . . ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation." ‘[10]

[43] In Jamaica a party is entitled to a right to due process and of access to the court under the Charter of Fundamental Rights and Freedoms of the Jamaican Constitution.

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[9] At page 22
[10] Page 59

[44] Persistent and habitual litigation may amount to an abuse of process. See: ***Ken Sales & Marketing Ltd v Earl Levy et al*** cited above.

[45] In this case the claimant had discontinued the first claim and withdrawn the Defence to the Counterclaim. However, judgment was entered against her on the Counterclaim. There was no decision on the merits. It is recognised that discontinuance of a claim and reinstituting a subsequent claim based on substantially the same facts against the same defendant *may* amount to an abuse of process but *not* necessarily so. See: ***JMMB Merchant Bank Limited v Gerogics.*** Indeed, CPR rule 37.7 shows that it may be legitimate for a claimant to do so.

[46] In cases of discontinuance, a fundamental consideration in determining whether bringing a subsequent action is an abuse of process is the reason for or purpose of the discontinuance. This is exemplified in ***Gilham v Browning***[11] where a defendant who had counterclaimed tried to introduce evidence very late in the proceedings. This was disallowed by the court. In an effort to nullify the court's ruling, the defendant discontinued the counterclaim and instituted fresh proceedings on the same basis as the counterclaim. The English Court of Appeal found that this procedure was abusive as the notice of discontinuance was an effort to escape from an action which was evidently hopeless in order to start a new action where the evidential problems would not arise. May LJ referred with approval to the dissenting judgement of Lord Denning MR in **Castanho** (which was later upheld by the House of Lords) where he stated as follows:

> *"I summarized the cases on 'abuse of process' in Goldsmith and Sperrings Limited [1977] WLR 478, 489-490. I said: 'On the face of it, the legal process may appear to be entirely proper and correct.' So here the notice of discontinuance, on the face of it, is in time and correctly done without leave. 'What makes it wrongful is the purpose*

[11] [1988] 1WLR 682

> *for which it is used.' If it is used for the purpose of the party obtaining some collateral advantage for himself, and not for the purpose for which such proceedings are properly designed and exist, he will be held guilty of abuse of process of the court."*

[47] In ***Andrew Hamilton et al v Asset Recovery Agency***[12], Morrison P who 'fully endorsed' (at paragraph 90) the legal analysis of Sykes J in the Court below, cited with approval the following passage from the judgment:

> *"[20] So, what does Lord Bingham mean by 'broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'? Whatever else it may mean, based on His Lordship's dictum in Gore Wood, it means, at least, examining the reasons advanced by the person who is accused of abuse of process. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored. Clearly, there is room for disagreement among experienced judges as the case of Gore Wood demonstrated."*

Law applied

Is there Abuse of Process of the court

[48] In the several affidavits filed on behalf of the claimant no reason or explanation is given for the discontinuance of the first claim. Yet this is a case that cries out for

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[12] [2017] JMCA Civ 46

an explanation bearing in mind the sequence of events leading up to the discontinuance. On 3rd April 2015 the defendant company had sought orders to strike out the first claim. The claimant then discontinued the first claim before the application could be heard. On 23rd July 2015, in entering judgment for the defendant against both claimants in the first claim, G Brown J stated that he was satisfied that "Case management Orders made on the 5th of November 2014" had not been complied with.

[49] Earlier I made the observation that at one stage in early December 2015 the claimant was seeking to stay proceedings on the judgment in the first claim while at the same time instituting this action. The attempt to stay the proceedings failed. The claimant now says that she was not served and was unaware of the hearing before G Brown J. However, having discontinued her claim and withdrawn her Defence to the Counterclaim, I am unable to see how the claimant can now say that she was unfairly prejudiced at the hearing. G Brown J was empowered to enter judgment and make the order for possession. If the claimant was surprised at this outcome or believed it was unfair then her remedy was by way of appeal or possibly to apply under the CPR to set aside the judgment entered in her absence. The judgment of G Brown J and the order for possession are still extant. In all the circumstances of the instant case and in the absence of an explanation I find that the course adopted by the claimant in bringing the present claim amounts to a collateral attack on the judgment of G Brown J seeking as it does to avoid its consequences without directly appealing against it or seeking to set it aside. This amounts to an abuse of the process of the court.

[50] Further, in all the circumstances of this case and in the absence of any explanation for the discontinuance the only reasonable conclusion to be drawn was that the first claim was discontinued in order to avoid an adverse decision or judgment on the defendant's application to strike out. The bringing of this new claim relying on the same averments, facts and documents also amounts to an abuse of process.

Whether the pleadings disclose a cause of action and reasonable grounds for bringing the claim

[51] CPR rule 8.8 provides that a claimant must state the remedy which the claimant is seeking and the legal basis for the claim to that remedy. Rule 26.3 provides that the court may strike out a statement of case if it appears to the court that it discloses no reasonable grounds for bringing the claim. The questions of whether the claimant has adequately set out the legal basis for the claim and whether her statement of case discloses reasonable grounds for bringing it require close scrutiny of the pleadings and are treated together. I adopt the approach of Lord Steyn in the ***Three Rivers*** case where at paragraph 91 of his judgment he said that under the English rule 3.4 (which is materially the same as rule 26.3) "the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim." I will assume that the facts alleged by the claimant are true and consider whether, even if true, they amount in law to a sustainable claim.

[52] Counsel for the claimant submitted that the claim was filed to convert the claimant's right protected by the caveat into an interest in the property. However mere lodging of the caveat does not establish that the claim is valid. That proposition is based on the erroneous position that decision of Batts J discussed above confirmed or supported the claim for an equitable interest.

[53] In reviewing the statement of case it is convenient to begin with the Fixed Date Claim Form which states that the claimant claims:

> "[1] A declaration that she is the owner of an equitable interest in and is entitled to possession and continued occupation of …. "Windswept" ...
>
> [2] A temporary injunction restraining the defendant from entering upon the said property ...

> [3] Leave to substitute personal service on the defendant …
>
> [4] Costs; and
>
> [5] Attorney’s costs.

No grounds or anything substantiating the claim is further stated.

[54] So far as is relevant to the issue of the grounds of the claim, the claimant's affidavit in support of the FDCF filed 2nd August 2017 states:

> '5. That the full nature of my claim is set out in the caveat and supporting declaration and I attach hereto marked "Exhibit 1" and "Exhibit 2" respectively for identification a true copy of the same and make them a part hereof.
>
> 6. The subject property is a resort facility and consists of a house, a cottage and a gazebo (built by the Claimant) with a swimming pool and the Claimant operates her business from the site. The addition to and renovation of the property done by me has significantly enhanced the market value of the property.
>
> 7. That pursuant to the foregoing I have acquired an equitable interest the property as set out in the statutory declaration referred to above as "Exhibit 2." '
>
> 8. That the claimant asks this Honourable Court for a declaration that she is an equitable owner of the property in a proportion commensurate to her contribution to the value of the property and her expenditure on the said property.'

[55] Again, so far as is relevant to the issue of the basis of the claim, the caveat attached as Exhibit 1 records under the heading “Nature of the estate or interest claimed”:

> Over the years, I have carried out several renovation and made several improvements and structural changes to the subject property thereby significantly improving the value of the property. To date I have spent approximately Twelve Million Jamaican Dollars ($12,000,000.00) in making significant renovations and improvements to the property and thereby I have improved the value of the property by approximately Thirty Million Jamaican Dollars ($30,000,000.00). I have accumulated a significant bulk of receipts evidencing the construction work, cost of labour and materials paid by me to several hardware stores, labourers and workmen for carrying out work to the subject property on my instructions. The receipts range from February 1999 to present.
>
> I consider the subject property to be my dwelling home. As such, all expenses and all bills relating to the subject property are paid by me.
>
> The interest claimed is approximately Thirty Million Jamaican Dollars ($30,000,000.00) representing the improved value of the property after renovations."

[56] The statutory declaration attached to the affidavit as Exhibit 2 contains errors in the paragraph numbering. However the relevant assertions are that the claimant's friend Ms Nadiak-Parchment had lived at Windswept for over 12 years and had lodged caveat 102036 "in order to secure her interest in the property which arose as a result of non-payment of charges for Ms Parchment's services and non-reimbursement of the monies advanced by her to fund the renovations of the property," which services and renovations were on the request of a director of the defendant (paragraphs 4 and 5); due to illness Mrs. Parchment sought prolonged treatment overseas, so "I agreed that I would oversee the property to include paying taxes and utilities for the property and maintaining the general upkeep of the property" (paras. 6-8); the claimant paid all the property taxes from 1998 to 2011 and from October 1999 she permanently lived at the subject property and

paid the utility bills from then onwards. She also repeated the averments made in the caveat that are set out above and added that she also installed a security system at the property.

[57] To complete the picture, I will consider the claimant's affidavit filed 2nd August 2017 in response to this application as part of her statement of case. She states at paragraph 13 that the instant action is a claim for an equitable interest in property because of the expenditure she incurred on the property with the instruction and knowledge of the defendant and its agent.

[58] So that is the totality of the claimant's statement of case for an equitable interest and compensation: her occupation of the property for a period of time, payment of property taxes and utilities, the expenditure of money with the knowledge of the defendant's agents which improved and increased the value of the property and the lodging of the caveat. I do not see how these statements, even if they were proven, are sufficient to constitute a legal basis for the claim or reasonable grounds for bringing it. Mere expenditure of money on land with the knowledge of the owner is insufficient in my view to amount to a cause of action. There must be some additional factor which is capable of raising a cause of action known to law such as breach of contract or to enable the claimant to rely on some species of estoppel or trust. It appears that the first claim was grounded on the possession of Ms Nadiak-Parchment as this claimant could not establish adverse possession by herself and any further claim for an equitable interest was based on the alleged legitimate expectations of Ms Nadiak-Parchment or agreements made with her.

[59] For these reasons I hold that the claimant's statement of case does not disclose reasonable grounds for bringing the claim.

Having regard to the foregoing, it is not necessary to decide the defendant's application that the matter be stayed pending the claimant paying the defendant's costs in the discontinued first claim.

Disposition

[60] 1. The claim is struck out.

2. Judgment is entered for the defendant.

3. Costs to the defendant to be agreed or taxed.

……..
Hon. C. Stamp, J.