

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006/HCV 00283

BETWEEN	EDRIS JARRETT	1 ST CLAIMANT
AND	JOSEPH JARRETT	2 ND CLAIMANT
AND	ERNEST A. SMITH	1 ST DEFENDANT
AND	NESTA CLAIRE-SMITH	2 ND DEFENDANT
AND	MARSHA SMITH	3 RD DEFENDANT
AND	ERNEST A. SMITH & CO.	4 TH DEFENDANT
AND	CARMEN JARRETT	5 TH DEFENDANT

Joseph Jarrett instructed by Joseph Jarrett & Co. for the Claimants.

Hilary Phillips, Q.C., instructed by Grant Stewart Phillips & Co. for the Defendants.

Heard 2nd October, 30th November 2006 and 2nd July 2008

Campbell, J.

**Abuse of Process, an Actionable Tort
Action Initiated for Improper and Collateral Purpose
Predominating Purpose for Initiating Action
Attorney-at-Law's Professional Duty of Care
Duty to Client - Duty to Third Parties
Striking out Claim**

(1) On the 22nd March 2006, the 1st - 4th Defendants filed a Notice of Application for Court Orders, seeking an Order that the Claimants' claim be struck out pursuant to Rule 26.3 (1) (b) of the Civil Procedure Rules, 2002 on the grounds that;

1. the Claim amounts to an abuse of the process of the court or is likely to obstruct the just disposal of proceedings; and
2. on the face, the Statements of Case disclose no reasonable grounds for bringing a claim sustainable in law against the Applicants/Defendants.

Background

(2) The 1st, 2nd and 3rd Defendants are attorneys-at-law, father and two daughters respectively, practising under the aegis of the 4th Defendant. The 1st and 2nd Claimants are mother and son. The son himself is an attorney-at-law. The 5th Defendant, not a party to this application, is the client of the 1st - 4th Defendants and asserts a relationship to the Claimants.

(3) The 4th Defendant appeared for the 5th Defendant in her protracted dispute with the Claimants. This dispute, we are advised, started sometime around 1993, when the 5th Defendant was summoned by the 1st Claimant to the Trelawny Resident Magistrate Court, in proceedings to recover possession of land registered at Vol. 1255 Folios 95 and 96 of the Register Book of Titles (Granville lands).

(4) On the 28th January, a cross case was filed by the 4th Defendant at the behest of the 5th Defendant, claiming damages for trespass (suit no. CL J050 of 1994) in respect of the said Granville lands (first suit). No Statement of Claim accompanied the Writ. The Defendants' application to strike out the Writ was heard on the 14th December 1994, and an Unless Order was made with the consent of the parties which allowed the Claimants 14 days within which to comply. The Claimants were unable to deliver the Statement of Claim. Nonetheless, the Claimant filed a Notice of Discontinuance which was served on the 23rd February 1995.

(5) The 5th Defendant subsequently instructed the 4th Defendant to file a Claim along similar lines to the first suit. In the second suit, no. CL J029a of 1995, it was alleged that the documents that were procured and put in support of bringing the Granville lands under the operation of the Registration of Titles Act are and were fraudulent and that the Claimants had made false representations to the Registrar.

(6) The second suit of the 5th Defendant was filed on the 17th February 1995, the same day that the Claimants filed their action claiming recovery. The Claimants however failed to file a Defence to the 5th Defendant's second suit. The Judgement in Default of Defence was eventually set aside, and both matters were consolidated. Three trial dates were fixed in relation to the matters and had to be vacated.

(7) The second suit was challenged, on the basis, it had no reasonable prospect of succeeding against the mother and son, Defendants named therein, and that the particulars of fraud was based on speculation and that no documentary proof had been produced to ground the allegation of fraud. The second suit was amended subsequent to the filing of Notice for Dismissal, and the matter was discontinued as against the mother.

(8) At Case Management Conference, adjourned to 16th January 2006, the 5th Defendant's amendments to the Statement of Claim were allowed and the 2nd Claimant withdrew his application for striking out the claim. The matters were fixed for trial in April 2008.

The Granville lands bear the name of the district where it is situated; Granville, which was one of the free villages that developed immediately after emancipation of the freed slaves. The freed slaves had declared "me nuh care fi hire meself out again" and had started their own farms. The Claimant, Edris Jarrett, in her Affidavit, says that the land was bought by their ancestor in the nineteenth century, and had been handed down in the family since. That perhaps is the reason for the interest displayed by the parties. The size of the land is unremarkable. It is described as being cut in two and separated by the main road.

The Claim

(9) On 27th January 2006 the Claimants filed an action claiming damages for abuse of process of the court and malicious prosecution against the Defendants and professional negligence as against the attorneys-at-law and their law firm. The Claim was further amended to include claims for exemplary and/or aggravated damages for libel against the lawyers and their firm and slander against their client.

Among the particulars, the Claimants allege:

- (a) That defamatory documents were published to persons working in the Defendants' law firm, and has caused the Claimants to be seriously injured in his reputation.
- (b) That the Defendants were professionally negligent in their conduct of the matter
- (c) That despite being shown the title to the Granville lands being in the name of the son, they filed an action against both mother and son, claiming that they were wrongfully registered as the owners of the Granville lands.
- (d) They had a duty to thoroughly investigate with the Registrar of Titles and not wait until 2005 to make discovery.
- (e) That by discontinuing proceedings against the 1st Claimant the defendants have shown that they acted wrongly in commencing proceedings against her and the amendments sought have shown that they initiated their action on a false premise.

On February 8, 2006, the Claimants filed an Amended Claim adding claims for exemplary and/or aggravated damages and a claim for damages including exemplary and/or aggravated damages for libel against the 1st to 4th Defendants and slander as against the 5th Defendant.

The Defendants'/Applicants' Case

(10) In support of the application for striking out the Claimants' Claim, the Affidavit of Marsha Smith, 3rd Defendant, states that the Claim was improperly brought against the Applicants; that the action was initiated by the Applicants in their professional capacity and not their private capacity. No cause of action will lie for libel because written and oral statements made in court proceedings including pleadings and other documents brought into existence for the purpose of the proceedings are protected by the principle of absolute privilege. The Applicants at all times acted in good faith and on the instructions of their client, the 5th Defendant, that the allegation of professional negligence is ill-founded and that the suit against the Claimant is still current, the Claim is premature and ill-conceived.

The Claimants' Case

(11) The 1st Claimant claims damages, that on the 21st June 2005, the Defendants discontinued proceedings against the 1st Claimant without any explanation or apology. That they had a duty that they had the full facts before proceeding against the Claimants and proper research would have revealed that the 1st and 2nd Claimants were never the Applicants of the registered lands. That despite being supplied with information that the registered title arose from an application of another person and that the title was in the name of the 2nd Claimant alone, the Applicant nonetheless filed an action in the Supreme Court against both Claimants, stating that they were both registered as owners of the subject land. The accusation of fraudulent procurement of Registered Title was based on a false premise and is "a flagrant abuse of the process of the court". The Claimants did not pursue in their submissions before me, the allegation of libel against the 1st - 4th Defendants.

(12) It appears that the nub of the complaint of "abuse of the process" of the court stems from the discontinuation of the action against the 1st Claimant. It is accepted that to initiate an action without an intention to pursue to determination, may constitute an abuse of the process of the court. The learned authors of Stuart Sime, 'Civil Procedure,' Ninth Edition, at page 257;

"In Barton Henderson Rasen v Merret (1993) 1 Lloyds rep. 540 Saville J said that is an abuse of the courts process to issue proceedings with no intention of taking the case any further. In contentious matters the courts exist for the purpose of determining claims. Therefore, starting a claim with no intention of pursuing it is not using the courts process for the purposes for which they were designed."

An inspection of the history of the litigation between the 5th Defendant and the Claimants is instructive. The 4th Defendant, on the instructions of the 5th Defendant, filed suit no. CL J 050 of 1994.

That matter was discontinued. However, another suit was instituted; an Interlocutory Judgment in Default of Defence was obtained against both Claimants and an Order to proceed to Assessment of Damages. The Claimants succeeded in having that judgment set aside, summons on directions and a trial date was fixed before the suit was discontinued almost a decade after it had been started. The Defendants claim that the reason for the discontinuance against the 1st Claimant was the information received in an Affidavit dated the 8th and 13th June 2005. There appears to me to be sufficient evidence to support a finding on a balance of probabilities that the Defendants, when they instituted the case in respect of the 1st Claimant, had intended to pursue the matter but only discontinued on the receipt of information that the 1st Claimant was not a signatory to the applications for the registered title.

Abuse of Process

(13) The Defendants, in response to the Claimants' claim for abuse of process, submit that abuse of process is part of the court's arsenal to control its processes. It does not form the basis of a cause of action as pleaded by the 1st Claimant or at all. With this submission, I disagree. The learned authors of **Winfield and Jolowicz on Tort Fifteenth Edition**, states at page 689;

“Aside from liability for malicious civil proceedings the law also recognizes a related tort sometimes called ‘abuse of process’. This lies where a legal process, not itself without foundation, is used for an improper, collateral purpose, for example as an instrument of extortion in a matter not connected to the suit.”

The tort of “abuse of process” lies when an action is filed which may have substance, but is used for an improper or collateral motive. The tort is to be distinguished from that of malicious prosecution. It matters not that there is reasonable and probable cause when the action is “merely a stalking horse to coerce the Defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate.”

(14) In **Williams and Others v Spautz (1992) 174 CLR 509**, where Dr. Spautz, a disgruntled university lecturer, having been dismissed, brought a spate of criminal prosecutions against persons whom he thought were responsible for his dismissal. Several of these persons brought separate actions seeking declarations from the court that the prosecutions were an abuse of the process. The court granted the declarations and stayed the prosecutions. Dr. Spautz appealed from the decision of the court. In its reasons for judgement, the court accepted the first instance judge's finding, which was stated as;

“The predominating purpose of Dr. Spautz in instituting and maintaining the criminal proceedings the subject of the present application, against Profs Gibbs and Williams and Mr. Morris was to exert pressure upon the University of Newcastle to reinstate him and/or to agree to a favourable settlement of his wrongful dismissal case.”

(15) The Court of Appeal upheld Spautz appeal, and concluded that the trial judge had erred in his formulation of the principles governing “abuse of process”. Priestly, J. felt that no permanent stay should be granted in the absence of an improper act in the prosecution of the process.

The High Court of Australia agreed with the Judges of the Court of Appeal that there was abundant evidence from which the court could find that Dr. Spautz had launched a campaign for his reinstatement pressuring persons with power to decide the issue by threatening lawsuits. The campaign was launched prior to the commencement of the actions. The court recognized a difficulty inherent in these cases and quoted with approval from **Connolley v D.P.P (1964) A. C. 1254**, where Bridge L.J. said;

“What if a litigant with a genuine cause of action which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by-product of the litigation, can he on that ground be debarred from proceedings? I very much doubt it.”

Although the High Court agreed with the learned lord justice’s conclusion, it found that central to the tort of “abuse of process” is the requirement that the party which has instituted proceedings has done so for a purpose or to effect an object beyond that which the legal process offers. (See paragraph 27 of **Spautz**)

(16) The test to be applied is the pre-dominant test. In **Metall and Rohstoff v Donaldson Inc. (1990) 1 QB**. The Plaintiffs had claimed damages under the heads of inducing breach of contract, abuse of the process of the court, accounting as constructive trustees and procuring breaches of trust. In an application by the Defendants to have the Order for service out of the jurisdiction set aside, the Judge ordered that the Writ relating to abuse of process and breach of trust be set aside. He found that the Claim for damages for the tort of abuse of process was misconceived. On appeal by the Defendants, the court held, in respect of the tort of abuse of process of the court, that before the Plaintiffs could rely on a tortious abuse of the process of the court, they had to show that the Defendants predominant purpose in using the legal process had been for a purpose other than that for which it was designed and that they had been caused damage by the abuse.

The leading judgment in **Williams** (para 42), observed;

“It is, of course, well established that the onus of satisfying the court that there is an **abuse of process** lies upon the party alleging it. The onus is "a heavy one", to use the words of Scarman L.J. in *Goldsmith v. Sperrings Ltd.* ((1977) 1 WLR, at p 498.”

Negligence of the 1st – 4th Defendants

(17) It was submitted by the Claimants because the four Defendants were being held jointly and severally liable for the negligence and abuse of process, therefore an Affidavit from just one of the attorneys-at-law would be insufficient in considering an application to strike-out the claim of Edris Jarrett. That the affiant could only speak to her involvement in the matter since that time and not from 1993.

Further, that it is impermissible to hold a mini-trial that any proper examination of the documentation and arguments would be akin to a mini-trial.

That the test to be applied is whether the 1st Claimant has a real prospect of succeeding. It was incumbent on the Defendants.

The submission on behalf of the 1st – 4th Defendants is that the Claimants are attorneys-at-law owe a professional duty of care to their client to exercise a standard of skill and care appropriate to his status, as well as an overriding duty to the court as one of its officers. It owes no such duty to the Claimant.

Analysis

(18) In an adversarial action, the attorney-at-law owes a professional duty of care to his client and to no one else. This is a paramount duty.

In *White and Another v Jones and Others* (1933) 3 All ER 481, the Court of Appeal in the appeal that dealt with non-adversarial suit undertaken by solicitors. Sir Donald Nicholls said at 489;

“... a solicitor owes a professional duty of care to his client and no one else. He is subject to professional rules and standards, and he owes a duty to the court as one of its officers. But within that framework it is to his client alone that he owes a duty to exercise a standard of skill and care appropriate to his status as a solicitor. ... In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client’s opponents.”

The judgement then proceeded to examine whether the duty owed by the solicitor was different from those enumerated when the solicitor took instructions for the preparations and execution of a Will.

(19) The Court of Appeal, in **White and Another**, pointed out an exception, to the fundamental rule that there was no duty owing to anyone other than the solicitor client. The court held that a solicitor who was instructed to prepare a Will for a client and in breach of his professional duty, failed to do so, was liable in damages to a disappointed prospective beneficiary if the client died before the Will had been prepared or executed. It was further held that the reason for the liability was that it was foreseeable that a disappointed beneficiary would suffer financial loss. Secondly, there was sufficient proximity between the solicitor and the beneficiary. Thirdly, the solicitor being in breach of his professional duty and there being no remedy in contract, it was just that he should be liable. The Court approved the decision in **Ross v Caunters (1979) 3 All ER 580**; where the solicitor's duty to third parties was distinguished from that of the client. Sir Robert Megarry V-C, at page 599, letter c;

“The duty owed by a solicitor to a third party is entirely different. There is no trace of a wide and general duty to do all that properly can be done for him. Instead, in a case such as the present, there is merely a duty, owed to him as well as the client, to use proper care in carrying out the client's instructions for conferring the benefit on the third party. If it has to be held that there is a duty wider than that, that will have to be determined in some other case.”

(20) In 1988, in **Al- Kandari v J. R. Brown & Co. (1988) 1 ALL ER 833**, where a firm of solicitors, acting for a husband, had given to the Plaintiff's solicitors an undertaking not to release the husband passport to him. The passport included the couple's two children was submitted to the Embassy to facility the removal of the children's name. The Embassy released the passport to the Plaintiff's husband, who abducted the children and took them out of the country. The Court of Appeal held that although a solicitor would not normally owe a duty of care to his client's opponents in hostile litigation, he would owe such a duty if he stepped outside his role as solicitor for his client and accepted responsibilities towards his client's opponents.

(21) In **Al-Kandari**, the Court of Appeal found that the undertaking given by the Defendants brought them out from acting as the husband's solicitor to be independent custodians of the passport. They therefore owed the Plaintiffs a duty to keep the passport in their custody and to inform the Plaintiffs if for any reason they cease to be. Bingham L. J. states at pg 839;

“The solicitor is selected for such a role, not because he is one party’s solicitor but despite that fact; he is selected because the parties know they can rely on him as a solicitor to act with probity and in accordance with the terms of the trust he has undertaken.”

The litigation between the parties was adversarial, and as so frequently happens in Jamaica, where the subject matter is land, the battle was being fiercely waged by both sides. There was nothing in the evidence to suggest that there was a benefit to be conferred on the Plaintiffs. To the contrary, the Affidavit in support alleges that the instructions were that the 5th Defendant was entitled to the land on which she had lived for many years.

There is no evidence before me that the 1st - 4th Defendants have, during the course of the conduct of this litigation, stepped-out of their role as attorney-at-law for the 5th Defendant. It has not been alleged that they accepted responsibilities towards the 5th Defendant’s opponents. I find that they owed no duty to the Claimants, in their conduct of the case on behalf of the 5th Defendant.

Striking Out of the Claim

(22) Has the Claimant’s case a real prospect of succeeding at trial? Lord Hope in the **Three Rivers District v Governor and Company of the Bank of England No.3 (2003)2 A.C 1**, enunciated the principles to be applied on an application for striking out, at paragraph 95;

“... , it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action be taken out of court as soon as possible.

In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case, the easier it is likely to be to take that view and resort to what is properly called summary judgment.”

There is no evidence that the 5th Defendant had instituted the action with a pre dominant purpose that was intended to effect a purpose or achieve an objective that was beyond the legal process of the claim filed. There is no such evidence of any pre dominant purpose extending beyond the reach of the claim. There was no evidence that the 1st – 4th Defendants stepped outside their roles as attorneys-at-law in their conduct of the 5th Defendant’s case. To my mind, this case falls into the category where it can be said with confidence, before trial, that the factual basis for the claim is fanciful because it is entirely without substance.

(23) Part 26.3 (b) & (c) allows the court in exercising its case management powers to strike out a Statement of Case, there is a similar power under Part 26.3 (c) where there is disclosed no reasonable grounds for bringing the action.

I find that the Statement of Case disclose no reasonable grounds for bringing a Claim sustainable in law against the Applicants.

Judgment for the Applicants, the 1st - 4th Defendants on the Notice of Application dated 22nd March 2006. The Claimants' case is struck out as disclosing no reasonable grounds for bringing a Claim sustainable in law.

Cost to the Defendants to be agreed or taxed.