[2019]JMSC Civ 263

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011HCV05563

BETWEEN	**BASIL JOHNSON (Executor of the estate of Josephine Allen)**	**CLAIMANT**
AND	**CLEMENT GEORGE TOMLINSON**	**1st DEFENDANT**
AND	**DAPHNE TOMLINSON**	**2nd DEFENDANT**

IN OPEN COURT

Brian J. Barnes instructed by Brian J. Barnes and Associates

Miss Carlene Larmond and Miss Anna Gracie instructed by Rattray, Patterson and Rattray

January 7, 8, 10, 18 and July 18, 2019

Striking out – No reasonable prospect of success – Noncompliance with court orders – Indefeasibility of title

L. PUSEY, J

[1] It is unfortunate that the Claimant passed away seven days before the case was set to be heard. However, the majority of the circumstances which lead to the court's decision occurred long before his untimely demise.

The Claim

[2] The subject property is registered at Volume 985 Folio 447 of the register book of titles and of about 1000 acres of land. The lands were transferred to the Defendants in 1976 as a result of the will of Allan Blair, a relative of the Defendants.

Mr. Blair obtained the land from the West Indies Sugar Company (WISCO) in 1962. WISCO obtained the property in the 1930s. The Second Defendant had passed away in 1994, some 17 years before the filing of this claim. She devised her share of the property to her son, the First Defendant. No action has been taken against her estate.

[3] The Claimant's case has gone through changes in the facts alleged and the remedies sought between the filing of the first Particulars of Claim and the trial date of January 7 2019. At the time of trial, the Claimant's case was set out in the Further Amended Particulars of Claim filed in December 2013.

[4] The claim was reasoned thus First Defendant

> *(1) The Defendants' title was derived from a title registered at Volume 333 Folio 76 and issued to the West Indies Sugar Company in 1938.*
>
> *(2) That title was said to be lost and a new title registered at Volume 985 Folio 447 in the name of Allan Blair in 1962.*
>
> *(3) The Claimant avers that the lost title report was "in furtherance of a fraud to eliminate from the system, the fraudulent title registered at Volume 333 Folio 76.*
>
> *(4) It is averred that the Defendants are therefore not bona fide purchasers for value without notice as they obtained the land by way of the will of Allan Blair who obtained the land by fraud and knowingly and actively furthered the fraud.*
>
> *(5) The Claimant reasons that the property was obtained by a fraud on the Claimant and his predecessors in title by the Defendants' and their predecessors in title. [paragraphs 4- 8 of the further amended particulars of claim].*

[5] The Claimant contends that the estate of Josephine Allen had rights to the property through being a descendant of Edwin Allen who died in 1899. He asserts that Edwin Allen and his family have been in occupation of the property since the late 1800s. He claims that the property devolved to Josephine Allen and she left it to her beneficiaries.

[6] In particularising the fraud, the Claimant sets out that the Defendants and their predecessors in title have misdescribed the land to have it subsumed under the name Winchester Estate and to remove the name “Prospect”. He claims that on the older maps Prospect and Winchester were far apart.

[7] The Claimant also indicates that since the Defendants came into possession of the property, surveys and subdivisions have been made. These surveys in effect removed the previous names of Prospect Estate and Parbucle Wharf and replaced the name Winchester Estate. He also lists transfers and sales made by the Defendants and characterises them as questionable or fraudulent, although he declines to explain why they are questionable or fraudulent.

[8] The First Defendant denies knowledge of or participation in any fraud and relies upon the indefeasibility of title. He also relies upon undisturbed possession of the property and the profits thereof for over 26 years. He contends that he first became aware that the Claimant placed persons on the property in 2009 and that he immediately sought recovery of possession against those persons.

The history

[9] In the eight years since this matter was filed it has occupied a lot of judicial time. The First Defendant’s attorneys and Miss Anna Gracie in particular, was kind enough to provide the court with a nine-page outline of the litigation history of this matter. I found that that outline was an accurate reflection of the history of the case based on my own review of the Supreme Court case file. An attempt to summarise that history would bend this judgment toward prolixity, therefore I will attempt to highlight the relevant aspects and give some more detail of the appearances in 2018 and 2019.

[10] Between April 2013 and July 2014 there were nine court appearances for Case Management Conference. Only one of these hearings was an adjournment before the same judge who was hearing evidence relevant to an application that determined whether or not the Claimant could read. Four of the Case Management

Conference hearings were adjourned due to the non-attendance of the Claimant and in three of these four hearings the court made “unless orders”.

[11] In total there were 23 hearing dates (including trials) and the case was considered by 10 judges and masters. These dates do not include those associated with this hearing.

[12] Three of these hearing dates were trial dates. The first trial date was set in July 2014 for hearing in November 2015. The Claimant’s attorney applied to vacate that date as the previous attorney had been incarcerated and the documents that he had would not be available until the attorney completed his sentence in 2016. The trial was adjourned to 7-9 March 2017.

[13] The Claimant filed some outstanding documents on the day of trial in March 2017 and sought and obtained an adjournment. The court granted the Claimant until the end on March 2017 to comply with the court’s orders. The case was set for trial in January 2018.

[14] In January 2018 the First Defendant’s attorney took ill on the Friday before trial. The court insisted on her attendance and having been satisfied of her illness the matter was set for January 2019. It was suggested that the evidence of the Claimant and First Defendant be taken by deposition, as they are both of advanced age. An application was made to the court and depositions were set to be heard before a judge on 21 May 2018.

[15] The matter came before George J on 21 May 2018. By way of comment, I wish to emphasise that all the judges that this matter came before for trial or deposition treated it as a matter of urgency as the parties were both elderly and the Claimant was unwell. George J took the evidence of the First Defendant but concluded that the Claimant was not able to give evidence.

[16] The Judge made further orders in an attempt to facilitate the hearing of the matter. Those orders include:

(1) An order that the Claimant file and serve an application supported by medical evidence and an affidavit requesting a next friend be appointed by the court on or before July 31 2018. This application should be heard at a pre-trial review set for 10th October 2018.

(2) The Claimant to file and serve an application to further amend the claim and particulars on or before 31 July 2018.

(3) Application to amend particulars is to be treated as urgent and heard during the week commencing September 17, 2018.

[17] No applications or affidavits were served by 31 July 2018. Counsel for the Claimant points out that matters were adjourned on 17 September 2018 because of a security issue at the court.

[18] At the pre-trial review the court extended the time to comply with George J's orders to 3 and 20 November 2018.

[19] The First Defendant applied to strike out the Claimant's case on December 13 2018. That application was to be heard at the adjourned pre-trial Review on December 18 2018.

[20] At the Pre-Trial Review, the court heard the application to strike out. The Claimant had filed a notice of application for a further extension of time to file the orders. The First Defendant contends that this application was served after midday on their attorneys and that the judge did not consider that application having taken the view that it was not properly before her.

[21] The court made an "unless order" requiring that the application to appoint a representative for the Claimant to be filed on or before January 2 2019. The court made another "unless order" that the application to amend the claim be filed by January 7 2019.

[22] The Claimant filed an application for witness summons to the Registrar of Titles, Director of Surveys and the Director of Records. The Claimant also filed an

application to appoint a “next friend/ representative” for Mr. Johnson on December 28 2018.

[23] The applications were heard on two dates during the Christmas vacation. On January 2 2019 the court was informed that Mr. Johnson had died on December 31 2018. Tie J set the other applications for January 4 2019 and indicated that the trial date would be maintained.

[24] On January 4 2019 an affidavit of Oswald James was filed. He indicated that he was executor of Mr. Johnson’s estate and he needed time before he could make the application to substitute for Mr. Johnson or stand in his stead as an executor. Mr. James is known to be a former attorney and is the person who represented the Claimant when this action was originally, filed. The application for “next friend/representative” was withdrawn.

[25] Of note is the fact that at no time was the application to have someone act on Mr. Johnson’s behalf, while he was alive, supported with the necessary medical documents. The Claimant’s attorney filed an affidavit attempting to explain the delays in making the application by explaining that he had difficulty finding family members interested in the action to give instructions. He also indicated that some of the beneficiaries of the estate of Josephine Allen also had little interest in the action. Mr. Barnes indicated that the decision to put forward a representative was only made in the middle of December 2018. This affidavit was apparently not relied on by any of the judges who heard this matter in December as it was deponed to by the attorney arguing before them.

The trial

[26] This matter came before the court on January 7 2019. Mr. Barnes for the Claimant sought another adjournment based on the passing of Mr. Johnson. He had not made the application to amend the claim, because he had no person to receive instructions from. He also indicated that he had prepared an application under CPR 21.7 to appoint the executor as a representative to continue the prosecution of the

case, however he had not yet received instructions to do so, despite having spoken to the executor, who was in the island. Without those instructions he had not filed the application.

[27] The First Defendant's attorneys objected to this latest application for adjournment and indicated that the Claimant failed to obey the most recent "unless order" to amend the claim.

[28] The court enquired of Mr. Barnes how he intended to prove the Claimant's case as the now deceased Mr. Johnson was his primary witness. Mr. Barnes responded that Mr. Johnson's evidence was merely information that he received from legal research the executor had done. He indicated that the executor would give evidence at the trial. The executor was not at court nor was there any reason proffered for his absence.

[29] Mr. Barnes indicated that he had previously applied to put the executor's witness statement in evidence without calling him because he had not been able to contact the executor. However, contact was re-established following the death of Mr. Johnson.

[30] The court allowed an adjournment to the following day to allow the Claimant to make an application to have someone represent the estate of Josephine Allen. Since the executor of Mr. Johnson's estate was in the island, familiar with the case an immediately clothed with authority on the death of Mr. Johnson, the court felt that this person could make an application. In granting the adjournment the court pointed out that much judicial time was spent on this matter, the executor was in communication with the Claimant's attorney and the judge was already familiar with the case having read the papers in preparation for trial. Therefore, the hearing of the application to substitute a party would be convenient and would aid in determining the strength of the case and the likelihood that the case could proceed on another date.

[31] On January 8 2019, the Claimant's attorney returned to court and indicated he had no instructions to proceed to make an application on behalf of the executor. Mr. Barnes indicated to the court, that the executor had told him that he would not be able to give instructions to Mr. Barnes until he had certain assurances from the beneficiaries of Mr. Johnson's estate and the estate of Josephine Allen. This position was conveyed to the court orally and the executor did not attend court.

[32] The court noted that an executor speaks for the estate upon death of the testator. Mr. Johnson was the executor of the estate of Josephine Allen, and therefore the executor of Mr. Johnson's estate could step into Mr. Johnson's place as representative of the suit. This was particularly so because the executor was familiar with the matter and a supposed witness in the case. The court also noted, that the executor did not file an affidavit to explain his reasons nor did he attend court.

[33] The court on its own initiative informed the parties that it would consider an order striking out the Claimant's case under Civil Procedure Rules (CPR) in particular rules 26.3 (1) a and c. The First Defendant raised the provisions of CPR 39.5 as an additional ground to strike the matter out. The hearing of the striking out consideration was set to be on January 10 2019.

Striking out

[34] At the hearing of the striking out initiative the court raised CPR 26.2 (4) which appears to indicate that when the court is acting on its own initiative, the registry ought to give the party affected 7 days notice of the time and place of the hearing. This point was not raised by the Claimant. The court took the view that rule 26.2 (4) referred to situations where the parties are not already before the court and had to be summoned to court for a hearing. In any event, even if this section was applicable to the circumstances of this case the judge also has the power under rule 26.1 (c) to extend or shorten time to do any act.

[35] The court took the view that in all the circumstances, a reasonable opportunity and adequate time was given to the affected party to address the issues. These circumstances include the fact that the matter was set down for 5 days of trial and therefore the Claimant's attorney ought to be prepared for the matter to be finally determined. The CPR provisions on which the court indicated that striking out was likely are as follows

> *"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) that there has been failure to comply with a rule or practice direction or with an order or direction or with an order or direction given by the court in 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;"*

[36] The other basis for striking out raised by the First Defendant is under CPR 39.5 which states

> *"Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules –*
>
> *(a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or*
>
> *(b) if one or more, but not all the parties appear the judge may proceed in the absence of the parties who do not appear"*

[37] The First Defendant cited the **Commissioner of Lands (The) v Homeway Foods Ltd and Anor** [2016] JMCA Civ 21 where McDonald–Bishop JA summarised the principles in striking out matters as gleaned and condensed from **Barbados Rediffusion Service Ltd v Aisha Mirchandani and Others (No 2)** [2006] 69 WIR 52.

"(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the noncompliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the noncompliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

(ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it."

[38] Mr. Barnes indicated that the remedy of striking out was too harsh punishment for this matter. He indicated that the powers delineated under CPR 26.3 were to be employed at the stage of case management conference only and were not available to the court at this stage. He stated that in any case the "nuclear option" of striking out was not to be used in matters like this. He relied on **Cedar Valley Springs Homeowners Association Incorporated v Hyacinth Pestaina** ANUHCVAP2016/0009 a case from the Court of Appeal of the Eastern Caribbean Supreme Court to fortify his position. In that case the appellate court set aside a master's striking out of a case as disclosing no reasonable ground to bring the action. The court held that having determined that the pleadings disclosed a reasonable cause of action, the need to plead additional facts could be dealt with by other means especially as the striking out took place before case management.

[39] Mr. Barnes reiterated that with the passing of Mr. Johnson and the executor being unwilling to step into his shoes, it was impossible for the Claimant's case to go forward without a person who could instruct him. He stated that it would be "draconian" to strike out the matter in these circumstances. He opined that there was good legal reason that the executor may be unwilling to seek to represent the estate of Josephine Allen because a court may frown on the executor who is a disbarred attorney who has been convicted of an offence of dishonesty being put in a position of being a trustee for the estate.

[40] The Claimant's attorney also indicated that his case would be improved by the yet unseen application to amend the claim. He also argued that the case had been

subject to review at case management conference and no issues were raised that the case disclosed no reasonable grounds for bringing the claim. Therefore, the case had passed the merit bar having been reviewed during the case management process.

[41] Mr. Barnes also argued that the only relevant striking out provisions applicable to this case was that in CPR 21.9 which allows for striking out after the death of a Claimant.

[42] The First Defendant's attorneys argued that the several delays and disobedience of the court's orders severely prejudices the octogenarian First Defendant and therefore the matter should be struck out. Counsel also argued that the nexus between estate Josephine Allen and the property was questionable and that the principle of indefeasibility of title and the inability to prove the Particulars of Fraud as against the Defendants qualified the statement of case to be struck out as disclosing no reasonable grounds for bringing the action.

The outcome

[43] This matter is struck out. The court agrees with the Claimant that it would not be appropriate to strike the matter out under CPR 39.5. The absent party is Mr. Johnson the representative of Josephine Allen's estate. Based on his very recent demise it would not be fair to strike out the matter on this basis.

[44] This does not, in my view affect the court's ability to consider the conduct of the Claimant in prosecuting this action. The history of the case has been characterised by delay, failure to comply with the orders made by several judicial officers and failure to abide by the CPR. There is a pattern in the Claimant's conduct of this matter of only making an attempt to comply with court orders when matters are brought to court or just before a previously set court date.

[45] The proposed application to amend the claim which was provided for by the order of George J in May 2018 is symptomatic of that practice. The first deadline set for

the application was July 31, 2018 and no application was filed. The second timeline was the hearing in the week of September 17, 2018. There was no hearing date sought. Counsel argued that a bomb scare on that date made the hearing impossible. George J's order presumed that the party would get a date from the Registrar to hear the matter in that week. This was not done. The bomb scare only disrupted the first day of that 5 day working week.

[46] An extension of time was sought and obtained at the pre-trial review before Wolfe-Reece J. (Ag.) a further extension was granted until the trial date and no application was made. No affidavit has been filed indicating the reasons for the application not having been filed. We are left with the viva voce explanations of Mr. Barnes.

[47] The court is not only stymied by the absence of a person to stand in the shoes of Mr. Johnson, but by Mr. Johnson's executor's refusal to act for him even temporarily. The executor who we are told will be the main witness for the Claimant in the absence of Mr. Johnson has not attended court or filed an affidavit to explain his absence. He has merely sent messages through Mr. Barnes who has had to battle strenuously with the hand he has been dealt.

[48] It is my view that this matter should be struck out in order to maintain respect for the court's orders, to ensure that fairness is done to this defendant and other litigants which need the court's time and resources. The Claimants statement of case is struck out pursuant to CPR 26. 3(1) (a).

[49] This court is also of the view that the case discloses no reasonable ground for bringing the claim. The first limb of the claim is that the beneficiaries of the estate of Josephine Allen have an interest in the subject property. The claim at present is predicated on the fact that Edwin Allen who it is said died in 1899 was in occupation of the property and that his descendants have been in continuous possession since his death. The property then 'devolved' to Josephine Allen. It appears that this is now said to be a possessory title which was passed down over 120 years.

[50] The claim lacks any averment of the particular descendants and the land that they held and how this land was passed to Josephine Allen. Mere assertions of descendants and the fact that the will of Josephine Allen mentions this land is not sufficient.

[51] The First Defendant also draws on the indefeasibility of title and cites Morrison JA (as he then was) in **Albert Smith v Hazel Steer** Supreme Court Civil Appeal delivered 8 May 2009 where at paragraphs 40 and 41 he says

> *"40. The combined effect of these sections is to confer on the registered proprietor what has come to be described as "indefeasibility of title", a phrase which, though not used in the Act itself, "is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys" (**Frazer v Walker** [1967] 1 A.C. 569, 580, per Lord Wilberforce).*
>
> *41. The concept has been given effect to in numerous decisions of this court, and it is sufficient to refer only to **The Registrar of Titles v Ramharrack** (SCCA No. 80/2002, judgment delivered 29 July 2005), a case cited by Mr. Foster. In that case P. Harrison J.A. (as he then was) said this (at page 7):*
>
> > *"Under the Registration of Titles Act the registered proprietor of an estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud."*

[52] Counsel also rely upon the authority of Simmons J in **Lloyd McGregor v Verda Francis** [2013] JMSC Civ. 172 quoting **The Law and Practice relating to Torrens Title in Australasia** by E.A. Francis Volume 1 at pp. 602 cited by counsel in support of the submissions that there needs to be actual proof that title was obtained by fraudulent means. The learned judge stated:

> *The learned author stated: - "With regard then, to the general exception from indefeasibility in cases of fraud, the position, it seems, may be summed up as follows-*

1. No definition is given, either by statute or by judicial decision of what constitutes fraud, nor, it seems, is any such definition possible.

2. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.

3. Fraud must involve an element of dishonesty or moral turpitude.

4. Notice of the existence of any trust or registered instrument does not of itself constitute fraud but may be an element in the establishment of the existence of fraud.

5. Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.

6. The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.

7. The fraud to which the sections refer is that of the registered proprietor or his agent.

8. Gross negligence without mala fides will not be regarded as fraud in New Zealand, or, it seems in Australia."

[53] There is no reasonable ground to indicate that the Defendants were involved in any fraud in 1938 or 1962. At that time, they were unconnected with the property. The fact that the Defendants sought land surveys based on their own title or that the place names were changed cannot be seen as perpetuating any fraud.

[54] The Claimant's statement of case is struck out as disclosing no reasonable ground to bring the claim pursuant to CPR 26 .3(1) (c).

[55] On these basis judgment is entered against the Claimant for the First Defendant with costs to be taxed if not agreed.