[2020] JMSC Civ 196

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV04289

BETWEEN	**SEAN KINGHORN**	**1st CLAIMANT**
	JUDY ANN KINGHORN	**2nd CLAIMANT**
AND	**SILVER STAR MOTORS LTD**	**DEFENDANT**

IN CHAMBERS

Sean Kinghorn instructed by Kinghorn and Kinghorn for the Claimants.

Christopher Dunkley instructed by Phillipson Partners for the Defendant.

Heard: July 28, 2020 and October 2, 2020

Application for Summary Judgment – Striking Out – Non Est Factum – Real Prospect of Success – Privity of Contract – Mediation Agreement

T. HUTCHINSON, J

INTRODUCTION

[1] There are two applications before me for ruling, the first in time was filed by the Claimants on the 9th of October 2018. It is supported by an affidavit and supplemental affidavit provided by the 2nd Claimant which were filed on the 9th of October 2018 and 10th of December 2019 respectively. In this notice the Claimants seek the following orders;

1. That pursuant to Rule 26.3 (b) and (c) of the Civil Procedure Code Rules, the Defence herein be struck out on the grounds that:

   it is an abuse of the process of this Honourable Court and/or is likely to obstruct the just disposal of the proceedings; the Defence discloses no reasonable grounds for defending the instant Claim.

2. That pursuant to Rule 15.2, Summary Judgement (sic) in respect of liability be granted in favour of the Claimants on the ground that the Defendant has no reasonable prospect of successfully defending the instant Claim.

3. That a date be set for the hearing of an Assessment of Damages in this matter.

4. That the Costs of this Application be borne by the Defendant

5. Such further and/or other relief as this Honourable Court deems just be granted

[2] The second application is that of the Defendant which was filed on the 14th of December 2018. This application is supported by an affidavit from Christina Hudson, a representative of the Defendant which was filed on the same date. In their application, the Defendants seek the following orders;

1. That the time for filing and service of this Notice of Application for Court Orders and Accompanying Affidavit is abridged.

2. The Claimant's Claim Form and Particulars of Claim filed on December 20, 2017 be struck out.

3. That judgment be entered for the Defendant.

4. Costs to the Defendant on an indemnity basis.

5. Such other and further relief as this Honourable Court deems just.

BACKGROUND

[3] In August 2011, the Defendants sold a Mercedes Benz which became the subject of the original claim. Although the name of the purchaser is stated, on the invoice provided, as Devon Wint, it is the Claimant's position that they entered into the agreement to purchase this motor vehicle and paid over the Purchase Price of $8,200,000.00 and Mr. Wint was merely their agent.

[4] In December 2014, after experiencing a number of issues, the Claimants returned the vehicle to the Defendants. By correspondence dated the 20th March 2015 and the 27th April 2015, the Defendant confirmed that the engine of the said vehicle needed to be replaced and that the costs for replacing same was $2,129, 543.50. In the said correspondence, the Defendant indicated that it would only cover half of the cost of replacing the engine and the Claimants would have to pay the balance.

[5] The Claimant's refused to make this half payment and in June 2015 they filed a Claim against the Defendant seeking among other remedies the replacement cost of the vehicle. In September 2015, the Defendants filed their defence and counterclaim in which they sought to recover over $2 million for damage allegedly done by the Claimant to a loaner vehicle owned by the Defendant. On the 27th day of July 2017, the original Claim was 'settled' at a Mediation hearing. The terms of that Agreement read as follows:

> In exchange for the promises made by the Claimant in paragraph 2 of this Agreement, the Defendant agrees to the following:
>
> a. The Defendant will return the material vehicle to the Claimant in good road worthy condition on or before the 31 st August 2017;
>
> b. The Claimant will accept the sum of $1,000,000.00 in equal instalments of $100,000.00 per month commencing the 31 st August 2017 and ending on the 31 st May 2018

c. The Claimant agrees to discontinue their Claim on the 31st August 2017.

d. The Defendant agrees to discontinue the Counterclaim on the 31st August 2017.

[6] The agreement was prepared by the Attorney for the Claimant who it is agreed had attended the Mediation with a laptop computer and printer and this was done with the consent of Counsel for the Defendant and the Mediator. The document was subsequently executed by both parties as well as the mediator but there is some dispute as to whether Counsel for the Defendants was present at the time of execution. It is the Defendants' position that he was not as he had departed to address other issues. Mr. Kinghorn who appeared for the Applicants in this hearing was unable to confirm if Mr Dunkley was still present or had already departed.

[7] Subsequent to the agreement being executed a dispute arose between the Parties as to the accuracy of Paragraph B of the agreement as the Defendants asserted that it was a reversal of what had been agreed. The Claimants on the other hand sought compliance with all the terms of the agreement.

[8] The terms not having been complied with, the Claimants filed the current claim to have the agreement enforced as the original action had been discontinued in 2017. In this Claim, orders are being sought for;

a. Damages for breach of contract and or detinue/conversion
b. Interest thereon for such rate and for such period as this Honourable Court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act.
c. Costs
d. Such further and/or other relief as this Honourable Court deems just.

PARTICULARS OF SPECIAL DAMAGE

Loss of motor vehicle	$12,000,000.00
Loss of Use ($5,000.00 per day 90 days and cont.)	$45,000.00
Sum due and owing to the Claimants by the Defendant	$1,000,000.00 It

was also noted that Special Damages are continuing.

ISSUES

a. Should the Defendants case be struck out on the basis that it is an abuse of process or discloses no reasonable prospect of success and summary judgment be entered in the applicants favour?

b. Should the Claim Form and Particulars of Claim be struck out on the basis that the current claim is a refiling of the original action and the Claimants herein lack the requisite locus standi to bring both claims?

CLAIMANT'S SUBMISSIONS

In written submissions filed in the matter, Mr. Kinghorn argued that the issues which arise for the Court's consideration are as follows;

a. Whether the defence filed in the current action discloses a reasonable ground for defending the claim.

b. Whether the claim is an appropriate one for summary judgment.

c. Whether the Defendant has established in law and fact that the Claimant's case has no reasonable prospect of success.

[9] In response to the first issue identified, Mr. Kinghorn submitted that it is undisputed that both parties were represented by Counsel at mediation. He argued that both parties having signed the agreement in those circumstances, the Defendant should

not be permitted to take issue with paragraph B and assert that they are not bound by the agreement. He asserted that the plea of no est factum on which the Defendant would now seek to rely does not avail them.

[10] In support of this contention, Mr. Kinghorn made reference to the local authority ***Mary Campbell v Consolidated Caribbean Investments Ltd [2016] JMSC Civ 100*** which examined and adopted the ratio of the Court in ***Saunders v Anglia Building Society [1971] AC 1004.***

[11] In the ***Mary Campbell*** case, the Claimant had signed a mortgage agreement with the Defendant which she later sought to challenge on the basis that the payment schedule and interest rate were different from what she had understood them to be at the time she signed the document. In addressing this topic, Mr. Kinghorn commended to the Court the dicta of Lord Reid in ***Saunders v Anglia Building Society*** at page 1016 where he stated.

> *"the plea cannot be available to anyone who was content to sign without taking the trouble to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers, without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different ... 'Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change."*

[12] He submitted that the guidance provided in this extract was adopted and applied by Anderson J in the local decision and it was his finding that the Claimant had failed to satisfy these prerequisites.

[13] In addition to the case law referred to above, Mr. Kinghorn drew the Court's attention to the content of an extract from ***Halsbury's Laws of England, Fourth Edition, Volume 13***, paragraph 68 where it was stated;

> *A person raising the plea must have taken such precaution as he reasonably could and must prove that he took reasonable care as well as proving all the other circumstances necessary to found the relief. Normally a blind or illiterate person must have the deed read over or fully explained to him before execution and a person of full capacity can only establish the plea in very exceptional circumstances, certainly not where his reason for not scrutinizing the document before executing it was that he was too busy or too lazy to do so and his reliance on someone whom he trusted will not usually be regarded as a sufficient reason.*

[14] He also commended to the Court the extract set out below;

> *the mistake must have been induced by a misrepresentation made by words or conduct by some person other than the executing party raising the plea, the other person need not be a party himself but a self induced mistake is insufficient. The plea is not available to a party whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his advisor.*

[15] Mr. Kinghorn asserted that in light of these principles this plea cannot assist the Defendant and they are bound by the agreement. He asked the Court to note the observations of Anderson J between paragraphs 22 and 25 of the ***Mary Campbell*** judgment, specifically where he noted that the Claimant had intended to sign a mortgage document and that was what she signed as well as the finding that the document signed was not fundamentally different from that which the Claimant had known and appreciated that she was signing.

[16] He concluded his submission on this point by asserting that the Defendants' plea of non est factum has no reasonable prospect of success and the Court should find that the Defendants are bound by the terms of paragraph B of the agreement.

Is this an appropriate case for Summary Judgment?

[17] In respect of this issue Mr. Kinghorn submitted that the Defendant's sole point of dispute is in relation to paragraph b of the agreement and no issue had been raised in respect of any other section of same. He observed that in spite of this the Defendant has not honoured any of the other terms of the agreement as the vehicle has not been returned. As such there is nothing to go to trial where the other issues are concerned.

[18] He argued that if the Court accepts that the plea of non est factum does not assist the Defendant then there is nothing to be tried and as such the matter would be an appropriate one for summary judgment.

Has the Defendant established in fact and law that the Claimants' claim has no reasonable prospect of success.

[19] In respect of this issue, Mr. Kinghorn submitted that the case law makes it clear that where there is an allegation that the terms of a mediation agreement have been breached, if it had not become the subject of a court order, the only recourse open to a party is to bring an action to enforce same. In this regard he made reference to and relied on the dicta of the Court in ***Frank Delano v Maria Miletic 2009HCV03497*** and **Magwall Jamaica Limited v Glenn Clydesdale and Victoria Clydesdale SCCA 145/2012**. He highlighted that in the latter decision the court relied on the authority of ***Green v Rozen [1955] 2 All ER 797*** where the observation was made by Lord Denning MR that in such a situation, the plaintiff in order to get judgment has to sue on the compromise unless the other party consents to an order of the court. Counsel also made reference to the decision of ***Cordel Green v Kingsley Stewart 2014 JMSC Civ 26*** where a similar application was considered and the same principles were highlighted.

[20] On the question of ownership of the vehicle it was submitted that this was a non issue and the only issue before the Court is the meaning and effect of the mediation agreement, Counsel submitted that in that regard the Claimants are cloaked with the requisite locus stands to bring the claim for breach of contract.

DEFENDANTS SUBMISSIONS

[21] In his submissions on behalf of the Defendants, Mr Dunkley observed that in respect of the original claim the Claimants had sought to recover the replacement cost of the vehicle in question and they have repeated that position in the instant claim. He highlighted that the actual purchaser on record with the company was not the Claimants but a Devon Wint to whom the vehicle was sold on the 4th of August 2011. He outlined that in the original claim a counterclaim had been filed by the defendants in which they sought to recover the sum of $2,062,782.39 which was the repair cost for damage caused by the Claimants to a vehicle loaned to

them and this counterclaim was never discontinued as there had been no true agreement.

[22] He argued that contrary to the contents of the signed agreement, it was agreed at mediation that the Claimants would pay the compromised sum of $1,000,000 at the rate of $100,000 per month to the Defendant in respect of the repair cost incurred by the latter to settle the counterclaim. He said that on receiving a copy of the agreement it was observed that this obligation had been reversed and the Defendants immediately took issue with same. He argued that the signed agreement does not reflect the true intention of the Defendants good faith intentions to settle and unless it is amended to reflect the verbally settled terms there is no meeting of the minds essential for the formation of a contract and the Defendants should not be bound by it.

[23] Mr. Dunkley referred to efforts made post settlement to have the agreement amended including a proposal to return to the mediator to ‘fix’ the agreement as it offered no compensation to the Defendant for the discontinuation of their

counterclaim. He also asked the Court to note that the Agreement filed as a part of the original affidavit of Judy Kinghorn differs from that which is attached to her supplemental affidavit as in the initial document it was stated that the defendant agreed to Clauses A to D in exchange for promises made by the Claimant in paragraph 2 but in the later document the word Claimant is struck out and replaced with Parties and a signature appears at this change which purports to be that of the mediator but there are no signatures by the parties themselves acknowledging this change.

[24] He submitted that in light of the standing of the Defendants, there would have been no need for them to enter into a payment plan to pay the sum of $100,000 monthly to the Claimant to satisfy the undertaking to pay $1,000,000. He asked the Court to find that in the absence of consideration to the Defendant to settle/compromise their action there is no agreement and what the Claimants are in fact seeking to do is to take advantage of the Defendant who signed the written agreement in the absence of their counsel without having noticed that clause B was in fact inaccurate.

[25] He argued that it was not correct to say that the Defendants had failed to honour the other parts of the mediation agreement as the vehicle in question had been fully repaired and ready to be collected by the Claimant from June 2015 and the Claimants would have been aware of this. He argued that in spite of this, the settlement agreement was a complete mischaracterization of the terms agreed by the parties at the mediation.

[26] Mr. Dunkley noted that the Defendants were not relying on the plea of Non Est Factum and as such the authority of ***Mary Campbell*** was not relevant. He submitted that the error made in the document was that of the draftsman who conveniently worded the clause so as to favour the Claimant and the latters' attempt to enforce this term which they knew was a mistake and completely unintended is unconscionable.

[27] He argued that in bringing the instant claim, the Claimants have sought to reinstate the original claim which had been discontinued and for this reason as well as the other reasons outlined above the claim should be struck out and summary judgment entered for the Defendants. He made reference to Rule 15.2(a) and 26.3(1) as well as the authorities ***Swain v Hillman et al 2001 1 All ER 91*** and ***S & T Distributors v ClBC Jamaica Ltd SCCA 112/04.***

[28] He asked the Court to find that there was no contract made between the defendants and claimants for the sale of the motor vehicle to them and on that basis the Defendant has a realistic prospect of success in defending the claim. He made reference to the authority ***Jamaica Legend Ltd and Percival Hussey v Port Kaiser Oil Terminal S.A. and Russo Alpert Jamaica 2016 JMCC Comm 27*** where it was observed by Batts J that it would be unfair to impose a contractual duty on a Defendant in favour of Claimants who were non parties to that contract.
[29] He asked the Court to apply that guidance to the instant case and find that the contract for the sale of the motor vehicle was between the Defendants and Devon Wint and the Claimants cannot succeed as they would be barred by the doctrine of privity of contract. He submitted that in light of the foregoing factors the Claimant's statement of case should be struck out on the basis they have no locus standi or reasonable prospect of succeeding on their claim.

ANALYSIS/DISCUSSION

Should the defendant's case be struck out on the basis that it is an abuse of process or discloses no reasonable prospect of success and summary judgment be entered in the applicants favour?

[30] In asking the Court to strike out the respective statements of case, the Claimant as well as the Defendant have placed reliance on the powers of a Court outlined at Part 26.3(1) of the rules. The Claimant relies on 26.3(1)(b) and (c), while the Defendant relies on 26.3(1) (c) these are set out 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 –

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; …

[31] Upon an examination of the rule, it is clear that 26.3(c) mandates that if a cause of action discloses no reasonable grounds for bringing the claim the Court should act to have the matter struck out and the same is true where the Defence provides no reasonable grounds on which the claim can be defended.

[32] This principle was affirmed in ***Sebol Ltd et al v Ken Tomlinson etal SCCA 115/2007*** by Dukharan Ja where at page 13 paragraph 28 he stated as follows:

"*The focus of the new rules is to deal with the matters expeditiously and to save costs and time, if there are no reasonable grounds for bringing an action, then the Court ought to strike it out."*

[33] This provision was also examined by Batts J in City Properties Limited v New Era Finance Limited 2013 JMSC Civ 23 where he stated;

"*On the issue of the applicable law, the section is clear and means exactly what it says. There must be reasonable grounds for bringing or defending a claim. These reasonable grounds must it seems to me be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that upon an application to strike out pleading, no affidavit evidence need be filed, the issue is determined by reference to the pleadings.*

[34] In addition to or in the alternative to their request for orders striking out the defence and the claim form and particulars respectively, the Parties have also asked the Court to enter summary judgment in their favour. The power of the Court to make a summary order is contained in Rule 15.2(a) of the CPR which provides that the

court may give summary judgment on the claim or on a particular issue if it considers that a Claimant or Defendant has no real prospect of succeeding on the claim or the issue. Where a Party makes such an application it is their burden establish that there is no prospect of success.

[35] Counsel for the respective parties also referred the Court to the decision of ***Swain v Hillman et al*** supra. In that authority it was highlighted that the Court is not to embark on a mini-trial when assessing the prospects of success of a party's claim. It was also emphasised that if the case is based on a point of law which is bound to fail then summary judgment may be granted. If, however there are arguable points of law then summary judgment ought not to be granted.

[36] The principles extracted therefrom were examined in a number of the other authorities which have been cited by Counsel for the Parties, these were ***Amos***

Virgo v Steve Nam 2008HCV00201, Rosemarie Samuels v JPS 2008HCV01680, Ralston Thomas v UGI 2009HCV03520, Merrick Samuels v Gordon Stewart et al Claim No. 2001/S-081 and ***S&T Distributors Ltd et al v CIBC Jamaica Ltd et al S.C.C.A Civ App 112/04***. These decisions have all been reviewed by the Court and while I do not propose to examine them in detail in this judgment, the principles stated therein have been carefully considered and applied.

[37] The thrust of this application by the Claimant is that the defence outlined is an abuse of process or provides no support on the pleadings of there being any reasonable grounds on which the claim can be defended. Upon a close examination of the submissions advanced to this end, it was noted that the focal point was that there no reasonable grounds for bringing this action provided by the Defendant.

[38] In support of this contention, the Claimants made reference to the mediation agreement. They noted that while the Defendant has taken issue with the agreement, on a close examination of their Defence only paragraph B is rejected.

The Claimant contends that the defence position is not founded on a sound legal footing as the plea of non est factum would not avail them.

[39] The Defendants on the other hand while denying that they have sought to raise a plea of non est factum, have indicated that the document is of a very different character than they intended to sign to as there is no provision therein for them to be compensated for their counter claim which was a significant factor driving their decision to settle.

[40] In considering the position of the respective parties, useful guidance was found in the extracts from ***Halburys*** as well as the decision of Lord Reid in ***Saunders v Anglia Building Society***, which were outlined above. On an examination of the defence and the affidavit of Ms. Christina Hudson, the Defendants' representative, while they fully understood the legal nature of the document signed and signed it

with the intention to bring the matter to an end; the challenge which has arisen is whether the character or effect of the document was different from that which they believed had been signed. The effect of this indication in my view raises the legal doctrine of non est factum.

[41] The questions surrounding the signing of the document are compounded by the fact that after the agreement had been arrived at, the Defendants maintain that they were instructed to sign by their Counsel, who then departed and purport to have done so in the belief that the document produced by Counsel for the Claimant accurately reflected what had been agreed.

[42] These are clearly arguable points of law and disputes as to facts as the agreement is being rejected on the basis that the draftsman prepared the document contrary to the discussions and its contents are not an accurate depiction of those proceedings. It is my considered view that assertions such as these which call into question the character of the document signed would need to be fully ventilated. In these circumstances it could not be said that the Defendants have no reasonable grounds for defending the claim, neither could it be said that they have no real

prospect of success. In light of the foregoing I am satisfied that this matter would not be an appropriate case for summary judgment. Accordingly, the Claimant's application is refused.

Should the Claim Form and Particulars of Claim be struck out on the basis that the current claim is a refiling of the original claim and the Claimants herein lack the requisite locus standi to bring both claims.

[43] In respect of this issue, it is the defendant's contention that the Claimants have simply refiled the original claim. In support of this argument, reference has been made to the fact that although the Claim Form makes reference to Damages, the Particulars pleaded re-state the claim for the replacement value of the vehicle in question and a sum for loss of use among other items listed.

[44] It is also the defence position that no action could properly be mounted for breach of contract as not only does the document fail to accurately reflect the agreed position but privity of contract would operate to bar the claim proceeding.

[45] The Claimants on the other hand have said that ownership is irrelevant and there was a settlement between them and the Defendant. They have also stated that the authorities reveal that their approach in filing a new claim is in fact the correct course of action.

[46] In considering the competing submissions, useful guidance is found in the authority of ***Cordel Green v Kingsley Stewart [2014] JMSC Civ. 26*** where a similar situation arose for consideration, at paragraph 21 of her judgment Edwards J (as she then was) stated as follows;

> [21] *Where settlement has been agreed, the parties must decide how to record it and how it will be enforced if either party does not abide by its terms. Where a case is settled in advance of a hearing each party has a responsibility to inform the court. The settlement itself can be viewed as a contract, so is binding even if it is not made into a formal order of the court. The agreements should deal with future status of the claim; whether there should be final judgment in favour of one party,*

whether the claim should be dismissed or a stay granted or whether the claim should be withdrawn and notice of discontinuance filed. Settlements are enforceable contracts between the parties, the consideration for which is forbearance to sue. Where there is a compromise of the proceedings the original cause of action should not be extinguished prior to the terms of the contract being complete. If so then the only remaining action is for breach of contract.

Having made this pronouncement, the Learned Judge also observed as follows;

> [30] *By virtue of rule 74.12 where an agreement has been reached and filed the court must make an order in terms of the agreement pursuant to rule 42.7. Rule 42.7 deals with consent orders and judgments. Where rule 42.7 applies the order must be drawn in the terms agreed and expressed to be by consent and must be signed by the attorneys for each part to whom the order relates, then filed in the registry. The effect of this is that where the parties agree at mediation and it is filed in court; an application is to be made to the court for a consent order in terms of the mediation agreement. Upon the making of this consent order, it becomes enforceable against the parties as an order of the court. It is therefore enforceable in the same proceeding and there is no need to bring fresh action to enforce its terms. Rule 42.7 (2) list the types of judgements or orders to which the rule applies. It includes an order for dismissal of a claim and for stay of proceedings on terms attached as a schedule to the order but not part of it (Tomlin orders). It also includes procedural orders by consent.*
>
> [31] *Conversely, where the mediation agreement is confidential (made on counsel's brief) it is not filed in court and therefore no order is made by the court. The parties therefore have no order or judgment to enforce in the proceedings. If the claim had been extinguished by operation of law, the alternative in such a case is for the party aggrieved to sue on the agreement as a contract. Any issue as to whether such a contract is binding or otherwise is to be determined at the instance of the court hearing those fresh proceedings. (emphasis supplied)*

[47] On a careful review of the principles outlined, it is evident that in the absence of a Court order made in the terms of the mediation agreement, as happened here, the only recourse which is open to a party on a breach of the agreement is to bring an

action for breach of contract. An application cannot be made to the Court to have the terms enforced as rule 74.12 of the CPR was never followed.

[48] The Claim and Particulars which have been filed in the instant matter, make it clear that the action is for Damages for breach of contract and/or detinue for the failure of the Defendant to hand over the vehicle per paragraph A of the agreement or pay the sum which the Claimants say should be paid to them per paragraph B. The pleadings disclose that the damages sought are in the amount of the replacement cost of the vehicle as well as damages for the retention of same. The Claimants also seek interest on any sum which may be awarded and their claim for loss of

use is self-explanatory. All of the above can properly be pleaded under the global heading of damages and do not equate to a refiling of the previous action.

[49] In relation to the submission that the claim and particulars should be struck out on the basis that the Claimant had no locus standi, while it is settled law that privity of contract would bar a third party from bringing an action to enforce an agreement between two independent parties, in this situation the Claimants maintain that they were the actual purchasers. They also assert that the Defendants having agreed to return the vehicle in question to them in a roadworthy condition, they should be permitted to enforce on this agreement.

[50] With questions surrounding privity of contract, locus standi and the enforceability of this agreement, it is clear that there are triable issues which would need to be ventilated before the appropriate tribunal. The effect of this is that the Defendant cannot succeed on their application at this stage, this is a matter which ought to be tried and the application for the claim to be struck out and/or summary judgment entered is refused.

CONCLUSION

[51] In light of the foregoing findings, my orders are as follows;

1. The Claimants application for Court orders is refused.

2. The Defendant's Application for Court orders is refused.

3. Each Party to bear their own costs.

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Hon. T. Hutchinson, J