



[2024] JMCC Comm 19

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO.SU2023CD00472**

<b>BETWEEN</b>	<b>KINGSTON WHARVES LIMITED</b>	<b>1<sup>st</sup> CLAIMANT</b>
<b>AND</b>	<b>KW LOGISTICS LIMITED</b>	<b>2<sup>nd</sup> CLAIMANT</b>
<b>AND</b>	<b>WESTERN TERMINALS LIMITED</b>	<b>3<sup>rd</sup> CLAIMANT</b>
<b>AND</b>	<b>COAST TO COAST TRADERS LIMITED</b>	<b>DEFENDANT</b>

Miss Samantha Grant instructed by DunnCox for the claimants

Mr Jerome D. Spencer for the defendant

**Heard February 22, 2024, and May 9, 2024**

***Civil Procedure - Application for the court to decline to exercise its jurisdiction to try a claim - Whether the failure to comply with CPR 8.16 amounts to ineffective service - Whether application to strike out the claim on the basis of no reasonable grounds to bring it amounts to submitting to the court's jurisdiction - Whether permission required for filing an amended Fixed Date Claim Form in light of the application to strike out the claim.***

**IN CHAMBERS**

**CORAM: JARRETT, J**

**Introduction**

[1] The application before me was filed by the defendant on December 15, 2023. In it the following remedies are sought:

“(1) A Declaration that the Court declines to exercise its jurisdiction to try this claim.

(2.1) The Claimant’s Fixed Date Claim Form filed on September 13, 2023, be struck out.

(2.2) Alternatively, an Amended Fixed Date Claim Form and supporting documents that are in compliance with Part 8 of the Civil Procedure Rules be filed and served within seven (7) days.

(3) Costs of the application and of the claim to the Defendant to be paid by the Claimants.

(4) Such further and other relief as may be just.”

For the reasons which follow, I granted the order sought at paragraphs (1) and (2.1) and ordered costs to the defendants to be agreed or taxed. The pleaded claim and a brief procedural background will put my decision in context.

### **The fixed date claim form**

**[2]** In their fixed date claim form filed on September 13, 2023, the claimants seek the following remedies against the defendants: -

- 1) "An Order permitting the Claimants to recover possession of all that parcel of land part of NEWPORT WEST in the parish of SAINT ANDREW being lots numbered 263, 264, 287, 376 and 393 of the shape and dimensions and butting as appears on the plan thereof and being the land comprised in the Certificate of Title registered at Volume 1281 Folio 178, Volume 1281 Folio 179, Volume 1229 Folio 362, Volume 1029 Folio 99 of the Register Book of Titles respectively (collectively referred to as " The Subject Property").
- 2) An Order that the Defendant be restrained, whether by itself or by its employees, contractors, servants or agents or otherwise howsoever, from entering, occupying, interfering with, disturbing or otherwise dealing with the Subject Property , or any fixtures and chattel located thereon;
- 3) An Order that the Defendant compensates the Claimants for losses incurred due to:
  - a. the loss of opportunity arising from the Defendant's continued occupation of the subject property;
  - b. the loss of opportunity arising from the Defendant's continued use of income-earning equipment belonging to the Claimant; and
  - c. damage done to the structure, land, fixtures and chattel located thereon.
- 4) Additionally, or in the alternative to Order No.3, an Order for:

- a) Mesne Profits arising from the Defendant's continued occupation of the subject property;
- b) Mesne Profits arising from the Defendant's continued use of equipment belonging to the Claimants; and
- c) Compensation for any loss arising from damage done to the structure, land, fixtures and chattel located thereon;

5) General Damages

6) Special Damages

7) Interest at the commercial rate pursuant to Clause 3.4.1 of Sub Lease Agreement dated January 15, 2020; or alternatively, interest at the statutory rate pursuant to the Law Reform (Miscellaneous Provisions) Act;

8) Costs on the indemnity basis pursuant to Clause 3.4.3 of the Sub Lease Agreement dated January 15, 2020.

9) Liberty to apply.

10) Such further and other relief as this Honourable Court may deem just."

**[3]** A certificate of value and truth follows directly after the aforementioned pleadings. Nothing more is pleaded.

**[4]** The fixed date claim form is supported by an affidavit of Stephan Morrison filed on September 13, 2023, which contains the evidence the claimants intend to rely on. It was issued with a first hearing date prior to the twenty-eight-day period limited by CPR 8.8(2)(c) for a defendant to file an affidavit if it wishes to rely on any evidence in defence of the claim. On that first hearing date therefore, the matter was adjourned as in the circumstances, the hearing date issued by the court's

registry was plainly premature. At the adjourned first hearing date, which strictly speaking was the “true” first hearing date, the extant application was before the court for the first time. On that day, the issue arose as to the date of “service” of the fixed date claim form and the documents required under CPR 8.16 to be served with it. The issue centred around the question whether the defendant was out of time to apply to have the court decline to exercise its jurisdiction to hear the claim under CPR 9.6.

[5] Given the factual dispute about “service”, I adjourned the matter and ordered that both the claimant’s process server and the person who swore an affidavit filed by the defendant indicating that he was asked by a process server to hand the documents to a representative of the defendant, were to attend for cross examination at the adjourned hearing. The issue of “service” was, however, ultimately resolved among the parties, as at the adjourned hearing, the claimants’ counsel indicated that they were no longer taking the point. In the interregnum the claimants filed an amended fixed date claim form on February 6, 2024, which contained not only the remedies sought but also the legal bases to support them. The latter being absent from the fixed date claim form filed on September 13, 2023.

### **The grounds for the application**

[6] The defendant states in its notice of application that the application is made on the following four grounds: -

1. “The Claimants Fixed Date Claim Form (sic) on the Defendant in breach of the mandatory provisions of Part 8 of the Civil Procedure Rules (Revised).
2. The Claimants Fixed Date Claim Form fails to disclose reasonable grounds for bring (sic) the claim and is frivolous, vexatious and an abuse of the process of the Court.

3. The overriding objective favours the grant of the orders herein.
4. The application is made pursuant to Parts 8 of the Civil Procedure Rules (Revised).”

[7] In support of the application is an affidavit of Mr Mark Sutherland filed on December 15, 2023. He states that he is a legal clerk employed to Mr. Jerome D. Spencer, the defendant’s attorney-at-law and that from information received from the defendant’s Stephen Robertson, he believes that the defendant was served with the fixed date claim form, the affidavit of urgency and the affidavit in support on November 17, 2023. He further states that he has been advised by counsel that the fixed date claim form does not comply with CPR 8 and that incomplete forms of the prescribed notes to defendant, form of acknowledgement of service and form of defence were served in breach of CPR 8.16.

### **The parties’ submissions**

#### *The defendant*

[8] Counsel Mr Spencer argued on behalf of the defendant that the court should decline to exercise its jurisdiction to hear the claim as the fixed date claim form was not properly served, as the reference number of the claim was not inserted into the form of acknowledgment of service and the form of defence, in contravention of CPR 8.16(2) (c). Relying on the decisions in **Nanco v Lugg and B & J Equipment [2012] JMSC Civ 81**, upheld on appeal in **B & J Equipment Rental Limited v Joseph Nanco [2013] JMCA Civ 2**, and **Hoddinott v Persimmon Homes (Wessex Ltd) [2007] ALL ER (D) 321**, Mr Spencer argued that the defendant was entitled to challenge the court’s jurisdiction to hear the claim, given the breach by the claimant of CPR 8.16 (2)(c). Mr Spencer further argued that filing an acknowledgement of service is not submitting to the court’s

jurisdiction, as CPR 9.6 requires that in order to make an application asking the court not to exercise its jurisdiction to hear a claim, it must first file an acknowledgement of service.

[9] In relation to the order seeking to strike out the claim, Mr Spencer argued that CPR 9.6(6)(a) gives the court the discretion to strike out the claim on an application such as the one before the court, on the basis that there is no reasonable basis to bring it. He submitted that the fixed date claim form filed by the claimant merely pleads the remedies sought and does not state the legal basis on which those remedies are premised. This, he argues, is in breach of the mandatory requirements of CPR 8.8. According to Mr Spencer, it is not enough to contend that the legal basis of the claim is contained in the affidavit in support, as the affidavit is evidence, not pleadings.

[10] Concerning the Amended Fixed Date Claim Form, counsel said he was not served with it, the court ought not to have any regard to it, coming as it does in the wake of his client's application to strike out the claim, and without an order from the court permitting it. Mr Spencer further submitted that having had sight of the amended document for the first time at the hearing, he has discerned that it seeks to cure the very deficiencies raised in his client's application. He cited the decision in **Diamantides v JP Morgan & Ors [2005] EWCA Civ 1612**, to argue the point that the court should not in these circumstances, countenance the Amended Fixed Date Claim Form without an application permitting it.

*The claimant*

[11] Miss Grant for the claimant indicated that the intention in filing the Amended Fixed Date Claim Form was indeed to address the issues raised by the defendant in the Notice of Application. She argued nonetheless that it cannot be contended that the fixed date claim form does not disclose the legal basis for bringing the claim, because the affidavit in support clearly outlines that it is one for recovery of possession of property. Counsel further submitted that the defendant has

submitted to the court's jurisdiction by filing an acknowledgement of service. She cited the decision of the court of appeal in **Hunter v Richards & Anor [2020] JMCA Civ 17**, to support this submission. It was also argued that the order seeking to strike out the claim for not disclosing any reasonable grounds for bringing it, amounts to submitting to the court's jurisdiction. According to learned counsel, although CPR 9.6(6) allows the court to strike out a claim, that is a power the court has, were it to decide not to exercise its jurisdiction to hear the claim. However, to seek to strike out the claim under CPR 26.3(1)(c) on the basis that it discloses no reasonable grounds to bring it, would require the court exercising its jurisdiction in the very claim, therefore making such an application is a submission to the court's jurisdiction.

- [12] It was further argued that the failure to insert the claim reference number on the form of acknowledgement of service and the form of defence were procedural irregularities which she is asking the court to cure by virtue of CPR 26.9. In relation to the application to strike out the claim, Miss Grant argued that the fixed date claim form and the affidavit in support seek recovery of possession from the defendant: "with the terms of the tenancy outlined in the pleadings". She submitted further that the defendant has: "filed no counterevidence that could lead to the conclusion that there was "no reasonable ground for bringing the Claim".

### **Analysis and discussion**

- [13] A good starting point is CPR 9.6. This rule provides the procedure to be used by a defendant who argues that the court should not exercise its jurisdiction to try a claim. It is useful to set out the rule in its entirety: -

"9.6 (1) A defendant who –

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction,

may apply to the court for a declaration to that effect.

- (2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgment of service
- (3) An application under this rule must be made within the period for filing a defence.
- (4) An application under this rule must be supported by evidence on affidavit.
- (5) A defendant who –
  - (a) files an acknowledgment of service; and
  - (b) does not make an application under this rule within the period for filing a defence,is treated as having accepted that the court has jurisdiction to try the claim.
- (6) Any order under this rule may also –
  - (a) strike out the particulars of claim;
  - (b) set aside service of the claim form;
  - (c) discharge any order made before the claim was commenced or the claim form served; and
  - (d) stay the proceedings.
- (7) Where on application under this rule the court does not make a declaration, it –
  - (a) must make an order as to the period for filing a defence; and

(b) may

(i) treat the hearing of the application as a case management conference; or

(ii) fix a date for a case management conference.”

(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the court under paragraph (7)(a) and such period may be extended only by an order of the court.

**[14]** It is clear from CPR 9.6(2), that a defendant must first file an acknowledgment of service before making an application for the court to decline to exercise its jurisdiction to try a claim. Mr Spencer is therefore right to argue that when the defendant filed its acknowledgment of service, that did not amount to a submission to the jurisdiction, but in fact was the necessary precursor to the application before me.

**[15]** CPR 8.16 (1) mandates that a claimant must serve the defendant with the claim form, a form of acknowledgment of service, a form of defence and the prescribed notes to defendant. CPR 8.16(2)(c) similarly mandates that there must be inserted in each form, the reference number of the claim. It is now settled that the failure to comply with CPR 8.16 does not nullify the claim but instead amounts to an irregularity in respect of service. (See for example, **B & J Equipment Rental Limited v Joseph Nanco**, and **Dorothy Vendryes v Dr Richard Keane and Karen Keane [2011] JMCA Civ 15**).

**[16]** In **B & J Equipment Rental Limited v Joseph Nanco**, Morrison P, at paragraph 26, quoted the following dicta of Dyson J writing for the court in **Hoddinott v Persimmon Homes (Wessex Ltd)**, and said that the interpretation by that court of CPR 11 of the English rules is applicable to an interpretation of our CPR 9.6 as both rules are almost identical terms: -

“22. In our judgment, CPR 11 is engaged in the present context. The definition of ‘jurisdiction’ is not exhaustive. The word ‘jurisdiction’ is used in two different senses in the CPR. One meaning is territorial jurisdiction. This is the sense in which the word is used in the definition in CPR 2.3 and in the provisions which govern service of the claim form out of the jurisdiction...

23. But in CPR 11(1) the word does not denote territorial jurisdiction. Here it is a reference to the court’s power or authority to try a claim. There may be a number of reasons why it is said that a court has no jurisdiction to try a claim (CPR 11(1)(a)) or that the court should not exercise its jurisdiction to try a claim (CPR 11(1)(b)). Even if Mr Exall is right in submitting that the court has jurisdiction to try a claim where the claim form has not been served in time, it is undoubtedly open to a defendant to argue that the court should not exercise its jurisdiction to do so in such circumstances. In our judgment CPR 11(1)(b) is engaged in such a case. It is no answer to say that service of a claim form out of time does not of itself deprive the court of its jurisdiction, and that it is no more than a breach of a rule of procedure...It is the breach of this rule which provides the basis for the argument by the defendant that the court should not exercise its jurisdiction to try the claim.”

**[17]** There is no doubt in my mind that the defendant is entitled to say that it was not properly served, since it is common ground that the reference number of the claim was not inserted in the form of acknowledgement of service or in the form of defence which accompanied the fixed date claim form. Irregular service cannot be cured by the court invoking its powers under CPR 26.9. It is for the defendant to waive service. Having not waived service, the defendant was entitled to make an application under CPR 9.6, asking the court not to exercise jurisdiction to try the claim.

**[18]** In its application, the defendant also asks the court to strike out the claim on the basis that it discloses no reasonable grounds to bring it, and that it is vexatious and an abuse of the process of the court. Neither CPR 26.3(1)(c) which provides for a claim to be struck out as disclosing no reasonable basis to bring it, nor CPR 26.3(1)(b), which provides for the striking out of a claim on the basis that it is an abuse of the process of the court were cited in the application. In the affidavit in support, it is contended that the fixed date claim form is not in compliance with CPR 8.

**[19]** CPR 9.6(6)(a) gives the court the power to strike out a claim on an application for it to decline to exercise its jurisdiction under CPR 9.6(1)(b). The basis on which the claimant asks the court to strike out the claim is that the fixed date claim form does not comply with CPR 8. In his submissions Mr Spencer said that none of the provisions of CPR 8.8 have been complied with.

**[20]** CPR 8.8 stipulates what must be included in a fixed date claim form. The requirement is mandatory. The rule reads as follows:-

“ 8.8 (1) Where the claimant uses form 2, the claim must state-

- a) the question which the claimant wants the court to decide; or
- b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
- c) where the claim is made under an enactment, what that enactment is;
- d) where the claimant seeks possession from a tenant,
  - i. whether the claim relates to premises in relation to which there is an exemption certificate pursuant to the provisions of the Rent Restriction Act; and

ii. if not, the relevant ground or grounds on which the claimant relies;

e) where the claimant is

i. claiming in a representative capacity; or

ii. sues a defendant in a representative capacity, what that capacity is.”

[21] It is evident from a review of the fixed date claim form that only remedies are pleaded and that none of the mandatory requirements of CPR 8.8 are contained in it. In short, no legal basis is pleaded to support the remedies sought. Furthermore, the claim is one for recovery of possession yet none of the requirements of CPR 8.8(1) (d) have been pleaded. Miss Grant argues that all the necessary information to support the remedies are in the affidavit in support of the fixed date claim form. The difficulty with this argument is that it ignores the mandatory requirement of CPR 8.8 (1) and fails to appreciate the distinction between evidence and pleadings. A defendant needs to know in clear terms the case he is called upon to answer and why. Pleadings are designed to help achieve that goal. Lord Wolfe in **McPhilmey v Times Newspaper Limited and others [1999] 3 All ER 775** at pages 792-793 referred to the continued importance of pleadings since the Civil Procedure Rules in England:-

“Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is the truth under the old rules and the new rules”.

[22] Under our rules, the fixed date claim form is the required originating process to be used in the types of claims outlined in CPR 8.1(4). Recovery of possession is one such claim. Like the claim form and the particulars of claim which accompany it,

fixed date claim forms are pleadings. But save for probate proceedings under CPR 68, a fixed date claim form must be accompanied by affidavit evidence to support the pleadings contained in it. With the fixed date claim form failing to comply with CPR 8.8, the defendant is entitled to ask the court not only that it should not exercise its jurisdiction to hear the claim, but also that it should strike it out, under CPR 9.6(6)(a). I agree with Mr Spencer that in failing to comply with CPR8.8, the fixed date claim form discloses no legal basis for the remedies the claimant seeks and consequently fails to disclose reasonable grounds to bring the claim.

**[23]** If I am wrong and the application seeking to strike out the claim amounts to a submission to the court's jurisdiction, the fact is that the fixed date claim form in failing to comply with CPR 8.8, it does not disclose any legal basis for the remedies sought. It is therefore liable to be struck out under CPR 26.3(1)(c) as disclosing no reasonable grounds to bring the claim. No affidavit evidence need be relied on to make such an application, as the law is settled that where a defendant seeks to strike out a claim on this basis, the court is limited to considering only the pleadings. (See for example Batts J's decision in **City Properties Limited v New Era Finance Limited [2013] JMSC Civ 230**).

**[24]** What then of the amended fixed date claim form which was filed after the applicant's application, and which seeks to cure the deficiencies in the claim identified in the application to strike out the claim? The short answer is that permission ought to have been sought before filing it. Mangatal J (as she then was) in **Index Communication Network Limited v Capital Solutions Limited and others [2012] JMSC Civ No 50** graphically described the course taken by the claimants as "pulling the rug" from under the leg of the applicant. Miss Grant in her submission made it unequivocal that this was the intent and purpose of the amendment. I adopt Mangatal J's response at paragraph 44, to a similar course taken by the claimant in **Index Communication Network Limited v Capital Solutions Limited and others**:

“... even if a matter has not reached the case management stage, where an application to strike out the existing Statement of Case is being heard, it is not correct that a party could simply, ‘pull the rug out’ from under the feet of the party applying to strike out on the basis of alleged weakness in the pleaded case, ... by simply turning up with a newly amended statement of case that has been filed without the court’s leave. ...” “Even if the statement of case under attack has not been previously amended, and the case management conference has not yet taken place, once the application under consideration before the court is an application to strike out a party’s Statement of Case, the Statement of Case cannot be amended without the leave of the Court.”

## **Conclusion**

**[25]** Failing to include the case reference number in the forms served with the fixed date claim form is an irregularity in service entitling the defendant to ask the court pursuant CPR 9.6, not to exercise its jurisdiction to hear the claim. The claimant’s noncompliance with CPR 8.8, also entitles the defendant to apply under CPR 9.6. Consequently, neither the filing of the acknowledgement of service nor the application for the court to strike out the claim for failing to comply with CPR 8.8 is a submission to the court’s jurisdiction. In any event, with the fixed date claim form not complying with CPR 8.8 it does not disclose the legal basis on which the remedies claimed are sought, making it liable to be struck out under CPR 26.3(1) (c). The amended fixed date claim form filed on February 6, 2024 without the court’s permission seeks to cure the deficiency in the fixed date claim form. The court’s permission was needed since the amended claim was made after the defendant’s application to strike out the extant claim. It therefore cannot be allowed to stand.

**Disposition**

**[26]** In the circumstances I make the following orders: -

1. The fixed date claim form filed on September 13, 2023 is struck out.
2. The amended fixed date claim form filed on February 6, 2024 is not allowed to stand.
3. Costs to the defendant to be agreed or taxed.
4. Leave to appeal granted to the claimants.

**A Jarrett**  
**Puisne Judge**