[2024] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022 CV 03417

BETWEEN	**METRO SECURITY SERVICES LIMITED**	**1ST CLAIMANT**
AND	**FLOYD LEROY CAMPBELL**	**2ND CLAIMANT**
AND	**JVEIN EDWARDS**	**1ST DEFENDANT**
AND	**SPRYTRAINING FITNESS LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Jovell C. Barrett, Attorney-at-Law, instructed by Nigel Jones & Company, Attorneys-at-Law, for the Claimants/Respondents

Lemar Neale, Attorney-at-Law, instructed by Nealex, Attorneys-at-Law, for the Defendants/Applicants

Heard: February 5, 2024 and April 16, 2024

CIVIL PROCEDURE - Application for extension of time to file a defence per rule 26.1(2)(c) of the Civil Procedure Rules - Whether the court should wholly discharge the interim injunctions granted on May 19, 2023 by Mr. Justice Staple (Ag.) (as he then was) - Whether the hearings on May 12, 2023 and May 19, 2023 for injunctive relief were inter partes or ex parte hearings and the proper course to follow in the circumstances - Whether the court should allow the defendants' defence and counterclaim which were filed on February 8, 2023 to stand as filed in time - Whether the applicants should be allowed an extension of time to file the

defence having regard to the length of the delay, the reason for the delay, the proposed defence and counterclaim, the degree of prejudice to the other party and the interests of justice - Civil Procedure Rules 10.3, 11.11(3), 11.17, 26.1(2)(v)

ANDERSON K. J

BACKGROUND

The application before the court

[1] The claimants claim that they and the defendants are tenants at Lot 35 Dunrobin Avenue, Kingston 10. They further claim that they and the defendants had agreed to share the leased property, under two separate leases, with each party having control of approximately one-half of the aforementioned leased property. The claimants assert that they, the defendants and the owners of the leased property, had agreed that a dividing wall be constructed to partially separate the businesses operated by both the claimants and defendants. The claimants claim that it was further agreed that the construction of the dividing wall, the relocation of the gate on the said premises, and the cost of separating the water and electricity metres, were to be borne by the 1st claimant and 2nd defendant. They maintain that the construction of the dividing wall and the relocation of the gate were done by the 1st claimant, further to the agreement between the parties and the owners of the leased property. The claimants contend that the work was done at a cost of $1.6 Million, which was paid for solely by the 1st claimant, but that the defendants failed and/or neglected to reimburse the 1st claimant for half of the cost as agreed. Additionally, they maintain that it was further agreed that the parking lot, on both sides of the property, would remain a common area for both the claimants and defendants, so that their clients could park their vehicles on either side of the dividing wall.

[2] The claimants contend that the defendants acted in breach of the aforesaid agreement by having prevented the 1st claimant and its customers, servants and/or agents from parking on the side of the leased property, that is directly in front of the defendants' business place. The claimants maintain that the defendants not only

breached that aspect of the said agreement, but that they also committed other breaches of the agreement. The claimants also assert that the defendants have uttered words in the presence of the 2nd claimant with the aim to defame him. It is against this background that the claimants brought a claim against the defendants for damages for breach of contract, defamation, harassment and unjust enrichment. Further, it is the claimant's case that they sought several injunctions to restrain the defendants from acts which they perceive to be tantamount to harassment, defamation and breach of the claimants' peaceful enjoyment of the leased premises.

[3] The defendants filed their original notice of application for court orders on January 12, 2024. Thereafter, they filed an amended notice of application for court orders on January 30, 2024. The matter came before me on February 5, 2024 and further amendments were made to the application, in that, a number of orders and grounds in the amended application were deleted. Some of the orders made by the court on February 5, 2024, were:

1. *'The defendants' amended application for court orders, which was filed on January 30, 2024, is further amended such that orders nos. 1, 2 & 3 and grounds nos. 2, 3, 4, 5, 6 7, 8, 9, 10 and 11 are deleted.*

2. *The defendants shall be at liberty to seek orders nos. 1-3 on the grounds nos. 2-11 as set out in their amended application for court orders but any application for those orders shall be filed, no later than February 15, 2024, and provided that same is filed in accordance with this order, that application shall be heard and determined in open court and shall be scheduled for hearing before a judge alone, in open court.*

3. *If the defendants wish to rely on affidavits in response to affidavit evidence of the 2nd claimant, which was filed today, the defendants shall be at liberty to do so, but shall do so by means of other affidavit evidence which shall be filed and served by or before February 15, 2024, and that other affidavit evidence shall be limited to making averments of response only to any averment made by the 2nd claimant in his affidavit evidence,*

which was filed and served today, as distinct from raising/making any new averments.

4. *By or before February 29, 2024, the parties shall file and serve a bundle of further submissions and any further authorities, provided that the same is limited to addressing the evidence given in the 2nd claimant's affidavit which was filed today, and any other affidavit being relied on by the defendants and filed and served, in accordance with order no. 3 above.*

5. *The defendants' further amended application seeking orders nos. 4 - 8 of their earlier amended application shall be heard on paper by K. Anderson, J. and this court's ruling on that further amended application is reserved.'*

[4] In light of the orders above, this court has to make a determination regarding the following orders which are being sought by the defendants:

4. *'The interim injunctions granted on May 19, 2023 by the Honourable Mr. Justice Staple (Ag.) (as he then was), be wholly discharged.*

5. *The applicants be granted an extension of time within which to file a defence.*

6. *The defence and counterclaim filed on February 8, 2023 be permitted to stand as filed in time.*

7. *Costs of the application be awarded to the applicants to be taxed if not agreed.*

8. *Such further and other relief as this Honourable Court deems just.'*

The ground on which the applicants are seeking the above orders is that: '***Rule 26.1(2 (v) of the Civil Procedure Rules (CPR), 2002 (as amended)*** *empowers the court to take any other step, give any direction or make any other order for the purpose of managing the case and furthering the overriding objective.'*

[5] The orders granted by Mr. Justice Staple (Ag.) (as he then was) on May 19, 2023 were as follows:

1. *'The defendants are restrained until the trial of this matter, whether by themselves, their servants or agents or howsoever otherwise, from further uttering, publishing or causing to be published words defamatory of the claimants which includes but is not limited to statements that the claimants employ criminals, the claimants are criminals, the claimants are thieves and any other statement written or uttered to damage the claimant's reputation or to interfere with the1st claimant's tenants, customers or servant or anyone there to use and/or occupy the property located at 35 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew, being the property comprised in the Certificate of Title registered at Volume 1454 Folio 694 of the Register Book of Titles (hereinafter referred to as "the property");*

2. *The defendants are restrained until the trial of this matter, whether by themselves, their servants or agents or howsoever otherwise, from interfering with the ingress and egress from the property by the claimants, the claimant's tenants, lawful visitors, the claimants' servants or agents or anyone there to use and/or occupy the said property;*

3. *The defendants are restrained from until the trial of this matter, whether by themselves, their servants or agents or howsoever otherwise, from harassing the claimants, the 1st claimant's tenants, lawful visitors, the claimant's servants or agents or anyone on the property to use and occupy the said property;*

4. *The defendants are restrained until the trial of this matter, whether by themselves, their servants or agents or howsoever otherwise from persisting in actions that interfere with the peaceful enjoyment of the property by the claimants, the 1st claimant's tenants, customers, lawful visitors, the claimants' servants or agents or anyone on the property to use and/or occupy the said property;*

5. *The defendants are restrained until the trial of this matter, whether by themselves, their servants or agents or howsoever otherwise, from blocking the claimants, the 1st claimant's tenants, customers, lawful visitors and the*

claimants' servants or agents from parking in the common area on either side of Lot 25 Dunrobin Avenue, Kingston 10 in the parish of Saint Andrew…'

Whether the court should wholly discharge the interim injunctions granted on May 19, 2023 by Mr. Justice Staple (Ag.) (as he then was)

The Defendants' Submissions - A Summary

[6] In his affidavit, which was filed on January 12, 2024, the 1st defendant claims that the claimants did not make full and frank disclosure of all the material facts of the claim, when they obtained the injunctions on May 19, 2023. The 1st defendant further claims that, had the claimants disclosed certain facts regarding their lease agreement, which were material to the application for injunctive relief, then this would disentitle the claimants from obtaining the said injunctions.

[7] The defence have asserted that they have a good reason for failing to attend the May 19, 2023 hearing, and that, had they been present, some other orders might have been made. They have submitted that they were not aware of the hearing date, and that it was upon their perusal of their file with their current attorneys-at-law, that they realized that the hearing for injunctive relief had previously been held. The 1st defendant avers:

'I recall on or about May 11, 2023 our previous attorneys-at-law office sent us a letter informing us about the claimants wanting an injunction…we were advised that the hearing was scheduled for the following day…It was upon reviewing the court files with our current attorneys-at-law that we realized that the injunction hearing came up on May 12 and 19, 2023.'

[8] The defence have further asserted that, it was upon their perusal of their file with their current attorneys-at-law, that they realized that their former attorneys-at-law, Everton J. Dewar & Co., were no longer representing them.

[9] It is to be noted that the defendants' former attorneys'-at-law, Everton J. Dewar & Co., in their affidavit in support of notice of application for court orders to remove their names from the record as the claimants' legal representative, which was filed on November 29, 2023, stated:

3. 'The defendants instructed the applicant to enter an appearance in this matter in December 2022 and to file and serve their defence. Pursuant to the defendants' instructions, the applicant filed and served acknowledgement of service and a defence on behalf of the defendants.

4. That after complying with the defendants' instructions, the applicant received several documents and letters from the claimants' attorneys-at-law, all of which were forwarded to the defendants for them to provide the applicant with their instructions and sign and pay the applicant to represent them in the matter.

5. That on May 11, 2023, during a telephone conference with the defendants, the applicant was instructed not to represent the defendants in the injunction application by the claimants…

6. By letter dated May 17, 2023, the applicant wrote to the defendants confirming the defendant's instructions. The said letter was personally delivered to the defendants at their offices.

7. By letter dated July 19, 2023 the applicant wrote to the defendants forwarding formal order dated May 19, 2023 and advising the defendants to adhere to the formal order…The letter was personally delivered to the defendants at their offices…'

The Claimants' Submissions - A Summary

[10] The 2nd claimant has averred, in his affidavit in opposition to notice of application of court orders, which was filed on February 5, 2024, that: '*The notice of application for injunction and affidavits in support were served on the defendants' attorneys-at-law on record and that the defendants were aware of the application but willingly chose not to attend.'* The court's record indicate that the claimants filed an affidavit of service on May 1, 2023 where their process server deponed:

4. 'That on April 19, 2023, I scanned and sent to the defendants' attorneys-at-law, a copy of the sealed notice of application for court orders filed on February 20, 2023, along with the affidavit of Floyd Leroy Campbell in support of notice of application for court orders filed on January 25, 2023…The email was sent to ejdewar@yahoo.com, which I know to be the defendants' attorneys' email address…

That through telephone calls with Mr. Dewar's office arrangements were made for their bearer Mr. Wayne Wilson to collect physical copies of the documents outlined in paragraph 4… The

sealed notice of application for court orders filed on February 20, 2023 and the affidavit of Floyd Leroy Campbell in support of notice of application for interlocutory injunction and of urgency filed on January 25, 2023 was collected by Mr. Wayne Wilson on April 24, 2023…'

The Court's Analysis

Whether the hearings on May 12, 2023 and May 19, 2023 for injunctive relief were inter partes or ex parte hearings and the proper course to follow in the circumstances

[11] It is imperative for the court to discuss the distinction between an inter partes and an ex parte application. According to the ***Oxford Dictionary of Law, Edited by Jonathan Law and Elizabeth A. Martin, 2013, pages 294 and 590,*** *'inter partes' means 'between the parties…describing a court hearing at which both parties attend, one of them having given the other notice of the time and place of hearing.'* On the other hand, according to the ***Jovitt's Dictionary of English Law, Second Edition by John Burke, 1977, page 733*** *'ex parte means that an application is made by one party to a proceeding in the absence of the other. Thus, an ex parte injunction is one granted without the opposite party having had notice of the application. It would not be called ex parte if he had proper notice of it, and chose not to appear to oppose it.'* The issue for the court then, is whether the defendants were given notice of the hearings held on May 12 and 19, 2023.

[12] The court can set aside ex parte orders, 'ex debitio justitiae', that is, without there even being an application before the court for same to be done. It is important to note though, that this is not the same as regards inter partes orders made by a court of concurrent jurisdiction. In that regard, see para. 17 below.

[13] Based on the 1st defendant's affidavit and their former counsel's affidavit, it is clear that the defendants had received notice of the May 12, 2023 hearing and the further adjourned hearing held on May 19, 2024. However, neither the 1st defendant, who is the director of the 2nd defendant, nor the 2nd defendant attended the hearing, with or without legal representation. The fact that the defendants had received notice of the hearing of May 12, 2023, indicates that the pertinent hearing was conducted inter partes

and not ex parte, since the claimants had given the defendants notice of the time and place of hearing. The onus was then on the defendants to attend court on the day and time stipulated by the notice, either by themselves or with their legal representative. The Privy Council decision of ***National Commercial Bank of Jamaica v Olint Corporation Limited [2009] 1 WLR 1405, page 1, para. D****,* noted that:

'A judge should not entertain an application for an injunction of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. Cases in the latter category will be rare, because even in cases in which there has been no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. ***Any notice is better than none****.'* (Highlighted for emphasis)

It is clear from the above, that the defendants were given notice of the hearings fixed for May 12, 2023 and May 19, 2023, contrary to their averments that they were not notified. Even if the defendants are contending that the notices for the hearings were short-served, the ***National Commercial Bank v Olint Corporation (op. cit.)*** case settles the matter that, *'any notice is better than none'*.

[14] Further, ***rule 11.11(3) of the CPR*** provides for service of notice of application as follows:

1) 'Where -

(a) notice of an application has been given, but

(b) the period of notice is shorter than the period required, the court may nevertheless, direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application.'

It is important to note that the rule above, allows for the service of a notice of application in a shorter time period than is usually required and that, the court may treat with the abridged notice as having been sufficient in the circumstances. Therefore, the court has a discretion to accept, as sufficient notice, a reduced period than what usually obtains

per the rules of court and deal with the application accordingly. In any event, it is not enough for defence counsel to contend that the defendants were absent from the hearings on May 12, 2023 and May 19, 2023, since ***rule 11.17 of the CPR*** empowers the court to proceed with a hearing in the absence of a party. That rule states: *'Where the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the court may proceed in the absence of that party.'* As a result, a party's absence from a court matter, cannot convert an inter partes application to an ex parte one.

[15] The evidence before the court is that Everton J. Dewar & Co. were the attorneys on record for the defendants at the time when the application for injunctive relief was filed, served and subsequently heard. The claimants have averred that they had served that firm with the relevant court documents. ***Rule 5.6 of the CPR*** allows an attorney-at-law to accept service on behalf of a party and that was what the previous firm did - they accepted service from the claimants on behalf of the defendants, who were their clients at the time. In fact, Everton J. Dewar & Co. remained on record for the defendants until they were removed from the record, by order of this court, as the defendants' legal representative, on January 12, 2024.

[16] The burden of proof lies with the defendants, as the present applicants, on a balance of probabilities, to prove that they were not served with the relevant notice for the hearings and that the hearings took place ex parte. I find that the defendants, have not so proven.

[17] It is my considered view that the court does not have jurisdiction to discharge, wholly or otherwise, an order or orders granted by another judge in an inter partes hearing. Should an applicant be dissatisfied with a decision of the court on an inter partes hearing, he has a recourse, which is to take the matter to the Court of Appeal. It is settled law that the court does not have jurisdiction to overturn or over-rule the order or orders granted by another judge. According to the case, ***Strachan v Gleaner Company Limited and Anor [2005] UKPC 33, at page 269, paras. f, g and h:***

> *'The Supreme Court of Jamaica is a superior court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time, a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally, his jurisdiction will have been challenged and he will have decided (after argument) that he has jurisdiction; more often, he will have exceeded his jurisdiction inadvertently; its absence having passed unnoticed. But whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it. As between the parties, and unless and until reversed by the Court of Appeal, his decision is res judicata.'*

[18] Furthermore, the Privy Council case of ***Isaacs v Robertson (1984) 43 WIR, page 129, paras. b and c,*** held, per Robotham, JA (Ag.), citing the passage in the judgment of Romer, LJ in ***Hadkinson v Hadkinson [1952] P 285 at page 288***, that:

> *'it is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void…A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…'*

Therefore, if the defendants are of the view that the orders of the court on May 19, 2023, were irregular, the parties would have no choice but to obey the relevant orders, unless or until they were wholly discharged by the Court of Appeal. In short, this court cannot discharge the interim injunctions granted on May 19, 2023.

Whether the court should allow the defendants' defence and counterclaim filed on February 8, 2023 to stand as filed in time

The Court's Analysis

[19] The case of ***Anthony Brown v Dadrie Nichol [2023] JMCA App 40***, ***paragraph 7,*** states that for an applicant to succeed in obtaining an extension of time within which to file an appeal, he or she must satisfy the court that:

i. 'the delay was not inordinate;

ii. *there are good reasons for the delay;*

iii. *there is an arguable case for the appeal;*

iv. *if the application is allowed, the degree of prejudice to the other parties is not oppressive; and*

v. *it would be in the interests of justice to grant the application.'*

The defendants' application will be assessed against the above requirements, as those requirements are strikingly similar to those which must, of necessity, apply in respect of the defendants' application for an extension of time, within which to file their defence and counterclaim.

The length of the delay

[20] According to the 1st defendant's affidavit, which was filed on January 12, 2024, the defendants were served with the claim on December 12, 2022. They further claim that they had instructed their previous attorneys-at-law, Everton Dewar & Co., to defend the claim on their behalf and that they had intended to counter-sue the claimants for trespassing on their property. They have deponed that that they were not aware that their defence and counterclaim were not initially filed and that there was a time limit in which to file same. They have further deponed that, it was after they had retained their current attorneys-at-law, that they became aware that, since their defence and counterclaim were not filed within forty-two (42) days from the time they were served, it would be invalid unless or until the court extended the time to treat with it as though filed in time. The defence filed their defence and counterclaim on February 8, 2023. The length of the delay in filing the proposed defence and counterclaim is in excess of two (2) months, which is contrary to the time prescribed for service under ***rule 10.3 of the CPR***. However, this could not be seen as an inordinate delay. On the other hand, if one measures the delay from the time of the filing of the defence and counterclaim to the date of the application on February 5, 2024, then the length of the delay would be much greater. This would be tantamount to almost one (1) year, which could be seen as an inordinate delay. It is my view that the delay of almost a year is quite significant but not decisive. It is important to note that the court does not usually decide an application for extension on the basis of only the length of delay. This court will always have a

discretion to extend time for the filing of a defence or counterclaim (ancillary claim), even where the length of delay is inordinate and there is no satisfactory explanation for same. See: Privy Council case of ***The Attorney General (Appellant) v Universal Projects Limited (Respondent) [2011] UKPC 37***.

Reason(s) for the delay

[21] The defence claim ignorance of the law but ignorance of the law is no excuse. They and their former attorneys-at-law had a duty, like any prudent, responsible man, to ensure that their matter was properly before the court, pursuant to the rules of court. The defendants have also proffered oversight as another reason for the delay in filing their defence and counterclaim. I am of the view that the preceding reasons do not amount to good reasons for the defendants' delay in filing their defence and counterclaim. I find that the defendants have not satisfied this requirement. However, while it is important to note that any failure by the defendant to give a good reason, is not decisive, it is a factor to be taken into account.

Whether the defence has a real prospect of success

[22] The next step is to consider whether the defendants' proposed defence is arguable since, according to ***Dale Austin v The Public Service Commission and Another [2016] JMCA Civ. 46***, an applicant's failure to provide a good reason for the delay will not be treated as dispositive of his application. The case of ***Russell Holdings Limited v L & W Enterprises Inc and ADS Global Limited [2016] JMCA Civ 39 at para. 82*** stated:

'For there to be a real prospect of success, the defence must be more than merely arguable and the court, in exercising its discretion, must look at the claim and any draft defence filed. Whilst the court should not and must not embark on a mini-trial, some evaluation of the material placed before it for consideration should be conducted. The application must therefore be accompanied by evidence on affidavit and a draft of the proposed defence.'

In the case at bar, I have considered the defendants' claim and particulars of claim, which were filed on November 15, 2022, the 1st defendant's affidavit in support of notice

of application for court orders, which was filed on January 12, 2024 as well as the defendants' draft defence, which was filed on February 8, 2023. According to ***paragraph 84 of Russell Holdings (op. cit.)***, the court said that the *'prospect of success must be real and not fanciful…The test is similar to that which is applicable to summary judgments.'* In paragraph 85 of that case, it outlined that a defendant could show that the defence had a real prospect of success by:

i. *'showing a substantive defence for example volenti non fit injuria, frustration; illegality etc.;*
ii. *stating a point of law which would destroy the claimant's cause of action;*
iii. *denying the facts which support the claimant's cause of action; and*
iv. *setting out further facts which is a total answer to the claimant's cause of action for example exclusion clause, agency etc.'*

[23] According to paragraphs 14 - 16 of the defendants' affidavit, although, they are not admitting to being indebted to the claimants wholly or partially, there is a strong basis for finding that the claimants could not recover the sums of money the claimants are claiming from the defendants, because after six (6) years, that claim would be statute-barred. Another point of law raised by the defence is that harassment is not a basis of law upon which the claimants can sue the defendants, and especially not the 1st claimant, which is a company. Further, the defendants contend that the claim is grounded in breach of contract but they do not have a contract with the claimants to share the leased premises.

[24] In addition, the defendants have outlined that it is the claimants who are trespassing on their share of the leased premises, which is a different version of events than what has been submitted by the claimants. The defendants have denied certain facts which support the claimants' cause of action, in that, the claimants have claimed that they solely stood the cost of the reconstruction of the dividing wall and relocation of the gate in the amount of $1.6 Million under the agreement between the parties, being the owners, defendants and claimants. Yet, the defendants have claimed, in their affidavit, that they stood the cost of approximately $850,000 to construct their own main

gate which is being used by the claimants. Further, they maintain, in their proposed defence, that it is the claimants who are utilizing the main gate that they constructed and are being unjustly enriched at the defendants' expense. In paragraph 11 of the defendants' defence, they contend that there was no agreement between them and the claimants concerning the separation of utilities. They further contend that it is the separate commercial lease agreements as between the defendants and the owners, and the claimants and the owners, which authorised the defendants and the claimants to relocate the main gate and separate the electricity and water. In paragraphs 16 - 17 of their defence, the defendants maintain that they and their customers or servants and/or agents do not use the dividing wall and that the said wall does not serve them at all. Thus, in their estimation, they have not profited or have been unjustly enriched by the construction of the dividing wall, as alleged.

[25] Having considered the points of law and fact raised in the defendants' affidavit and defence, I have concluded that they fall within the ambit of that which was so well-articulated in the ***Russell Holdings*** case ***(op. cit.)***. Therefore, I have concluded that the defendants' defence is one which has, a real prospect of success.

The degree of prejudice to the other party

[26] If the court should grant the defendants an extension of time within which to file their defence and counterclaim, I find that the claimants are not likely to suffer any undue prejudice. However, the defendants will most likely, suffer undue prejudice if this claim at bar, is not determined on its merits.

The interests of justice

[27] It is important to consider **r*ule 26.1(2)(c) of the CPR***, which states:

'Except where these Rules provide otherwise, the court may extend or shorten the time for compliance with any rule, practice direction, order or direction of the court ***even if the application for an extension is made after the time for compliance has passed****.* (Highlighted for emphasis)

I find that this is one of those cases where the interests of justice would be best served if the court were to extend time for the defendants to comply with the rules as regards the filing of their defence and counterclaim, although the time for compliance has passed. I am of the view that the defendants should be allowed to present their defence and counterclaim to the court.

Conclusion

[28] In the premises, the court does not have the jurisdiction to wholly or otherwise discharge the inter partes orders, which were granted by Mr. Justice Staple (Ag.) (as he was then) on May 19, 2023. If the defendants are dissatisfied with the court's position, the proper recourse would be to appeal the judge's decision. I will extend the time to allow the defendants to file their defence and counterclaim.

Disposition

[29] My orders are as follows:

1. The application to discharge the order of Staple, J., made on May 19, 2023, is denied.

2. The defendants' application for an extension of time in which to file a defence and counterclaim, is granted.

3. The defendants' defence and counterclaim, which were filed on February 8, 2023, are permitted to stand as filed and served within time.

4. The claimants shall, if they wish, file and serve a reply to defence and counterclaim, by or before May 31, 2024.

5. Each party shall bear their own costs as regards the defendants' amended application for court orders, which was filed on January 30, 2024, which was further amended by oral order of this court, made on February 5, 2024.

.....
Hon. K. Anderson, J