



[2022] JMSC Civ.51

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

**CIVIL DIVISION**

**CLAIM NO. 2018HCV03967**

<b>BETWEEN</b>	<b>CARWIN SHIRLEY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CAROL MARIE HEW</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>ESTATE STEPHEN RAYMOND HEW</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>CLIFTON HEW</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>ESTATE STEPHEN ALEXANDER HEW</b>	<b>4<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>LISA ANN HEW AKA LISA WILLIAMS</b>	<b>5<sup>TH</sup> DEFENDANT</b>
<b>AND</b>	<b>DIONNE THERESE HEW</b>	<b>6<sup>TH</sup> DEFENDANT</b>

**IN CHAMBERS**

Mr. Cecil J. Mitchell instructed by Cecil J. Mitchell and Co. for the Claimant

Mr. Kevin Powell instructed by Holyn Holyn and Morris for the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants

Heard: March 30, 2022 and April 29, 2022

**Carr, J**

**Application to strike out /or in the alternative to enter summary judgment – Delay of Two Years for the hearing of the application – Request for adjournment refused – Breach of Contract – Statute of Limitations for matters involving contract**

## **Introduction**

**[1]** The Applicants, the First Third and Sixth Defendants, filed a notice of application for court orders on the 28<sup>th</sup> of August 2019 to strike out the claim against them. They seek the following orders from the court:

- a) The automatic referral to mediation be dispensed with.
- b) The claim form and particulars of claim filed by the Claimant on October 10, 2018 be struck out as against the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants.
- c) Further and/or in the alternative the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants be granted summary judgment on the claims against them.
- d) Costs of this application and of the claim to the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants.

**[2]** The application was filed on the basis of the courts' jurisdiction under Rule 26.3 (1) (b) and (c) of the Civil Procedure Rules. The Defendants relied on the grounds that the claim was an abuse of process or in the alternative that it is likely to obstruct the just disposal of the proceedings. The grounds of their application rested on two limbs a) that the cause of action asserted did not accrue within six years before the institution of the claim and is therefore statute barred and b) that the claim alleges fraud which is not properly particularized and cannot be made out given the facts as outlined by the Claimant in his statement of case.

**[3]** Additionally, or in the alternative it was argued that the claim as filed disclosed no reasonable grounds for bringing it against the Defendants. It was contended that the Claimant has no real prospect of success as the facts alleged in the statement of case do not support a claim of fraud or conspiracy against the Defendants, and the claim is statute barred.

## **Chronology of events**

**[4]** Prior to commencing the discussion of this matter it is important to set out the events which have preceded the hearing of this application.

- [5]** The claim and particulars of claim were filed on October 10, 2018. On the 31st of October 2018 an acknowledgement of service was entered on behalf of the 1st and 6th Defendants. the 3rd Defendant filed an acknowledgment of service on the 19th of February 2019.
- [6]** A defence and counter claim was filed by the 1st and 6th Defendants on the 26th of November 2018. The 3rd Defendant filed a defence on the 26th of March 2019.
- [7]** The Notice of application which is the subject of this hearing was not served on the Claimant until the 22nd of February 2020. To date there has been no Affidavit filed in response to the application.
- [8]** This application as well as an application for default judgment on the counter claim first came before the court on the 19th of March 2020. It was adjourned to the 16th of December 2020 for the Claimant to obtain legal representation. On that date the matter was adjourned as Mr. Cecil J Mitchell indicated to the court that he was recently retained in the matter and needed time to obtain proper instructions. On the 29th of June 2021 the matter was adjourned again as the file could not be located, the computerized system was not updated, and the bundles were not to hand.
- [9]** In the interim Counsel on behalf of the Claimant filed applications to extend the time to file a defence to the counter claim as well as an application to amend the particulars of claim.
- [10]** On the 1st of July 2021 Mott Tulloch-Reid, J (Ag.) heard the applications on behalf of the Claimant and reserved her judgment. The applications on behalf of the Defendants were adjourned for a date to be set by the Registrar.
- [11]** On the 30th of July 2021 both applications on behalf of the Claimant were refused and the applications on behalf of the Defendants were scheduled for hearing on the 14th of December 2021.

**[12]** On that date the matter was adjourned due to the unavailability of a Judge and the matter was set for the 30th of March 2022.

### **Request for adjournment**

**[13]** It is in this context that the matter came up for hearing some two years after service on the Claimant. The delay in the hearing of the applications was as a result of a combination of factors. However, there can be no doubt that the parties have been prejudiced in not having their matter concluded expeditiously.

**[14]** Counsel, Mr. Mitchell filed an application to remove his name from the record on the 16th of March 2022, citing differences between himself and his client. He was not present at the commencement of the proceedings and was contacted by Counsel for the Defendants. He indicated that he had advised his client that he was to appear via the zoom platform for the virtual hearing of the matter and he gave him the credentials to enable him to do so. At this point the Claimant was not present for the hearing. Mr. Mitchell contacted his client by telephone and the call was put on speaker so that he could hear the proceedings.

**[15]** The Claimant asked the court to adjourn the matter on the basis that he had reported the matter to the Office of the Director of Public Prosecutions and that they were in the process of an investigation. He needed time to have that information collected and placed before the court. Counsel on behalf of the Defendants objected strenuously to an adjournment on the basis that the matter has been before the court on many occasions and his clients were anxious to have their applications heard.

**[16]** I ruled that the matter was to proceed to a hearing. The reasons for this are as follows:

- a) The claim has been before the court since 2018.

- b) The applications were first before the court from March 2020, as such two years had elapsed without the Defendants being given an opportunity to be heard.
  - c) The date for this hearing was fixed from the 14<sup>th</sup> of December 2021.
  - d) There was no affidavit filed on behalf of the Claimant in response to the applications.
  - e) Mr. Mitchell indicated to the court that he had advised his client to seek legal representation prior to the hearing.
  - f) The applications for extension of time to file a defence and to amend the particulars of claim were refused by a Judge.
  - g) The reason given for the adjournment could not assist the Claimant given the nature of the applications which were filed. The application for default was grounded in the failure of the Claimant to file a defence to the counter claim, the application for an extension of time to file a defence was refused this meant that there was in fact no defence filed in respect of the counter claim by the Defendants.
  - h) The application for striking out or summary judgment was based on the claim form and particulars of claim filed. The decision to refuse the application to amend the statement of case resulted in the court having to treat with the documents as filed. The Claimant's desire to pursue another course of action through the Office of the Director of Public Prosecutions could not be used to further delay these proceedings.
- [17]** The application for default judgment was therefore granted and I proceeded to hear the application to strike out /or for summary judgment. Both the Attorney on behalf of the Defendants as well as the Claimant himself were given an opportunity to make submissions on the issue and the decision was made after careful consideration.

## **Analysis and Discussion**

**[18]** The Civil Procedure Rules sets out the power of the court to strike out a claim at Rule 26.3 (1) which states;

**“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.”**

**[19]** In the case of **City Properties Limited v. New Era Finance Limited**<sup>1</sup> Batts, J in interpreting the rule held:

**“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. Therefore, it seems to me that when the rule refers to “reasonable grounds” for bringing a claim it means nothing more or less than that the claimant has disclosed in the pleading that he has a reasonable cause of action**

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<sup>1</sup> [2013] JMSC Civil 23 at para. 9 and 10

**against the defendant. He does this by pleading facts supportive of the existence of a cause of action or defence as the case may be.”**

- [20] In determining whether or not to strike out a claim therefore the court must look at the pleadings. The Defendants have the burden of establishing that the Claimant has no reasonable cause of action.
- [21] They start on the basis that the claim is statute barred. The claim as filed refers to several breaches of contract. The main agreement was one which was allegedly made between the Claimant, the deceased Stephen Raymond Hew, and his wife, the 1st Defendant. This agreement according to the particulars of claim was made sometime in 2001. The Claimant avers that he offered to assist the couple with their legal troubles and in exchange for his assistance he would be given 33.33% of all that they owned. He stated that the agreement was a verbal one and that it continued for many years.
- [22] In 2006 he discovered that the couple was dishonest in most of their dealings and he told them that the matter may be referred to his lawyer. Subsequently the couple, unbeknownst to him, along with other family members conspired to remove the name of the deceased from the titles to the various properties he owned in an effort to prevent the Claimant from realizing his payment for services rendered.
- [23] This he said resulted in a breach of the contract and was actionable. The breach he avers occurred on the 27th of August 2007, and as such he was claiming damages in the sum of 50% of the value of the estate of the deceased.
- [24] The other breaches of contract are as follows:
- a) In relation to the 1<sup>st</sup> and 6<sup>th</sup> Defendants in respect of a conspiracy with his tenant to deprive him of rent and compensation for property damage.
  - b) Failure to compensate the Claimant for the maintenance, repair and improvements made on premises referred to as Cotton Tree Plaza at 32 Queen’s Drive, Montego Bay, St James.

c) The 6<sup>th</sup> Defendant illegally entered 6 units of apartments belonging to the Claimant and tampered with the locks and changed the locks and illegally took over the premises.

[25] There was no averment of any contractual arrangement between the Claimant and the 1st and 6th Defendants that would speak to the aforementioned breaches outlined in the previous paragraph. It is clear from the pleadings that those matters do not involve any contractual relationship at all. As such the only contract pleaded that the court can recognize as the basis for the claim is the one which was made in 2001 and which was breached according to the Claimant in August 2007.

[26] In response to the claim the 1st Defendant denied having any business dealings with the Claimant. She also denied entering into any contract or any partnership with him. She averred that her husband who is now deceased was never registered as the proprietor of 83 acres of land located in Crawle Pen St. James. The land was the subject of an application under the Registration of Titles Act which was never completed.

[27] The property which the Claimant described as 8 ½ acres of beach front property consisting of 12 lots was never transferred to her husband, despite an agreement to purchase. The land has since been occupied by squatters and apart from an unsuccessful attempt by her husband in September 2008 to recover possession, no other effort was made to remove them.

[28] She denied being involved in any fraudulent acts and she indicated that the claim was statute barred.

[29] **The Limitation of Actions Act** makes reference to the United Kingdom Statute 21 James I. Cap. 16 as forming a part of the laws of Jamaica. At **Section 46** it states:

**“In actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be**



**deemed sufficient evidence in any of the Courts of this Island, of a new or continuing contract, whereby to take any case out of the operation of the United Kingdom Statute 21 James I. Cap. 16, which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island...”.**

**[30]** In the case of **Shaun Baker v. O’Brian Brown & Angella Scott Smith**<sup>2</sup>, Edwards, J, as she then was, discussed the history of the United Kingdom Statute and its applicability to the laws of Jamaica in respect of the limitation period for actions.

**“This statute is as old and as difficult to read as it is to locate. It speaks of actions for trespass and actions on the case, as well as a "hodpodge" of various other actions. The limitation period for these actions is not uniform, (they later became uniform in England by a series of amendments) but for our purposes, the limitation period for actions on the case, a category within which this present action would fall, is stated to be six years. There is no discretion provided for in the Act for extension of time for this form of action.”**

The principle gleaned from this case is that in the Jamaican courts the limitation period for simple contracts is that of six years. Therefore, no action can be brought in a claim in contract, but within six years of when the cause of action first arose. There is no inherent jurisdiction to extend the time to file such a claim. The defence of a statutory limitation is a complete defence once pleaded and proved. The purpose of a limitation period is to protect a litigant from a stale claim and/or a claim that he does not expect to face after so much time has passed. Any claim made outside of the limitation period is therefore considered an abuse of the process of the court and stands to be struck out as such.

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<sup>2</sup> 2009HCV5631 delivered on the 3<sup>rd</sup> of May 2010 paragraph 49

- [31] This claim was filed on the 31<sup>st</sup> of October 2018, the alleged breach of contract as described by the Claimant in his statement of case occurred on the 27<sup>th</sup> of August 2007. He therefore had six years from that date to file his action. The Claimant's claim was filed some eleven years after the breach arose. The limitation period has expired and the claim is therefore statute barred. In the circumstances the claim is struck out as an abuse of the process of the court.
- [32] Counsel for the Defendants also raised the issue of the failure to particularize the fraud and that this too would be a basis upon which the court could rightfully exercise its discretion to strike out the claim.
- [33] In the case of **Leroy McGregor v. Verda Francis**<sup>3</sup> Simmonds, J, as she then was, summarized the principles as it relates to a pleading of fraud in this way:

**“It is settled that any charge of fraud must be pleaded and sufficiently particularized. This principle was expressed by Thesiger, L.J. in Davy v. Garrett (1877) 7 Ch. D. 473 at 489 in the following words: “In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts”. A claimant is required to set out the facts and the circumstances that are being relied on to prove that a defendant had or was motivated by a fraudulent intention. It is also clear that the court should not be asked to infer that intention from general allegations. This point was made by Selborne, L.C. in Wallingford v. Mutual Society 5 App. Cas. 685 at 697 who stated that “...general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice”.**

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<sup>3</sup> [2013] JMSC Civ. 172, para. 36 and 37

**[34]** It is clear that the allegation of fraud was not particularized in relation to the Defendants. In fact, on the pleadings it would appear that the fraud which is averred was based on the transfer of titles to properties in the name of the deceased to his daughters. This it was alleged was tantamount to fraud because the intention was to deprive the Claimant of his entitlement under the agreement. In executing the transfer documents, the Claimant would not be able to realize all that he should have had if the properties remained in the name of the deceased. This however is insufficient in law to satisfy a court of an allegation of fraud. The Claimant has failed to particularize any acts specific to the Defendants to suggest circumstances or words which could be attributed to the Defendants to indicate that there was a fraudulent intention on their part.

**[35]** The statement of case does not disclose a reasonable ground for bringing the claim and as such the application to strike out on this basis is also accepted.

**[36]** It is clear from the foregoing that the Claimant would not have a real prospect of succeeding on the claim given the deficiencies in his statement of case. However, I am minded to have the matter struck out in the circumstances on the basis that it is an abuse of the process of the court.

**Orders:**

1. The Claim Form and Particulars of Claim filed on the 10<sup>th</sup> of October 2018 are struck out against the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants.
2. Costs of the application and the claim to the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants to be agreed or taxed.
3. The Defendant's Attorney-at-Law is to prepare file and serve this order.