



[2013] JMSC Civ.106

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 01026

BETWEEN	ALTON BROWN (Claiming under Power of Attorney from Alexander Brown Registered at volume 519 folio 289)	FIRST CLAIMANT
AND	ALTON BROWN	SECOND CLAIMANT
AND	THE ATTORNEY GENERAL	FIRST DEFENDANT
AND	REVENUE PROTECTION DIVISION	SECOND DEFENDANT
AND	MAJOR JOHANNA LEWIN	THIRD DEFENDANT
AND	GREGORY FARQUHARSON	FOURTH DEFENDANT
AND	HORACE JAMES	FIFTH DEFENDANT
AND	CRANSTON MORGAN	SIXTH DEFENDANT
AND	MARTIN WALKER	SEVENTH DEFENDANT
AND	RICARDO HADLEY	EIGHTH DEFENDANT
AND	MELVILLE McLEOD	NINTH DEFENDANT
AND	DAVID LEVY	TENTH DEFENDANT
AND	KRISSANNE GRAHAM	ELEVENTH DEFENDANT

Franklyn Halliburton instructed by Halliburton & Associates for the claimants

Alecia McIntosh instructed by the Director of State Proceedings for the defendants

Joel Brown watching on behalf of the Director of Public Prosecutions

May 21, 27, July 29 and 30, 2013

CIVIL PROCEDURE RULES - RULE 26.3 (1) (a) - APPLICATION FOR STRIKING OUT FOR NON-COMPLIANCE WITH COURT ORDER

SYKES J

[1] The claimants, Mr Alexander Brown and Mr Alton Brown are brothers. The court will use their first names to distinguish them. Not referring to their last names should not be taken as a lack of respect. The claimants have applied for an order striking out of the defendants' statement of case on the ground that the defendants have failed to comply with the order of Kirk Anderson J dated March 27, 2012. They also say that the defendants have not advanced any reason for non-compliance with the order upto the time of the filing of this striking out application. The claimants concluded their application by saying that the defendants' non-compliance is wilful, contumacious and calculated to frustrate or delay the court process.

[2] The application also asks that judgment be entered in favour of the claimants in terms of:

- a. return of a BMW X5 motor vehicle which was seized by the State;
- b. return of J\$530,000.00 which was seized from Alton's home in Clarendon;
- c. damages for wrongful detention and loss of use;
- d. and interest.

What has led to this application?

[3] This claim has its origins in a criminal investigation which began in 2010 or before. On June 30, 2010, Mr Gregory Farquharson, Mr Martin Walker and Mr Ricardo Hadley, all members of the Jamaica Constabulary Force, as well as Mr Horace James, Mr Melville McLeod and Miss Krysanne Graham, members of the Revenue Protection Division, (RPD) seized a BMW X5 motor vehicle under a warrant issued to an member of the RPD. The claimants say that the warrant was issued to Major Johanna Lewin and the defendants alleged that it was issued to Mr Horace James. Mr David Levy, a customs officer, was also part of the raiding party. The allegation appears to be that the vehicle was brought into Jamaica or removed from the wharf in breach of the Customs Act. Alton and another person have been charged with criminal offences relating to the vehicle and that matter is presently before the Resident Magistrate's Court for the Corporate Area.

[4] The vehicle has not been returned despite several letters of demand for its return. The letters were sent to the RPD and Major Johanna Lewin.

[5] In March 7, 2011, Alton filed a claim, in a representative capacity, against the defendants alleging that the defendants unlawfully seized a BMW X5 motor vehicle. The claim in respect of the vehicle is in detinue. Alexander is the owner of the vehicle and it was left in the custody of Alton.

[6] On March 28, 2011, the claim was amended by Alton joining the claim in his personal capacity. The claim was further amended on April 4, 2011. On March 21, 2011 (arising from the initial claim filed and served), the defendants filed and served a request for information on Alton. He answered the questions by March 28, 2011. The claim form and the particulars of claim do not state clearly what the criminal charges are. No defence was filed until July 11, 2011, well outside the time permitted by the rules.

[7] The claim also alleges that Mr Gregory Farquharson, Mr Horace James, Mr Martin Walker, Mr Ricardo Hadley, Mr Melville McLeod, Mr David Levy and Miss Krysanne Graham have unlawfully detained JA\$530,000.00 taken from Alton's home in the parish of Clarendon. In respect of Mr Cranston Morgan, it was alleged that told Alton that vehicle would not be returned because it was being held while an investigation was conducted.

[8] The defence alleged that the vehicle was removed from the wharf by way of a fraudulent letter purporting to say that a waiver on the duties payable had been granted. The defence admits that the vehicle was taken by the defendants but says that it was lawfully seized under a valid warrant. The basis of the seizure was that possession of the vehicle without the duties being paid constituted dealing or possessing uncustomed goods as defined by the Customs Act. The defence denies that Mr Cranston Morgan told Alton that the vehicle would be detained pending investigations. The defence says that the warrant was not issued to Major Johanna Lewin but to Mr Horace James. The defence denies that money was taken from Alton's home and further denies that Messieurs Walker and Hadley were present at the operation at Alton's Clarendon home but does not deny that investigators went to the home.

[9] Alton filed and served his own request for information on January 24, 2012. No response came from the defendants. This non-response led Alton to file an application on March 12, 2012 in which he sought the following orders:

- a. order that criminal proceedings in the Resident Magistrate's Court for the parish of St Andrew against Alton be stayed pending the outcome of the civil proceedings he brought against the defendants;
- b. Major Johanna Lewin and Gregory Farquharson be removed from investigating or from further investigating the case against Alton;

- c. the defendants be ordered to provide answer to the request for information served on January 24, 2012;
- d. the defence be struck out should the defendants fail to respond to request for further information and judgment be entered for the claimants.

[10]This application was supported by an affidavit also of March 12. In the March 12 affidavit, Alton stated that he is acting in his personal capacity and under a power of attorney granted to him by Alexander. He swore that he is charged with a number of offences before the Corporate Area Resident Magistrate's Court. He indicated that the same issues arise in the civil case and therefore the criminal case should be stayed until the civil matter is finally decided. The March 12 application was filed just seven days before the trial of the criminal case was scheduled to start on March 19, 2012.

[11]The application came before Christine McDonald J on March 15, 2012. Her Ladyship ordered that the Director of Public Prosecutions (DPP) be served and the matter was adjourned to March 22, 2012. The merits of the application were not examined by her Ladyship. During the period between March 15 and 22, Alton filed the first of two affidavits dated March 19, 2012. In this affidavit he outlines his effort to serve the Clerk of Court with papers in the civil matter. It is not clear why he was doing this because the order was that the DPP be served. The Clerk, understandably, declined to accept service on the basis that she was not a party to the proceedings. The second March 19 affidavit chronicles the sequence of correspondence between Alton's former attorneys and Major Lewin. He outlines his displeasure with her conduct of the investigation. He claims that he was informed (the source is not stated) that several 'clandestine means to track and listen to [his] telephone conversations on both [his] cellular, home and office phones' were employed by the defendants.

[12]It is not clear whether the matter was heard on March 22, 2012, the date to which it was adjourned by Christine McDonald J. What is beyond doubt is that the matter came before Kirk Anderson J on March 27, 2012. His Lordship made a number of orders. In respect of the request for information, his Lordship ordered that the defendants only needed to respond to requests 1, 3, 4, 6 and 7. The date for compliance with this part of the order was set for April 13, 2012. In addition, it was also ordered that the defendants state with specificity the sum of money allegedly owed to the Customs Department by the claimants in respect of the importation of the relevant vehicle (a BMW X5) and the defendants were also to state whether any duties of money had been paid in respect of the same motor vehicle and if so, how much, the name of the person or entity to whom the sum was paid. No date for compliance was set in respect of this part of the order. The first two orders sought by the March 12 application were not adjudicated upon. Those were adjourned to April 10, 2012.

[13]On April 10, the March 12, 2012 application was adjourned to November 23, 2012. After this adjournment, Alton filed yet another affidavit dated April 18, 2012 affidavit. In this affidavit Alton stated that the defendants had not complied with those parts of Kirk Anderson J's order for which the deadline for compliance was April 13, 2012.

[14]Despite being adjourned to November 23, 2012, the matter came before McDonald-Bishop J on May 9, 2012. By this time, Alton had filed another application for striking out the defendants' statement of case. He wanted this application to be heard with the March 12 application. By way affidavit evidence placed before Sykes J, Alton stated that McDonald-Bishop J declined to hear any of the applications because her Ladyship was told of the pending appeal from Kirk Anderson J's orders of March 27. No stay of execution of Kirk Anderson J's order was in place. A subsequent affidavit from Miss Patricia Jackson, counsel for RPD, confirmed that the defendants were considering whether to appeal Kirk Anderson J's order requiring the defendants to answer those parts request for information they were ordered to

respond to. Even on May 9 when the matter came before McDonald-Bishop J the defendants had not complied with Kirk Anderson J's order.

[15]On November 23, 2012, the matter came before Straw J. The defendants had not complied with Kirk Anderson J's orders. Her Ladyship ordered that the defendants should provide the answers to the request for information on or before December 20, 2012 failing which the defendants were to pay two hundred thousand dollars in costs. It was also ordered that the hearing of the first two reliefs sought in the March 12, 2012 application be heard on May 21, 2103. As will be observed eight months after Kirk Anderson J's order, the defendants did not comply with the order and they did not apply for a stay of the orders and neither did they ask for a variation of the order.

[16]When the matter came before Straw J in November, the defendants stated to her Ladyship that they were no longer pursuing the appeal from Kirk Anderson J's March 27, 2012 order.

[17]On December 20, 2012, the defendants eventually purported to comply with Kirk Anderson J's orders providing answers to the request for information. No attempt was made to comply with the other part of the order requiring the defendants to state the amount of duty paid and the amount owing. Compliance with this part of Kirk Anderson J's order was outstanding until May 24, 2013. This belated compliance came when the when the matter came on for hearing before Sykes J on May 21, 2013 during which Mr Halliburton pursued his application for striking out on the basis of non-compliance with the part of Kirk Anderson J's order commanding divulging information on payment of customs duties in respect of the vehicle. In short, more than one year passed before the defendants complied with the order.

[18]There is no evidence that the first two reliefs sought by Alton in his March 12, 2012 application were ever heard. At the hearing before me Mr Halliburton indicated he was no longer pursuing them.

[19]On May 20, 2013, Alton filed an amended application for striking out on two main grounds. The first is that the answers provided to the request for information are inadequate and the second is that the defendants have not provided the information regarding duty owed and duty paid as ordered by Kirk Anderson J on March 27, 2012. The amended application also asked for the costs ordered by Straw J because the answers provided failed to answer the request. The application also asked that the defence be struck out and judgment entered in favour of the claimants.

[20]In support of his striking out application, Alton has sworn an affidavit dated May 20, 2013. He has also relied on previous affidavits filed by him. These are dated March 12, 2012, March 19, 2012 and April 19, 2012. There are two affidavits dated March 19, 2012. The defendants rely on the affidavit of Miss Patricia Jackson dated May 24, 2013.

[21]Alton's May 20, 2013 affidavit summarises the facts stated already and adds important additional information. He stated that when the matter came before Kirk Anderson J on April 10, 2012, the defendants' counsel who appeared at that time indicated that because of the lateness and paucity of instructions she was not equipped to deal with the substantive applications for a stay of the criminal proceedings and the removal of the investigators. It appeared that the defendants filed an appeal against Kirk Anderson J's orders of March 27, 2012 on April 10, 2012. According to Alton, when the matter came before Kirk Anderson J on April 10, the learned judge was not informed that the defendants were appealing the March 27 order but gave the impression that they were having difficulty preparing for the hearing of the substantive application of March 12, 2012.

[22]Miss Patricia Jackson stated that the RPD only became aware of the request for information in March 2012 when it was served with an application for court orders file March 9, 2012 asking the court to order the defendants to provide answers to the

request for information. This application is separate from the Alton's application of March 12, 2012.

[23]Miss Jackson also swore that the RPD's attorney at law (the Attorney General) was served with the request for further information on January 24, 2012. However, because of administrative difficulties the request was not brought to the attention of the specific attorney in the Attorney General's Chambers who had conduct of the matter until a letter dated February 20, 2012 was written to the Chambers by Alton's attorney at law. It was these inefficiencies (my words), said Miss Jackson, that caused RPD not to know about the request for information.

[24]The affidavit continues by informing that the Director of State Proceedings took the view that the information requested should not be provided at that stage of the proceedings and the defendants should await a determination by the Supreme Court of whether the defendants should provide the answers to the request.

[25]Miss Jackson agrees with Alton's recollection of the events before Kirk Anderson J on the two days the matter was before his Lordship. It is not clear when the defendants decided to appeal the order of Kirk Anderson J. The narrative suggests that this was sometime in April/May 2012.

[26]At some point the defendants decided not to proceed with the appeal. It is not clear when this decision was made or whether it was communicated to Alton. It seems that the decision not appeal was made prior to the hearing before Straw J on November 23, 2012. Despite this decision, the information requested was not provided and had to be ordered by her Ladyship. The purported answers finally came on December 20, 2012.

[27]Miss Jackson also said that it was not until May 20, 2013 that the defendants realised that Alton was not satisfied with the answers. She accepted that the other parts of the March 27 order were not complied with.

[28]According to Miss Jackson, since Straw J's order did not mention the other parts of Kirk Anderson J's order, the defendants thought that they need not comply with it. Miss Jackson concluded by saying that (a) the information requested was already disclosed in the criminal proceedings; (b) that at all times the defendants acted in good faith and (c) the defendants have not sought to flout or disregard the authority of the court.

Analysis of the facts

[29]The defendants say that they took the view that the March 27 order need not be complied until a court indicated whether they should comply. This was an unfortunate decision. It hardly needs to be said that all litigants are under a duty by virtue of the CPR to assist the court in meeting its mandate of managing cases fairly and justly. If the Attorney General had some reason for not being able to comply with the order as distinct from deciding not to comply with the request, then the only, and I repeat, the only proper course, is to apply to the court for an order relieving them of the need for compliance or for variation of the order. None of the defendants applied to the court for this relief. Indeed, the next move came from Alton who filed his application on March 12, 2012 asking for a stay of the criminal proceedings, the removal of the investigators and an order compelling compliance with the request for information. In other words, between January 24, 2012 when the Attorney General, as the attorney on record for the defendants, was served with the request for information and March 12, 2012, when Alton filed his application no action in relation to the request was taken by the Attorney General or any of the defendants. Even taking into account Miss Jackson's explanation that it was Alton's attorneys at law's letter dated February 20, 2012 which made RPD aware of the request for information, the fact remains that none of the defendants did anything to vary the terms of the request for information after the application came to attention of all of them.

[30]It seems to this court that the real reason for not complying with the request for information came out in paragraph twenty one of Miss Jackson's affidavit. There she

stated that the information was already disclosed in the criminal proceedings. In addition, during the hearing of the application, it emerged that the defendants thought that providing the information would somehow undermine the criminal prosecution. This chain of events does indeed strongly suggest that the Attorney General had decided that he would not comply with the court order because he felt that the information was already disclosed as part of the prosecution's duty of disclosure in criminal cases. There may be some justification for this view because the prosecution as part of its case would need to show that the vehicle was subject to customs duties and that the duties were either not paid at all or not paid in full. Unfortunately, no affidavit from the defendants in this case stated with clarity whether this information was in fact supplied to Alton.

[31]The other point to note is that on November 23, the defendants told Straw J that they were no longer pursuing the appeal. This was after informing McDonald-Bishop J in May that they were. Sometime between May and November 2012, a decision was taken not to pursue the appeal against the March 27 order. Despite this decision the answers to the request for information were not supplied. Even then, it took a further order from Straw J to move the defendants toward compliance.

[32]The problem in relation to request of information demonstrates why the time honoured practice of answering exactly and precisely what has been asked is to be adhered to. In determining whether the defendants answered the request for information the court examined the relevant documents and found the following. Question one asked the defendants to state whether the first claimant was investigated and subsequently charged and to say whether the defendants had previously investigated Alton. If yes, to say whether that first investigation was similar to or the same as the present investigation. The response to this question is ambiguous. The defendants say that Alton 'has neither been investigated nor charged.' This, at best answers that part of the question which asked whether Alton was investigated and charged but it does not say whether there were previous investigations in which the first claimant was the subject of the investigation and

whether those earlier investigations, if they took place, were similar to or the same as the present investigations.

[33] Question three has not been properly answered. The phraseology of the question was not the best but the purpose of the question was clear. It was seeking to find out what items were taken from the search of 45 Upper Waterloo Road, which items were retained and which items were kept and whether those items kept are exhibits in the claim. The answer was that most of the items were returned and some kept. Which items were kept and which were returned were not explicitly stated. The answer needs to clarify this.

[34] Question seven was not properly answered. The question asked was whether the defendants contacted the registered owner of the vehicle and if so, by what means. The defendants were also asked to provide proof of such contact and if no contact was made, what reason was there for the lack of contact. The answer that came was that an attempt was made to contact Alexander after someone purporting to be Alexander called the RPD. From all this it is not clear who the registered owner is. The question has not been answered.

The applicable law

[35] The Caribbean Court of Justice in **Barbados Rediffusion Service Ltd v Mirchandani** (2006) 69 WIR 52 addressed the question of the principles applicable when a striking out application is made. de la Bastide P, having reviewed the authorities, concluded as follows:

- a. while recognising that there were two schools of thought on the matter, it is good law that a striking out order may be appropriate in certain circumstances and one of those is where the breach is contumelious or contumacious or simply defiant;

- b. the expression contumelious or contumacious refers to defiant disobedience of a court order;
- c. the judge should bear in mind that striking out a parties' case and 'so [denying] him a hearing on the merits, is an extreme step not to be lightly taken';
- d. a striking out may be made either when necessary to achieve fairness or when it is necessary to 'maintain respect for the authority of the court's order';
- e. it is not accurate to say that disobedience to court orders can never justify the making of a striking out order;
- f. the fact that a fair trial is still possible does not preclude the making of a striking out order;
- g. 'Defiant and persistent refusal to comply with an order of the court, may justify the making of a striking out order';
- h. Despite the fact that the striking out order may be seen as punitive, it is not retributive but necessary and symbolic in order to preserve the authority of the court;
- i. the purpose of a striking out order in response to persistent failure to comply with an order is to discourage others who might consider disobeying court orders and failure to respond tends to undermine the rule of law;

- j. before making such an order, the court should look at the matter in its entirety and undertake the balancing exercise to ensure that 'proportionality is maintained and that the punishment fits the crime';
- k. the reason for this balancing exercise is that 'even within the range of conduct that may be described as contumelious, there are different degrees of defiance which cannot be assessed without examining the reason for the non-compliance.'
- l. the previous conduct of the party in default will be relevant.

Application to facts

[36]The Attorney General, the first defendant and the attorney for all the defendants, was served with the request for further information on January 24, 2012. The fact that there were internal inefficiencies within the Attorney General's Chambers which prevented the matter from coming to the attention of counsel with responsibility for the matter cannot avail the Attorney General. What is of greater importance is that even after it came to the attention of counsel, the Attorney General did not approach the court to set aside or vary the request for information which is what ought to have been done if the view was that the request should not be complied with.

[37]Having let matter lie until the court hearing, once the order was made and a deadline set the only legitimate responses are (a) compliance with the order; or (b) an appeal accompanied by a stay of execution. Non-compliance is not a proper response.

[38]Miss McIntosh submitted that the failure to meet the second part of Kirk Anderson J's order was not deliberate but arose from a misunderstanding. The misunderstanding being that the defendants did not appreciate that they were still required to produce the information concerning payment of the duties if any were

paid at all. It is not easy to see why this misunderstanding would arise since it is well known that the order of a court remains extant until obeyed or varied.

[39]Turning now to the answers provided to the request for information. It is the case that Alton did not indicate that he was dissatisfied with any of the responses until May 21, 2013 despite the fact that he had them since December 20, 2012. It is equally true that the defendants have now complied with Kirk Anderson J's order of March 27, 2012 and have provided the information on duties paid. There is now compliance with Kirk Anderson J' orders save for the deficiencies identified in the responses to the request for information.

[40]Alton is asking that the defendants' statement of case be struck out and judgment be entered in his favour as well as the consequential order that the vehicle be returned to him. In effect, he is asking that the exhibit in a criminal case against him be returned to him. He is asking for a civil remedy that would have the effect of undermining the criminal court's ability to impose the penalty of forfeiture if he is found guilty for breaches of the Customs Act. In the context of this case, this penalty would be disproportionate to the breach. The court is satisfied that there was a good faith effort to answer the questions. The problems that have arisen are more in the nature of inefficiency rather than blatant disregard for the court's orders.

[41]The answers to questions 1, 3 and 7 were not adequate but it appears that that deficiency can be remedied. The court will order that full and complete answers be provided to the questions Kirk Anderson J's order identified.

[42]Having regard to all the circumstances, striking out of the defendants' case at this time would be too disproportionate having regard to the breach. The criminal prosecution is still going on. The application to strike out is dismissed.

[43]Costs of this application to the claimants. Costs to be agreed or taxed and paid not later than November 29, 2013. If costs not paid by November 29, 2013, the defendants' case is struck out.

[44]The court will also order that these civil proceedings be stayed until the criminal proceedings are concluded. This order will be modified in the orders below. The reasons are these. There is no disadvantage to the claimants since their loss arising from the seizure, should Alton and his co-defendants be acquitted, can be quantified in the civil trial. Also he can be compensated for any loss of earnings or loss of use by amending his claim and should he succeed at the civil trial, he can claim interest.

[45]It is not in the best interest for both the criminal and civil proceedings to be proceeding side by side involving the same parties and the same issues. There is the risk of inconsistent decisions on the same issues. It is also not the best use of resources of the parties to be fighting a war on two fronts. Now that there is mandatory mediation, it would seem incongruous that Alton would be a defendant on Monday where he is being prosecuted by the Crown for serious breaches of the criminal law and on Tuesday, he is sitting in mediation with the Crown, only to resume combat in the criminal trial on Wednesday. For all these reasons the civil proceedings are stayed until the criminal trial is completed. However this stay is subject to the order made below. The sanctions imposed require that the stay be lifted if certain conditions are not met.

[46] If Alton is convicted then this civil claim founders since a court of competent jurisdiction would have found that he had no lawful right to immediate possession of the vehicle.

Disposition

[47]The order of the court is as follows:

- a. The application to strike out is dismissed with costs to the claimant.
- b. Costs to be agreed or taxed.
- c. Taxation to take place not later than September 30, 2013 and any costs assessed or agreed must be paid not later than November 29, 2013.

- d. The defendants are to provide full answers to questions 1, 3 and 7 of the request for further information not later than September 18, 2013.
- e. The civil proceedings are stayed until the conclusion of the criminal trial.
- f. In the event that the defendants fail to provide full answers to questions 1, 3 and 7 of the request for further information by September 18, 2013, then the stay of the civil proceedings comes to an end and the claim is to proceed.
- g. In the event that the costs agreed or taxed are not paid by November 29, 2013 and there was provision of the answers as ordered, then the stay on the claim comes to end and the claim is to proceed.
- h. In the event that answers are not provided in accordance with this order but costs are paid as provided by this order, then the stay comes to end and the claim is to proceed.
- i. In the event that the defendants do not provide the answers in accordance with this order and in the event that costs agreed or taxed are not paid by November 29, 2013, then the claim is to proceed and at the trial of the civil claim, the defendants are barred from adducing evidence but can participate by way of cross examination of the claimants and their witnesses and by making legal submissions.