



[2023] JMSC Civ. 178

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2022CV04014

BETWEEN	RICHARD RANDOLPH MAXWELL FRANCIS	1ST CLAIMANT
AND	JUANITTA JULIET CHIN (AKA JUANITTA FRANCIS)	2ND CLAIMANT
AND	CHRISTOPHER FLETCHER	DEFENDANT

IN CHAMBERS

Mrs. Georgia Gibson Henlin, K.C. and Ms. Keisha Spence, Attorneys-at-Law, instructed by Henlin Gibson Henlin, Attorneys-at-Law for the Claimants.

Mr. Hadrian R. Christie, Attorney-at-Law instructed by HRC Law, Attorneys-at-Law for the Defendant.

HEARD: June 26th and July 21st, 2023

CIVIL PROCEDURE: NOTICE OF APPLICATION- WHETHER ISSUE OF STRIKING OUT IS RES JUDICATA- CLAIM FORM PROCEEDINGS – WHETHER CLAIM OUGHT TO HAVE BEEN COMMENCED BY MEANS OF CLAIM FORM – CONVERSION OF PROCEEDINGS FROM FIXED DATE CLAIM FORM TO CLAIM FORM.

P. MASON J (Ag.)

BACKGROUND TO THE APPLICATION

- [1] On March 29th, 2023, Wolfe-Reece, J delivered her judgment in the matter of **Richard Randolph Maxwell Francis and Juanitta Juliet Chin (AKA Juanitta Francis) v Christopher Fletcher [2023] JMSC Civ. 52** which concerns two applications for

interim injunction in which one was made by the Claimants and the other, by the Defendant. Counsel for the Defendant, Mr. Hadrian Christie raised an objection which in effect, challenged the validity of the proceedings. Mr. Christie's contention was that the proceedings were a nullity on the basis that the filing of the Fixed Date Claim Form was plagued with procedural irregularities in breach of Part 8 of the Civil Procedure Rules, 2002 (CPR).

- [2] Wolfe-Reece J in rejecting the Defendant's objection found that it would be unduly harsh, unfair and unjust, and therefore not in the interest of justice between the parties to uphold the Defendant's objections. Her Ladyship found that there would be no prejudice to the Defendant if the court were to permit the Claimants to remedy any procedural defect or error under Part 8 in filing the Fixed Date Claim Form based on its powers under CPR. r. 26.9.

DEFENDANT'S NOTICE OF APPLICATION

- [3] The Defendant filed a Notice of Application for Court Orders on January 10th, 2023 seeking the following orders:

1. The Fixed Date Claim Form filed on 20 December 2022 and the Affidavit of Richard Francis in Support of Fixed Date Claim Form filed on 23 December 2022 be struck out.

OR

2. A declaration that this court has no jurisdiction to try this claim.

OR

3. A declaration that this court declines to exercise its jurisdiction to try this claim.

OR

4. The following paragraphs, sentences, and/or words be struck out of the Affidavit of Richard Francis in Support of Fixed Date Claim Form filed on 23 December 2022.

(a) Paragraph 7

(b) "During this time my father-in-law would continue to make checks on the property" in Paragraph 8.

(c) "The last check-up by my father-in-law Mr. Chin, was in 2014" in Paragraph 9.

- (d) *"In addition to checking up on the property" in Paragraph 9.*
 - (e) *"During the periodic checks of the said property, there was no evidence of occupation or possession and the said property remained vacant" in Paragraph 10.*
 - (f) *"He entered the property on the 19th November 2022, walked around and took pictures which were sent to m" in Paragraph 11.*
 - (g) *"He did so on the 19th November 2022. He sent pictures which showed that the windows and the roof of the property were altered" in Paragraph 12.*
 - (h) *"They conducted surveillance on the property for five days from the 23rd November 2022 and reported on the 12th December 2022 and on the 14th December 2022 he secured the premises" and the extracted report purportedly from Mark Shields in Paragraph 12.*
 - (i) *" who asked me about the property because he had visited in 2019 and nothing was happening" in Paragraph 11.*
 - (j) *Paragraph 13.*
 - (k) *Paragraphs 14 - 19.*
 - (l) *Paragraph 21.*
 - (m) *Paragraph 23.*
- 5. Costs of this application in favour of the Defendant, to be taxed if not agreed.*
- 6. Such other orders as the court deems fit.*

CLAIMANTS' NOTICE OF APPLICATION

[4] The Claimants thereafter filed a Notice of Application for Court Orders on February 10, 2023 seeking the following orders:

- 1. That the Fixed Date Claim Form filed on the 20th December 2022 be converted to a Claim Form and claim herein and be managed as if it were commenced by Claim Form.*
- 2. That the Affidavit filed in support of the said Fixed Date Claim or in the alternative that the Claimants be permitted to file a Particulars of Claim.*
- 3. Cost of the Application be Cost in the Claim.*
- 4. Such further and other orders as the Courts deems just.*

ISSUES

- [5] The issues to be ventilated in this application are as follows:
- I. Whether the issue concerning the striking out of the fixed date claim form filed on the 20th December 2022, due to irregularities can be deemed res judicata.
 - II. Whether the court ought to allow the Claimants to covert the Fixed Date Claim Form to a Claim Form and file the requisite Particulars of Claim.

LAW AND ANALYSIS

I. Whether the issue concerning the striking out of the fixed date claim form filed on the 20th December 2022, due to irregularities can be deemed res judicata.

- [6] According to **Halsbury's Laws of England**, 5th ed., the doctrine of Res Judicata is described as follows:

The doctrine of res judicata provides that, where a decision is pronounced by a judicial or other tribunal with jurisdiction over a particular matter, that same matter cannot be reopened by parties bound by the decision, save on appeal.

- [7] In the case of **Gordon Stewart v Independent Radio Company Limited and Wilmot Perkins [2012] JMCA Civ 2**, the Jamaican Court of Appeal stated thus:

The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice be done between them.....

- [8] Additionally, Morris JA in the Belizean Court of Appeal case of **Belize Port Authority v Eurocaribe Shipping Services Limited and Another** Civil Appeal No 13/2011, judgment delivered 29 November 2012 at para. [43] discussed the principles of res judicata as follows:

"[43]: On the basis of these authorities, I would therefore conclude that the doctrine of res judicata in the modern law comprehends three distinct components, which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are: (i) cause of action estoppel, which, where applicable, is an

absolute bar to relitigation between the same parties or their privies; (ii) issue estoppel, which, where applicable, also prevents the reopening of particular points which have been raised and specifically determined in previous litigation between the parties, but is subject to an exception in special circumstances; and (iii) Henderson v Henderson abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and the various interests involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in Johnson v Gore Wood & Co (a firm), at page 499). There can be no doubt, in my view, that, in Johnson v Gore Wood (a firm), the House of Lords was concerned to circumscribe somewhat more closely the limits of Henderson v Henderson abuse of process and to confine its applicability to cases of real misuse or abuse of the court's processes, or oppression."

- [9]** The Defendant filed a Notice of Application for Court Orders on January 10, 2023, for the Fixed Date Claim Form ("FDCF") and the Affidavit of Richard Francis in Support to be struck out on the basis that the Affidavit in Support was in breach of CPR r. 8.1(1) in that the Affidavit was filed some three days later than the FDCF.
- [10]** The Defendant is of the view that the Claimants, having breached CPR r. 8.1, should have filed an application for an extension of time and to correct the breach. Another issue of discontent of the Defendant involves the Affidavit of Richard Francis filed on December 23rd, 2022 and the subsequent Affidavit of Ernest McGowan filed on January 12, 2023. The Defendant contends that these affidavits are invalid as they were witnessed by a Notary Public in the USA, but were not accompanied by a Notary Public certificate, contrary to section 22 of the Judicature (Supreme Court) Act.
- [11]** Mr. Christie sites CPR r. 26.3 and indicates that the court may strike out a claim or part thereof for non-compliance, specifically in this instance, which includes the filing of invalid affidavits. He further contends that the Notice of Application for Court Orders filed on February 10, 2023 does not correct the procedural breach.

[12] Although the court accepted that there were procedural irregularities regarding the FDCF, it was contended that the procedural irregularities did not result in the claim being invalid. This point was examined by Wolfe-Reece J in the case of **Richard Maxwell Francis and Juanitta Julie Chin (AKA Juanitta Francis) v Christopher Fletcher [2023] JMSC Civ 52**. The Honourable Judge refused to strike out the claim emphasizing that the power of a court to strike out a claim ought to be used sparingly and only as a last resort. Instead, the court should balance and consider the interests of the parties involved. In addition, the court must exercise its discretion in accordance with the overriding objective of the CPR and ensure that justice and fairness between the parties is achieved.

[13] At paragraph 22 of the judgment, Wolfe-Reece J reasoned that striking out for non-compliance with the CPR should be a sanction of last resort. In balancing the interests of the parties, the court must exercise its discretion fairly and justly. It is therefore within the interest of justice that the court orders or directs a party to remedy a procedural error or irregularity to bring that party into compliance with the rules as this is the preferred first course of action rather than utilizing the finality of the draconian measure of striking out which has the effect of permanently ending the proceedings.

[14] Hence, in the interest of justice, the Court orders or directs a party to remedy a procedural error to bring it into compliance with the rules. Wolfe-Reece J referred to CPR r. 26.9 as applicable in the absence of any specific sanction or consequence for non-compliance with the rules (in CPR Part 8). CPR r. 26.9 states:

(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) *The court may make such an order on or without an application by a party.*

[15] It is contended that the fact that the Claimants have filed and emailed a copy of the unsealed FDCF on the Defendant is proof that the Claimants can rely on a pre-existing cause of action. As such, it is the view of the court that the Claimant be permitted to rectify any procedural breach whether under Part 8 or otherwise surrounding the filing of the FDCF. The Honourable Judge, in her decision to rectify the procedural breach made reference to the case of **James Brown v Karl Rodney and Maureen Rodney [2017] JMSC Civ. 32** where in summary she stated:

“The Court exercised its discretion and ordered the Claimant, Mr. Brown, to rectify his procedural breach/error by converting the Claim Form that was used to commence the proceedings to correct initiating document the FDCF to bring him into compliance with Part 8 of the CPR.”

[16] Similarly, Sinclair-Haynes J (as she then was) in the case of **David West and ors v James Wylie and ors** (unreported) HCV 2762/2007 found that CPR 26.9 applied in circumstances where non-compliance with CPR r. 22.1 is an irregularity and it does not render the proceedings a nullity. The Defendant in this case submitted that the FDCF should be struck out for breaching CPR r. 22.1. It is within this context that the court exercised its discretion to ensure an error is rectified without an application being made.

[17] Wolfe-Reece J in the **Richard Francis** reasoned that there would be no prejudice caused to the Defendant if the court were to permit the Claimant’s time to remedy any procedural defect or error under Part 8 based on its powers to invoke CPR r. 26.9(3) of the CPR to make an order to put matters right. She further added that it would be unduly harsh, unfair and not in the interest of justice to uphold the Defendant’s objection to the Claimant’s application. As such, the Judge was correct in her decision to dismiss the proceedings based on procedural irregularities.

[18] Based on the foregoing discussion, I am of the view that the issue of striking out the FDCF and Affidavit in Support on the basis of a procedural breach, has already been dealt with by the Hon Justice Mrs. Woolfe-Reece on March 29, 2023, in the case of *Richards and anor v Fletcher [supra]*.

[19] Contrary to the perception of the Defendant, the Claimants do not have to file an application to remedy the breach. The Court has already invoked CPR r. 26.9(3) to settle the procedural breach as such, the matter is now res judicata. It would be an abuse of the court's powers to file an application to deal with the same subject matter again.

II. **Whether the court ought to allow the Claimant to convert the Fixed Date Claim Form to a Claim Form and file the requisite Particulars of Claim**

[20] CPR r. 8.1 (4) states:

Form 2 (fixed date claim form) must be used -

(a) in mortgage claims;

(b) in claims for possession of land;

(c) in hire purchase claims;

(d) where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;

(e) whenever its use is required by a rule or practice direction; and

(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

[21] Hart-Hines J (Ag.) (as she then was) in the case of **Manfas Hay v Clover Thompson et al** [2018] JMSC Civ 26 interpreted CPR r. 8.1(4) in paragraph [10] of her judgment as follows:

It seems to me that it would be an anomaly if Rule 8.1(4)(b) would have wider application than Rule 8.1(4)(d), so that, under the latter rule, only claims which were "unlikely to involve a substantial dispute of fact" could be brought by FDCF, but under the former rule it would not matter that a claim was likely to involve a substantial dispute of fact. In light of the wording of Rule 8.1(4)(d), it must have been envisaged by the drafters that for all claims brought pursuant to Rule 8.1(4), consideration would be given to the nature of the claim to be

brought and the likely defence to such a claim, so that it would be permissible for proceedings to be brought by claim form instead of FDCF, or, for the proceedings brought by FDCF to be treated as if begun by claim form. In many of the cases I have considered, the courts have adopted the latter approach....

[22] Hart-Hines J (Ag.) in that case, went further to state at paragraph [13] that despite the wording of CPR r. 8.1 (4)(b),

...a Court may exercise its discretion to convert the proceedings, in order to ensure that all the issues in the case are fairly placed before the Court. However, case law indicates that the exercise of such discretion must be based on the nature of the claim and the likely or apparent disputes as to fact.

[23] Hart-Hines J (Ag.) as she then was, referred to the case of **Melville and others v Melville** (1996) 52 WIR 335 at pages 339-340, where Patterson JA stated:

“The Rules of the Supreme Court in England provide for the continuation of proceedings begun by originating summons as if begun by writ in cases where it appears to the court at any stage of the proceedings that they should for any reason have been begun by writ. It is a very useful provision that was introduced in England for the first time in 1962. The Civil Procedure Code does not have such an express provision, but, by virtue of section 686, the procedure and practice that obtains in England is followed in the court below. Consequently, even where proceedings could not have been properly commenced by originating summons, the court below, in the exercise of its discretion, may order that the proceedings continue as if begun by writ instead of striking out the matter.”

ANALYSIS

[24] Counsel for the Claimant submitted that the claim was correctly started by way of Fixed Date Claim Form, however, due to the fact that there are substantial disputes of fact which have arisen throughout the proceedings, the court would benefit from the matter being brought by way of a claim form. Counsel further argued that this would allow the parties to proceed to mediation and if necessary “*case management*

conference with the requisite orders for disclosure, witness statements and a trial date being fixed for the hearing of this matter in open court with each witness being subject to cross examination.”

[25] Counsel asserted that the following issues as disputes of fact:

- I. Whether the Defendant was in lawful occupation of the subject property*
- II. The length of time of the occupation by the Defendant*
- III. Whether the Defendant has a right in rem to the possession and ownership of the subject property*
- IV. Whether the subject property was abandoned by the Claimants prior to the occupation of the property by the Defendant*
- V. Whether the Claimants are still the registered proprietors of the subject property*

[26] It is clear from the authorities cited, that the court has a discretion in order to decide whether or not to direct that the proceedings be converted to a claim form. In order to assess whether to convert the Fixed Date Claim Form to a Claim Form, it is necessary for me to identify the disputed facts and issues which the judge is likely to consider in order to make a determination in the claim.

[27] On an assessment of the case at bar, I find that there are several substantial disputes of fact including those listed by the Claimant’s Attorney in her submissions. Further, the court has to consider, among other things:

- I. Whether or not the Defendant’s occupation of the property was open, undisturbed, continuous and exclusive;
- II. The capacity in which the Defendant occupied the land, namely whether or not the Defendant occupied the land by way of adverse possession;
- III. Whether or not the Claimant abandoned the relevant land in or about 1993;

[28] It is therefore clear that this matter will involve substantial disputes of fact. These issues will require the cross-examination of witnesses in order to allow the court to make a proper assessment of the matter.

[29] In light of the aforementioned, I, therefore, find that this is an appropriate case to allow the Claimant to convert the Fixed Date Claim Form to a Claim Form.

ORDERS

[30] In light of the above, I make the following orders:

1. The Defendant's Notice of Application for Court Orders filed on January 10, 2023, is refused.
2. The Fixed Date Claim Form filed on December 20, 2022, by the Claimants is hereby converted to a Claim Form herein and is to be managed as if it had commenced by a Claim Form.
3. The Claimants are permitted to file and serve Particulars of Claim on or before July 31st 2023.
4. The Defendant is at liberty to file and serve a Defence within 42 days of receipt of the said Particulars of Claim.
5. The parties are to attend mediation on or before December 31st 2023.
6. Case Management Conference is fixed for January 16, 2024 at 2:00 p.m. for 2 hours.
7. The Defendant's Application for Security for Cost contained in its Notice of Application for Court Orders filed on December 22, 2022 is to be heard at the Case Management Conference.
8. Costs to be costs in the Claim.
9. The Claimant's Attorneys-at-Law shall prepare, file and serve this order.