

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1996/F021

BETWEEN SAMUEL FRANCIS PLAINTIFF
AND THE PRIORY SCHOOL TRUST SOCIETY LTD. FIRST DEFENDANT
AND THE CHAIRMAN OF THE EXECUTIVE COMMITTEE OF THE PRIORY SCHOOL TRUST SOCIETY LTD. SECOND DEFENDANT
AND HENRY RICHMOND HAROLD FOWLER THIRD DEFENDANT
AND CHAIRMAN OF THE PRIORY SCHOOL BOARD OF DIRECTORS (REFERRED TO AS THE PRIORY SCHOOL TRUST FORTH DEFENDANT
AND MICHAEL S. FENNEL FIFTH DEFENDANT

Mr. R. S. Pershadsingh Q.C. for Plaintiff

Mr. D. McKoy for 2nd, 3rd and 4th Defendants instructed by Williams McKoy and Palmer.

IN CHAMBERS

APPLICATION TO STRIKE OUT WRIT OF SUMMONS

HEARD: JUNE 19, 1996 AND SEPTEMBER 30, 1996.

KARL HARRISON J.

On the 19th June, 1996 an application was made before me to strike out the Writ of Summons filed herein against the second, third and fourth defendants in the above action. I heard arguments and submissions from both sides and had reserved my ruling.

The Grounds upon which the defendants rely are:

- "1. That the Statement of Claim discloses no reasonable cause of action against the second, third and fourth defendants.
2. That the writ of summons and the statement of claim fail to adequately identify "The Chairman of the Executive of the Priory School Trust Society Ltd." and "Chairman of the Priory School Board of Directors referred to as the Priory School Trust Council."

The writ of summons was filed on the 1st March 1996 and a document headed "Conditional Appearance" filed on the 7th March 1996 by Attorneys-at-Law, Williams, McKoy and Palmer for and on behalf of the second,

third and fourth defendants. It sought leave of the Registrar that:

"This appearance is to stand as unconditional unless the defendants apply within fourteen days to set aside the writ herein and service of the Notice of Writ of Summons upon him.

Sgd. Registrar"

It would seem however, that the Registrar did not grant leave as her signature has not been affixed below the notice referred to above. The records also reveal that the summons to strike out was filed on the 19th March 1996, but June 19th 1996 was set as the date for it to be heard. So, in truth and in fact the application was made in time for the appearance to remain conditional. Unfortunately, the Court Administrator did not send the document and file to the Registrar and instead a date was fixed for the summons to be heard without leave being granted. In light of this omission Mr. Pershaadsingh has submitted:

1. That since leave was not granted for the Conditional Appearance filed on the 7th March 1996, it had no legal force or validity whatsoever as an unconditional appearance. In the circumstances, he argued that the defendants would have had no *locus standi* to make the application which was now before the Court.
2. That the "document" headed "Conditional Appearance" cannot be relied upon to draw an inference in law that it has become unconditional.
3. That if the defendants had obtained leave and the time to make their application had expired, that appearance would have become unconditional and they would have been estopped from making an application to strike out. In those circumstances they would be obliged to file a defence to the statement of claim.
4. That the application ought to have been supported by an affidavit.

Now, it is a fundamental rule of practice that a defendant in a civil action does not have any locus standi until he has entered an appearance. Therefore, if he wishes to defend an action he must enter an appearance. (See 53 of the Judicature (Civil Procedure) Law).

A defendant may however enter a conditional appearance if he intends to challenge the jurisdiction of the Court or to raise the point that there has been some irregularity in the issue or service of the writ. This "conditional appearance means that it is an appearance in qualified terms.

Where however, the defendant enters a conditional appearance and the point which he raised is disposed in favour of the plaintiff then the appearance will remain an unconditional. (See Somprotex Ltd v Philadelphia Chewing Gum Corp. (1968) 3 All E.R. 26)

What then is the effect of a conditional appearance? It is stated in the English Supreme Court Practice, 1967 Edition, that it is a complete appearance to the action for all purposes subject only to the right reserved by the defendant to apply to set aside the writ or the service thereof, on any ground which he can sustain. It is my considered view therefore, that the leave of the Registrar is required merely to prevent such proceeding from being abused and to prevent delay. The limit of time it is said, is also inserted for the same purpose. The plaintiff is therefore barred from taking any step based on the appearance until the time fixed for hearing the application has expired. He may however apply to strike out the conditional appearance.

In considering what is "reasonable time" for the defendant's application, regard will be had to the circumstances of the case, and as to whether the condition was inserted in good faith or merely for the purpose of delaying the plaintiff.

Section 191 of the Civil Procedure Code provides inter alia:

"The Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action."

Although the Rules expressly state that application may be made at any stage of the proceedings, application should always be made promptly.

Where the application is made on the basis that the pleadings do not disclose a reasonable cause of action, no evidence is admitted - see A.G. of Duchy of Lancaster v L & N W Ry. [1892] 3 Ch. 278 and Republic of Peru v Peruvian Guano Co. (1887) 36 Ch. D 489.

The rules of practice make it quite clear therefore, that a conditional appearance is a complete appearance for all purposes subject only to the right reserved by the defendant to set aside the writ etc. and an application to strike out a writ of summons or pleadings may be made at any stage of the proceedings.

I am further of the view that the failure on the part of the Registry of the Supreme Court to place the filed document before the Registrar for leave to be granted ought not to put the defendants at a disadvantage and be used to prevent them being heard. Provided the Conditional Appearance was filed promptly, as was the case here, it is most unlikely that the Registrar would have refused leave. It is also quite evident that the defendants have not taken any further steps in the proceedings since the filing of this "Conditional Appearance" which could have prejudiced their application. I hold therefore, that the document filed, which is headed "Conditional appearance" is indeed a valid appearance to the Writ of Summons and this gives the applicants locus standi to make the application before me. I also hold that affidavit evidence in support is not required for such matters (A.G. of Duchy of Lancaster v L & N W Ry. [1892] 3 Ch. 278 and Republic of Peru v Peruvian Guano Co. (1887) 36 Ch. D 489).

The Statement of Claim in this action alleges inter alia, that the defendants in breach of a contract of employment unlawfully terminated the plaintiff's employment..... It speaks also of the plaintiff and defendants entering into a lawful agreement of employment whereby the defendants had employed the plaintiff for a set period of time pursuant to certain terms and condition of service,

The defence filed for and on behalf of the first defendant has admitted at paragraph 1 that the plaintiff was at one time employed to the Priory School Trust Society Limited as a Director and Principal of the Priory School and that his employment with the school was terminated, and this termination was lawful.

Mr. McKoy submitted therefore, that since there is a defence to the action by the school, that matter should be allowed to proceed to trial as it was contended by the plaintiff in his statement of claim that the school had employed him and had dismissed him from his position as principal. On this basis, it was therefore Mr. McKoy's contention that the statement of claim did not disclose a reasonable cause of action against the third defendant.

Mr. McKoy also submitted that so far as the action against the second and fourth defendants are concerned, the writ was inadequate because the plaintiff cannot successfully sue an office. The simple reason for this, is that the suit being against the Chairman of the Executive Committee and Chairman of the Priory School Board of Directors, one would be unable to know who should defend the suit, as a number of persons have passed through these offices.

I am in total agreement with counsel for the second, third and fourth defendants where his submissions are concerned and find that there is merit in the application. The order is therefore made pursuant to paragraphs 1 and 2 of the summons filed on the 19th day of March, 1996 and the writ struck out against these defendants with costs to the second, third and fourth defendants to be taxed if not agreed.