[2017] **JMSC Civ 203**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV05095

BETWEEN	**IMPERIAL SUITES HOTEL LIMITED**	**CLAIMANT**
AND	**LEROY JOHNSON**	**DEFENDANT**

IN CHAMBERS

Seyon T. Hanson instructed by Seyon T. Hanson & Co. for the claimant

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the defendant

June 1 and 30, July 7 and December 8, 2017

Application for court to discontinue part-heard application to strike out defence and enter summary judgment, commenced in absence of lead counsel for the defence who was ill – Client's constitutional right to be represented by attorney of choice – Whether breach of right to fair hearing and equality before the law – Whether inappropriate material relied on in affidavit in absence of lead defence counsel – Whether irremediable prejudice suffered by defendant – Court's ongoing role to filter evidence into admissible and inadmissible categories – Duty of court to exercise discretion judicially in relation to application for an adjournment – Overriding objective – Whether matter should commence *de novo* before a different tribunal

D. FRASER J

The Procedural Issue for Determination

[1] The issue for determination in this ruling is whether or not this court should continue to hear the application to strike out the defence of the defendant and for summary judgment to be entered on behalf of the claimant or these proceedings should be aborted and the hearing commenced *de novo* before another Judge. It is important to set out the context in which this issue has arisen. The sequence of events from the filing of the claim to this point is important.

The Claim

[2] In its claim filed on October 29, 2015 the claimant sought the following reliefs:

i) a declaration that it is the legal and beneficial owner of land registered at Volume 1165 Folio 960 of the Register Book of Titles with civic address 5 Pointe Crescent, Ocho Rios in the parish of Saint Ann;

ii) an injunction to restrain the defendant his servants or agents from renting, leasing, collecting rent or otherwise dealing with the property and from threatening and/or preventing the claimant its servants or agents from entering upon and possessing the property;

iii) an order for recovery of possession of the property against the defendant;

iv) an account of all the rental unlawfully collected by the defendant since April 2015 and ongoing;

v) payment by the defendant to the claimant of the sums unlawfully collected for rental or in the alternative damages for trespass;

vi) that the defendant pays to the claimant the sum of $326,444.24 paid by the claimant to the National Water Commission for water usage on the property by the defendant his servants or agents.

vii) interest, costs and such further and/or other relief deemed just.

[3] On September 12, 2016 the claimant obtained injunctions restraining the defendant his servants or agents from i) preventing the claimant its servants or agents from entering or remaining on the disputed property and ii) collecting rent, until the determination of the matter. The defendant was also ordered to disclose details of all the leases and/or rental agreements he had entered into with tenants at the property.

The Application for Summary Judgment

[4] On November 11, 2016 the claimant filed an application to strike out the defence of the defendant and to have summary judgment entered in his favour. On January 12, 2017 when the application first came up for hearing it was adjourned to June 1, 2017 and case management orders made to facilitate the hearing of the matter. Included in the orders were:

i) Claimant's Attorney to file core bundle of all pleadings, applications and affidavits filed, by May 19, 2017;

ii) The parties to file and exchange submissions and lists of authorities by May 25, 2017; and

iii) The defendant to file intended Notice of Application for Court Orders by February 28, 2017 which is to be heard with the Notice of Application filed November 16, 2016. If the defendant fails to comply with this order then his application will not be heard with the claimant's application.

The Proceedings on June 1, 2017

[5] On June 1, 2017 the claimant represented by Mr. Dave Green and its counsel Mr. Hanson, were present. The defendant Mr. Johnson was present represented by counsel Mr. A. Graham from the firm Keith Bishop & Co.

[6] The court was in receipt of a letter from Mr. Bishop to Mr. Hanson copied to the Registrar of the Supreme Court dated June 1, 2017 in which Mr. Bishop indicated that he was unwell and would be seeking an adjournment.

[7] The terms of the letter are as follows:

(i) The claimant's application for summary judgment was to be heard between 10 a.m. and 1:00 p.m. but the Judge was not able to hear the matter until 2:00 p.m.;

(ii) Mr. Bishop had on the previous day communicated to Mr. Hanson that he was unwell. His health did not improve overnight and as such he would be seeking an adjournment. He would also visit his physician the said morning;

(iii) Mr Graham was given limited instructions to seek an adjournment and would provide an update;

(iv) He was hopeful the court would accommodate the application for an adjournment and an early convenient date would be assigned for the hearing of the matter for one (1) day; and

(v) The letter was copied to the Registrar for it to brought to the attention of the Judge.

[8] When the matter was called up Mr. Hanson indicated he was ready to proceed despite the contents of the letter. Mr. Graham indicated that Mr. Bishop, counsel for the defendant was ill and provided an electronic copy of a medical certificate (on his cell phone) showing that Mr. Bishop had been granted 2 days sick leave for June 1 and 2, 2017. Mr. Graham requested that the matter be adjourned in the circumstances.

[9] Mr. Hanson stoutly resisted the application for an adjournment. He stated that the claimant had complied with the orders of January 12, 2017 but that the defendant had not. Further that the matter needed to be heard as it was filed with an affidavit of urgency. He highlighted that on January 12, 2017 the representative of the claimant had been taken to the fraud squad and held for the better part of a day,

in a context where the claimant's contention was that the allegations of fraud related to the mortgagee who previously held the property.

[10] He lamented that the claimant had been in his words, "suffering constant intimidation and agony", based on the way the matter had been handled. While expressing sympathy for the illness being suffered by Mr. Bishop, he contended that the defendant was represented by a firm of attorneys. He noted that Mr. Graham was in Chambers on September 12, 2016 when an injunction was granted against the defendant and was also present with another attorney representing the defendant on January 12, 2017 when the summary judgment application first came on for hearing. He therefore invited the court to exercise its discretion to have the matter proceed.

[11] Mr. Graham in response advanced that the other attorney who was present on January 12, 2017 and who had been assisting Mr. Bishop in the matter had resigned. He stated that he was not seised of the matter, although he had attended court before in relation to it. He reiterated that Mr. Bishop, who was counsel handling the matter was ill and had a medical certificate that covered two days.

[12] During these initial submissions there was a knock on the door. When inquiries were made by the clerk it was indicated that the person was a representative from the fraud squad requested to be at court by Mr. Bishop. The person was not allowed admission to chambers. Mr. Hanson argued that these circumstances strengthened his submission that the matter needed to be heard as a matter of urgency based on what had happened on January 12, 2017 and with the fraud squad again being present today.

[13] Having heard and considered the submissions, bearing in mind the nature of the matter, the affidavit of urgency, the prevailing circumstances and the overriding objective I ruled that the matter should proceed. I indicated I would hear the submissions of the claimant and then extend time for the defendant to comply with the order of January 12, 2017, by filing his submissions and list of authorities. I

would then adjourn the hearing for another date when Mr. Bishop would make his submissions in response.

[14] Accordingly, the matter proceeded. Mr. Hanson submitted and Mr. Graham and the defendant remained throughout. At the conclusion of Mr. Hanson's submissions, I made the following orders:

i) Extension of time to June 9, 2017 for the Defendant to file submissions and list of authorities.

ii) Counsel for the Defendant to file and serve submissions and list of authorities in response to the written and oral submissions of counsel for the claimant on or before June 9, 2017 at 3 p.m.

iii) Oral hearing for Counsel for the Defendant to speak to his submissions and for Counsel for the Claimant to reply, if necessary, to any authorities, set for June 30, 2017 at 9 a.m.

iv) Counsel for the claimant to file and serve order.

The Proceedings on June 30, 2017

[15] Prior to the hearing on June 30, 2017 submissions and a bundle of authorities were filed by the defendant on June 7, 2017, two days before the deadline stipulated in the order of June 1, 2017.

[16] On June 30, 2017 Mr. Dave Green was again present on behalf of the claimant who was represented by Mr. Hanson. The defendant was present represented by Mr. Bishop. Mr. Bishop indicated he wished to make submissions about the matter having commenced in his absence. He indicated that based on the instructions he received from his client and the note of the proceedings he received from Mr. Graham and Mr. Hanson he saw no basis to challenge the exercise of the courts discretion to proceed on June 1, 2017 on the basis of bias.

[17] He however mounted a vigorous challenge on the basis that his client's constitutional right to be represented by the attorney of his choice was breached

in a context where that attorney was ill. He referred to the following sections of the Constitution:

i) 13(4)(g) which guarantees the right to equality before the law;

ii) 16(2) which entitles a person to a fair hearing within a reasonable time by an independent and impartial court or authority in the determination of civil rights;

iii) 16(4) which emphasises that though a court can exclude persons other than litigants and their counsel from proceedings in certain circumstances, the parties and their legal representatives always have a right to be present

[18] Counsel emphasised this was in a situation where the outcome of these proceedings could be determinative of the defendant's property rights, in circumstances where the defendant is alleging the existence of a continuing fraud. He relied on the case of ***Jade Hollis v The Disciplinary Committee of the General Legal Council*** [2017] JMCA Civ 11.

[19] Counsel further submitted that in the absence of his attorney of choice the matter proceeded with a Judge's Bundle that contained inappropriate material in breach of Parts 15 and 30 of the Civil Procedure Rules (CPR) concerning the use of affidavits and how they should be structured. In that regard counsel complained that the bundle contained affidavits in support of the application for the injunction that were improperly included, and other affidavits that had defects such as the absence of an indication of authority to swear the affidavit, hearsay not attributed to a specific source, or an affiant speculating on the motive for the defendant taking particular actions.

[20] Counsel submitted that he had no indication whether any of the affidavits that should not have been relied on were utilised by counsel for the claimant. Also he contended that had he been present he would have made an application to have sections of certain affidavits struck out, Counsel argued that rules should be strictly

complied with especially as the claimant's application sought to conclude the matter.

[21] Therefore counsel continued, if an affidavit was found to contain improper material, the court should give leave for the affidavit to be refiled omitting the offending material. He submitted that the judge's bundle should only contain material relevant to the application for striking out pursuant to part 26 of the CPR and to the application and affidavit pursuant to part 15 of the CPR. Accordingly, counsel invited the court to abort the proceedings and to order a new summary judgment hearing to commence *de novo*.

[22] Mr. Bishop requested that he and Mr. Graham be permitted to file affidavits by July 4, 2017 outlining the factual situation in relation to the hearing on June 1, with Mr. Hanson having up to July 6, 2017 to respond. The court agreed. The matter was adjourned to July 7, 2017 for Mr. Hanson to make his oral response.

The Proceedings on July 7, 2017

[23] No further affidavit was filed on behalf of the defendant. On July 6, 2017 Mr Hanson filed an affidavit outlining his account of the interaction between himself and Mr. Bishop on May 31 and June 1, 2017 and the proceedings in chambers on June 1, 2017.

[24] Mr. Bishop did not take issue with the affidavit filed by Mr. Hanson save and except he contended that, in relation to Mr. Hanson's submissions outlined at paragraph 16 of the affidavit, the court should have been made aware of the communication between himself and Mr. Hanson as it might have influenced the exercise of the court's discretion. Mr. Hanson in reply indicated that the letter sent by Mr. Bishop which outlined their communication, having been brought to the court's attention prior to his entering chambers, there was no need to restate what was in the letter. He indicated that his position that he would be seeking to proceed was not in any way inconsistent with prior discussions he had had with Mr. Bishop on May 31 and June 1, 2017.

[25] In response to Mr. Bishop's submissions on June 30, 2017 Mr. Hanson indicated that the Judge's bundle was compiled based on the order made on January 12, 2017. Mr. Bishop was present when the order was made and didn't object. In any event he contended that there was nothing in the bundle in respect of which the court should disabuse its mind. The pleadings related to the summary judgment application. The other material in the bundle related to the previous application for the injunction. The same evidence relied on for the injunction was updated to support the summary judgment application.

[26] Mr. Hanson also noted that Mr. Bishop responded to the affidavit filed in November 2016 in January 2017 without taking issue with the form or contents of the affidavit. Further he argued that the authority of Mr. Green, a secretary of the claimant company, to depone on behalf of the company had never been challenged before. It was an internal matter for a company to decide who was authorised to speak on its behalf. Therefore, he submitted counsel was engaging in mere conjecture without a written application to challenge the appropriateness of the affidavit of Mr. Green.

[27] Counsel however went even further. He submitted that if Mr. Green's affidavit was stripped of anything said to be scandalous, vexatious or irrelevant, the thrust of the affidavit remained — that the defendant has no legal or equitable interest in the property and hence has no defence.

[28] Counsel also submitted that the ***Jade Hollis*** case was wholly distinguishable from the instant situation and that the court in this case had exercised its discretion judicially as was recognised in ***Jade Hollis*** as the duty of a court faced with circumstances such as these. Counsel relied on ***Re Yates' Settlement Trusts Yates and Another v Paterson and Others*** [1954] 1 ALL ER 619 to support the submission that an adjournment should not be granted where it would cause an injustice, as an adjournment would have in this case.

[29] Counsel submitted that no prejudice was occasioned to the defendant by the matter proceeding on June 1, 2017 as the defendant was allowed an extension to file submissions and to attend to make oral submissions. This in a context where the matter could have been decided there and then.

[30] In response Mr. Bishop submitted that Part 38.7(2)(c) of the CPR speaks to what should be in a core bundle. Hearsay that may have been admissible for the injunction hearing was inadmissible in this hearing and the affidavits where necessary should be redacted and refilled.

[31] Counsel sought to distinguish ***Re Yates*** on the ground that there are no circumstances of health or age in this case as in ***Re Yates*** that would have dictated urgency.

[32] Counsel relied further on ***Amybelle Smith v Noel Smith*** RMCA 4/2005 jud del. April 24, 2009 to submit that the attorney in Smith who was not granted the adjournment sought was able to represent the client, unlike the situation in this case where Mr. Graham was not in a position to offer any representation for the defendant.

Discussion and Analysis

[33] It is best to start with an analysis of the cases cited and relied on by the parties. In ***Jade Hollis*** the Court of Appeal had to consider the effect of a refusal to adjourn a disciplinary hearing being conducted by the Disciplinary Committee of the General Legal Council, at which a complaint against the appellant was being heard, despite the production of a medical certificate on her behalf indicating that she was ill and unavailable for work for a period of almost one month.

[34] The hearing which had commenced in the presence of the appellant on a prior occasion was continued, (by the complainant against the appellant giving evidence in chief), on two days within the period covered by the medical certificate, and was set to continue on yet another date within that period. It was however not continued

on that date as a notice of appeal was filed prior to the last date challenging the decision to refuse the requests for adjournments and seeking a stay of the disciplinary proceedings.

[35] The Court held that the Committee had a duty to exercise discretion judicially. While acknowledging the duty of the Committee to balance justice between the parties and that the matter had been ongoing for a long time having been subject to many delays, it was found that insufficient regard was given to the fact that the appellant was absent because she was ill. Further the court found that evidently the Committee gave no consideration to whether any unfairness or prejudice to the complainant could have been reduced by an award of costs or other means. The Court held that the appellant's right to be present at the hearing and constitutional right to a fair hearing were compromised. The order refusing the adjournment and to conduct the hearing in the absence of the appellant were set aside and the proceedings ordered to commence *de novo* before a differently constituted panel.

[36] At the outset a number of distinctions are evidenced between the situation in ***Jade Hollis*** and in this case. Firstly, the illness and absence was that of counsel, not the client. While the right to be represented by counsel is vitally important and like the right of the litigant to be present has constitutional underpinning, it is even more important for the litigant to be present. That point would also gain additional significance in a situation such as in ***Jade Hollis*** where disciplinary proceedings are being conducted which take on a quasi-criminal flavour and are subject to the criminal standard of proof.

[37] Secondly, I agree with the submission of Mr. Hanson that the defendant in this case is represented by a firm of attorneys and Mr. Graham who attended on June 1, 2017 had been present in the matter on at least two previous occasions. Though lead counsel Mr. Bishop was absent, counsel was present on the defendant's behalf although admittedly he indicated he was only briefed to seek an adjournment. After the adjournment was refused he and the defendant remained throughout the entirety of the proceedings on June 1, 2017. This was a wholly

different situation than in ***Jade Hollis*** where after the adjournment was refused and counsel for the appellant withdrew there was no one present on behalf of the appellant while the proceedings continued.

[38] A third consideration is that in this case the matter was proceeding on affidavit evidence which was long before the court. Evidence which had not been challenged by an application to strike out any affidavit or aspects of any affidavit. In the ***Jade Hollis*** situation there was live evidence in chief in progress. No one was present to object if necessary to evidence, or to observe the demeanour of the complainant while giving evidence, to assist in responding to that evidence or to aid in cross-examination. In fact, the Court of Appeal identified instances in the notes of the complainant's evidence in chief, recorded in the absence of the appellant and her counsel, where both hearsay and highly prejudicial material were heard by the panel with no indication that such material would not be acted upon. The two situations, ***Jade Hollis*** and the instant case, are significantly different.

[39] Another critical distinction between the situation in ***Jade Hollis*** and in this case, as submitted by Mr. Hanson, is that only the hearing on June 1, 2017 was conducted in the absence of Mr. Bishop whose sick leave would end on June 2, 2017. It was clearly indicated when the decision was taken by the court that the matter should proceed, that the submissions of Mr Hanson would be received and then time would be allowed for Mr. Bishop to file his submissions and authorities, which were out of time, and then attend on another date to speak to them.

[40] In ***Jade Hollis*** dates were set and the matter continued within the period covered by the medical certificate, in a context where there was no indication the Committee doubted the veracity of the certificate or had formed the view that the appellant had been malingering. Further the continuation also disregarded that counsel for the appellant indicated the continuation date set was inconvenient for her. Given these several distinctions I do not find that ***Jade Hollis*** supports the position advanced by Mr. Bishop.

[41] In ***Amybelle Smith,*** an application for an adjournment was refused by a Resident Magistrate and counsel holding for absent counsel who was ill was required to stay and represent the defendant. This was despite the fact that counsel holding contended that he was not in possession of a file, witness statements or full instructions and was therefore at a disadvantage. The case proceeded and damages were awarded against the appellant for destruction of some crops.

[42] On appeal the Court of Appeal upheld the exercise of discretion by the learned Magistrate having taken into account the three year delay in the matter coming to finality. This in a context where the Court observed that from the affidavit of holding counsel he had received instructions from the appellant and had given her assistance "in the best way" that he could. The Court also opined that counsel's handling of the case on the appellant's behalf were quite commendable and it was "not simply a matter of him asking one or two questions in cross-examination and then he took his seat." The court found that he had done as requested by counsel who was ill, that is, to "protect his client and himself" in a context where counsel who was ill knowing the history of the matter realised the trial might have to proceed.

[43] While ***Amybelle Smith*** shows that in appropriate circumstances a matter may correctly proceed to finality, in the absence of counsel of the client's choice who is ill, in the instant case it is noteworthy that that is not what transpired. Mr. Graham who was holding for Mr. Bishop was not required to proceed to finality. He was required to represent the defendant during the submissions made by Mr. Hanson on the understanding that Mr. Bishop would respond on a subsequent date

[44] Of course, the jewel of Mr. Bishop's contention is that Mr. Graham was ill equipped to represent the defendant during the submissions made by Mr. Hanson resulting in potentially inadmissible material being relied on by the claimant. This Mr. Bishop submitted may have caused irremediable prejudice to the defendant's position in this application, which if successful would finally determine the claim. But can this submission sustain the weight of conclusivity Mr. Bishop asks it to bear?

[45] In determining whether to proceed on June 1, 2017, the court had to balance the interests of the parties. On the one hand was the claimant who had filed an application supported by an affidavit of urgency that was on its second hearing date in 6 months, almost 8 months after the matter had been filed. On the other hand was the fact that lead counsel for the defendant was ill, but the defendant was present and there was counsel from the same firm as lead counsel holding; counsel who had previously attended in the matter at other stages of the proceedings.

[46] Here the case of ***Re Yates*** is instructive***.*** There an application to the court to approve a settlement was adjourned on the basis that there was a matter on appeal to the House of Lords, that might have affected the case which set out the principles governing the settlement. On appeal, the decision was overturned. The Court of Appeal noted that the applicant was old and in ill health and the case that directly governed the application was not under appeal. In those circumstances, as the adjournment might have resulted in an injustice if the applicant died before the application was heard, the trial court was directed to proceed with the application. ***Re Yates*** is therefore authority for the proposition that the urgency of circumstances may, apart from other factors, require an application for an adjournment to be refused.

[47] Balancing the interests in this case, the court decided to proceed in a manner that would in the court's view best serve the overall interests of justice. The application which had an element of urgency would commence in the presence of the applicant and his counsel, (though not counsel who was fully *au fait* with the matter), on the understanding, as previously highlighted, that only the claimant's submissions would be heard on that day and the matter would continue when lead counsel for the defendant was available. It should also be appreciated that the court had also to consider the overriding objective which contemplates the appropriate use of court time, in a context where there are more cases before the courts than can conveniently be heard in the time available.

[48] The question whether or not material was before the court or relied on which was inappropriate, is the subject of disagreement and opposing submissions. Assuming for the moment that Mr. Bishop is correct and some inappropriate material was referred to and considered by the court during the submissions made by Mr. Hanson, would that have necessarily caused irremediable prejudice?

[49] A judge sitting as the tribunal of law and fact whether considering evidence delivered *viva voce* or by affidavit, always has to perform the role of filtering evidence into admissible and inadmissible categories. A judge is trained to disregard material that falls into the inadmissible category and where necessary is required to specifically state that such material has not formed part of his contemplation in arriving at a decision. This case is no different. In any event the impugned material was on the file and available to be read. There was no application filed to strike out any affidavit or aspects of any affidavit.

[50] Though Mr. Bishop was not present to raise any objection at the time Mr. Hanson was submitting, the defendant's position has been preserved. If the matter proceeds he will still be able to resist the application both procedurally and substantively. Some examples of material which Mr. Bishop views as inadmissible have already been identified. No doubt there may be more. The question of whether or not certain affidavits or sections of affidavits are admissible is therefore still a live issue subject to the fuller submissions of both counsel and the ultimate ruling of the court.

[51] The fact that there would not be the opportunity, if Mr. Bishop is wholly or partially correct, for affidavits to be redacted and refiled is not of significant moment. We are in the middle of the hearing. This court is seised of the matter. If the court rules any material inadmissible, in accordance with well established legal principles, it will be disregarded. In those circumstances the court would also expressly indicate appreciation of that requirement, in seeking to demonstrate that whatever decision is ultimately made will be based only on admissible evidence.

[52] Therefore no final ruling need or should be made at this point, concerning the propriety or otherwise of some of the affidavit material and the bundle compiled. That ruling should be made in the course of the resumed hearing after full and complete submissions. This is so especially as Mr. Hanson has submitted that even if all the impugned material were excised, the essential facts are such that there would still be sufficient material remaining for the application to succeed. The evidence and the law will reveal who is correct.

Disposition

[53] Based on my review of the circumstances of the exercise of discretion to refuse the application of the adjournment sought on June 1, 2017, the conduct of the hearing and the subsequent orders made, I see no basis to conclude that the constitutional or other legal rights of the defendant were in any way compromised or that he was thereby exposed to irremediable or any prejudice.

[54] Accordingly, the application for the court to:

(1) discontinue the part-heard application for the defence to be struck out and summary judgment entered in favour of the claimant; and

(2) direct that the matter be commenced *de novo* before a different tribunal;

is refused.

[55] The hearing is to continue on a date to be agreed, with the submissions of counsel for the defendant to proceed.