



Suit No. CL S-124/92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN

SELECT HOLDINGS LIMITED

PLAINTIFF

A N D

PETROLEUM CORPORATION
OF JAMAICA LIMITED.

DEFENDANT

HEARD: OCTOBER 9, 13, 18, 2000

RECKORD, J.

The plaintiff in this suit entered upon a rocky road and after a rocky ride lasting over 8 years ended up in destruction when its attorney-at-law discontinued the action. It had not got beyond its initial stage of filing a writ of summons on the 27th of April, 1992.

It all began when sometime in early 1992, workmen on the plaintiff's land which adjoins the Petcom Service Station in Portmore, in excavation work discovered that certain petroleum based substances had penetrated the soil and there was a particular strong smell of gasoline in the soil. Apparently leakage of gasoline

from the storage tank had resulted in this situation. On the 25th of March, 1993 the plaintiff's attorneys-at-law wrote to the Petroleum Corporation of Jamaica (P.C.J) complaining that the state of affairs had caused its client to suffer loss and damages and requested they immediately undertake remedial work necessary to make its client's premises safe.

It appears that nothing satisfactory was done by PCJ, because just over a month later, on the 27th April, 1992, the plaintiff filed its suit against P.C.J. claiming damages both in nuisance and negligence. Attorneys-at-law Myers, Fletcher and Gordon entered appearance on behalf of the P.C.J. and served notice on the plaintiff's attorney in the 22nd of May, 1992.

It is to be noted that no statement of claim was filed within the stipulated 14 days. On the 10th of August, 1992, the plaintiff's attorneys wrote to the defendant seeking and obtaining its consent to filing its statement of claim out of time.

Strangely, the expected statement of claim was not forthcoming and the defendant attorneys wrote to the plaintiff's attorneys, on the 2nd of December, 1992 asking for the statement of claim. According to the defendant, this request was ignored.

Thereafter, this matter and apparently its attorneys, all went to sleep, as nothing further was heard for over three years. Eventually they awoke from their slumber and on the 18th of March, 1996 filed a notice of intention to proceed and notice of change of Attorneys-at-law.

Surprisingly, they again lapsed into slumber for over three years and on the 17th of November, 1999 the plaintiff filed another notice of intention to proceed within

one calendar month and which was served on the defendant's attorney on the 24th November, 1999.

Three months later the matter took an unethical and sinister turn. The record discloses that on the 21st of February, 2000, Mr. Graham, one of the plaintiff's attorneys-at-law wrote directly to the General Manager of the defendant company and recommending that 'you communicate with us as a matter of urgency so that we can discuss and hopefully resolve the matter.' It is to be noted that this letter was never copied to Myers, Fletcher and Gordon who only became aware of it through their client.

In the meantime, the defendant's attorneys had filed a summons in this court seeking dismissal of the action for want of prosecution. The summons was set for hearing on the 23rd of March, 2000. Based on previous decisions of this court, the plaintiff felt that there was everylikelihood that P.C.J. would have succeeded on its summons (Eg. See **West Indies Sugar vs. Minnell (1993)** 30 JLR 452)

After its attorneys were served with this summons, the plaintiff filed a summons for leave to file its statement of claim out of time (this is eight years after writ filed). This summons was also fixed for hearing on the 23rd of March, 2000 (the same day of the defendant's summons).

Amazingly, the plaintiff sought costs of this application in any event.

Notwithstanding the pending hearings, three days before, on the 23rd of March, 2000, the plaintiff's attorneys-at-law filed in the Supreme Court a notice of

discontinuance of the action it had taken out over eight years before against P.C.J. and a 3rd party.

This relieved the defendant from the burden of satisfying the court on its summons. However, this relief was short lived because on the 22nd of March, 2000, (2 days later), the plaintiff filed a new suit in the Supreme Court, this time against Petroleum Company of Jamaica (Petcom), which is a wholly owned subsidiary of the Petroleum Corporation of Jamaica (P.C.J.). Re-suit C/L S-060/2000 Select Holdings
2000/S-060 Plaintiff vs. Petroleum Company of Ja. Ltd.

In its endorsement to the writ, the claims to recover damages for negligence, nuisance, trespass and breach of the rule in Rylands and Fletcher, for "that the defendant caused and/or permitted hazardous contaminant consisting of oil and assorted hydrocarbons which are normally stored on the defendant's premises to escape therefrom and enter into the plaintiff's adjoining land and permeate the soil and as a consequence has caused the plaintiff to suffer loss and damage and to incur considerable expense." In its new suit the plaintiff also claims an injunction to restrain the defendant, its servants and agents.

In paragraph 5 of its statement of claim it alleges that the damage took place during the period 1992 to 1999 and claiming special damages amounting to U.S. \$250,000.00 with interest @ 50% on the balance of the purchase price for the property it had contracted to sell.

The new defendant has submitted that this action is "an abuse of the process of the court and is filed for the sole purpose of trying to preserve the plaintiff's now

statute barred cause of action and to avoid the inevitable outcome of the application to dismiss the previous action for want of prosecution.”

Counsel suggest that this action is the same action as the one previously brought in 1992 and that it should be struck out in accordance with the Supreme Court Practice (1997) Order 18.19.15 page 332 – 335.

Counsel for the defendant in her response to the plaintiff's summons, rejected the plaintiff's arguments raised in opposition to the defence filed and prays that the plaintiff's summons dated May 4, 2000 be dismissed with cost in favour of the defendant.

Mr. Malcolm for the plaintiff advanced submissions in support of his summons to strike out some nine paragraphs of the defence filed on the grounds that same had no place in the pleadings, others needed further and better particulars and what constitutes restraint of trade.

With respect to the defendant's summons to strike out the plaintiff's action, he submitted this was misconstrued and that the matter set out by the defendant had absolutely no place in these proceedings. The previous actions against Petroleum Corporation of Jamaica are separate entities. Action against one cannot be construed or taken to be an action against another legal person and that this applies even when one of these entities is a wholly owned subsidiary of the other (see Solomon vs. Solomon).

Mr. Malcolm further submitted that the question for trial is to be determined on an examination of all the available evidence and cannot be the subject of the summary procedure.

The defendant's submission that this suit is statute barred is without basis. Petroleum Corporation of Jamaica (PCJ) has nothing to do with this case against Petroleum Company of Jamaica (Petcom) Mr. Malcolm in response submitted that the plaintiff's new action arose from a continuing nuisance and referred to 2 Canadian authorities in support.

I have no doubt in my mind that the action brought by the plaintiff in this 2nd suit i.e. suit against Petcom is based on the facts relied upon in the previous action against P.C.J. I agree with counsel for the defendant that this is an abuse of the process of the court.

As far as the plaintiff's case that this is a continuing nuisance is concerned that is rejected out of hand.

Accordingly, this action suit No. 2000/S 060 is an abuse of process of the court and is struck out.

The plaintiff's application for paragraphs of the defence to be struck out is refused and the summons is dismissed. The defendant will have its costs on both summonses. Leave to appeal granted to the plaintiff.