

IN CHAMBERS

Mr Craig Jacas for the Applicant/Defendant

Mrs Shawn Steadman-Wilkinson and Ms Annaliese Minott instructed by Livingston, Alexander & Levy for the Respondents/Claimants

November 15, 2023 & May 9, 2024

Land – Recovery of Possession - Whether Fixed Date Claim Should Be Converted To Claim Form – Whether there are Substantial Disputes of Fact – Whether one Executor can give evidence of the acts carried out by co-executor – Open Justice Principle

WINT-BLAIR J

- [1] In a Notice of Application for Court Orders filed on June 14, 2022, the applicant, Constance Campbell-Lewis seeks a determination as to whether a Fixed Date Claim Form is the appropriate process to commence this claim.
- [2] The instant application has been described by Mr Jacas as a claim involving substantial disputed facts. Counsel argues that notwithstanding rules 8.1(3) and (4) of the Civil Procedure Rules (“CPR”), a Fixed Date Claim Form (“FDCF”) is not appropriate for the resolution of a claim involving substantial disputes of fact, rather, the claim ought to have been commenced by way of Claim Form. Counsel argued that the claimants knew or ought reasonably to have known of this before commencing the claim in this way and relied on the cases of **Manfas Hay v Clover Thompson and anor**,¹ **Ralph Williams and ors v The Commissioner of Lands**

¹ [2018] JMSC Civ 26 at para [10]

and Times Square West Holdings Ltd² and Paragh v Paragh.³ The discretion of the court is engaged in cases involving substantial disputes of fact as set down in **Melville v Melville.⁴**

- [3] It was submitted that the defendant falls to be severely prejudiced should the matter proceed via FDCF and it is in the interest of fairness and justice that the proceedings continue as if by ordinary claim.
- [4] In addition, the claimants/respondents intend to rely on hearsay evidence in paragraphs 12, 13, 14, and 15 of the Affidavit of Michael Sinclair in support of FDCF; paragraphs 12, 13, 14, and 15 of the Affidavit of Douglas Sinclair in support of FDCF and paragraphs 22 of the Affidavit of Robert Moyston in support of FDCF in breach of rule 30.3 (1). These paragraphs all ought to be struck out as they do not fall within any of the exceptions provided under rule 30.3(2). Counsel relied on **Peterkin v Natural Resources Conservation Authority et al** and **Subramaniam v Public Prosecutor.⁵**
- [5] It was further submitted that the trial should take place in open court as was decided in **Norton Hinds, Phillip Paulwell and others v The Director of Public Prosecutions,⁶** which discussed section 16(3) of the Constitution of Jamaica and the principles of open justice.

² [2012] JMSC Civ. 118

³ [2019] JMSC Civ. 152

⁴ (1996) 52 WIR 335 at pages 339-340, Patterson, JA

⁵ [1956] 1 WLR 965 at 969

⁶ [2017] JMCA Civ 17 at paras [61], [62]

- [6] The respondents/claimants oppose the application arguing that there are no substantial disputes of fact which would necessitate the conversion of the FDCF. The administration of justice and expediency in attaining the trial of this matter militate against such an order and the paragraphs alleged to be hearsay are properly before the Court.
- [7] It was submitted that rule 8.14 of the CPR states that the FDCF must be used for claims for recovery of possession of land. In the case of **Div Deep, Mahesh Mahtani and Haresh Matani v Tewani Limited**,⁷ a FDCF was filed by the registered proprietor for recovery of possession. The appellant contended inter alia that there were disputes regarding the legal and equitable interests in the property. Marsh, J ruled that the claim could proceed by FDCF and the appeal was upheld by the Court of Appeal. The decision of the Court of Appeal made it mandatory that claimants filing a claim such as the case at bar must use Form 2, as the rules do not provide another option. It is accepted that a court may in certain circumstances decide that such a claim may more appropriately be dealt with by Claim Form, but it is not up to the claimant to do so as this would run afoul of the rules. The claimant relies on the dicta of the Court of Appeal in paragraphs [14] and [54] to submit that the claimant has adhered faithfully to the dictates of the rules and were obliged to commence proceedings using Form 2.
- [8] Counsel for the claimants/respondents distinguishes the case of **Manfas Hay v Clover Thompson and Another**⁸ on the basis that it is the decision of a Master in Chambers which deals with the Originating Summons in the pre-CPR era. Both rules 8.14(b) and 8.14(d) are independent of each other and stand on their own. A litigant cannot be sanctioned for using the procedure mandated by the rules.

⁷ [2010] JMCA Civ. 10

⁸ [2018] JMCA Civ. 26

- [9]** Further, it is submitted that the disputes of fact raised in the case at bar are not substantial. It is agreed that the disputed lots are vacant and were owned by Hepburn Sinclair. Whether there was bushing of the disputed lots, lumber taken or crops planted over the relevant period can be disposed of using a FDCF. The defendant's affidavit in response details her case and exhibits documents and receipts in support thereof.
- [10]** Whether Mr Williams has a direct view of the disputed lots is not a substantial issue as it does not appear to be in dispute that he does have a view of them. The defendant only denies that he has a direct view. The defendant does not dispute that his property is very expansive and adjoins the property where she resides. This is neither a significant dispute of fact or a substantial issue as the main crux of his evidence is that he has lived in the area since 1972 and has never seen the defendant occupying the disputed lots or even entering upon it except on or about May 2021.
- [11]** It is not disputed that the defendant has paid property taxes. A letter was sent to the defendant to cease paying property taxes for the disputed lots. This is not a weighty consideration as the authorities disclose that paying property taxes is not conclusive evidence of ownership.
- [12]** It was further contended that the issue as to whether the defendant is entitled to the disputed lots by adverse possession is a legal issue for the court. Whether the Sinclair family has enjoyed exclusive, undisturbed possession and exercised full rights of ownership over the disputed lots to the exclusion of the defendant is a legal issue as well. The defendant is misguided in stating that it is whether the claimant or their predecessor in title have exercised undisturbed possession, as it is whether the defendant has done so, the claimant's predecessor having registered title. The burden of proof is on the defendant to prove that she has dispossessed the claimants.

- [13] The claimants have alleged that they have hired someone to bush the disputed lots and that they, or persons on their behalf, have visited, this is a matter for the court, but it is not a substantial dispute of fact when taken together with the other issues to be decided by the court.
- [14] Whether there was advertising of the disputed lots for sale cannot be a fact in dispute as no such allegation has been made. The defendant has indicated that she wishes to challenge several documents but has only named the appraisal and valuation in her affidavit. The value of the disputed lots is not an issue before this Court. It is only relevant to set out the steps taken by the registered proprietors or others on their behalf in respect of the lots. The defendant's stated challenge to the valuation is that she has never seen anyone come onto the land to conduct a valuation. It is submitted by the claimants that unless the defendant is always at home and in view of the disputed lots, she cannot credibly say that a valuator has never visited them.
- [15] An order for cross-examination can be made by the Court with respect to any disputed issues of fact raised by the affidavit evidence. There would be no need for lengthy cross-examination given the circumstances. Adverse possession as a defence without more does not mean that the matter cannot be heard by way of FDCF.
- [16] The matter is properly before the court as commenced. It is the FDCF which is mandated by the rules allowing the court to deal expeditiously with the claim, thereby using less judicial resources in furtherance of the overriding objective. In **Div Deep** the application to convert the claim was frowned upon by Panton, P who

said that: *“The filing of the application for court orders was an unnecessary move that has only served to delay the resolution of the dispute between the parties.”*⁹

- [17] It is submitted that the instant application has similarly served to delay the hearing of the claim and has occasioned unnecessary costs and more than its fair share of the Court’s resources. The application was filed on June 14, 2022. On the first occasion, it did not proceed as no submissions had been filed. On the next occasion, Mr Jacas had a particular difficulty. This is the third time that the application is before the court. Were the matter to continue as if by Claim Form, then the claimants would have to file a Particulars of Claim and after the requisite period, the defendant would file its Defence and follow the lengthy procedural route of a Claim Form including the process of mediation, case management conference, standard disclosure, pre-trial review and a lengthy trial date. It is submitted that having regard to the rules, the facts of the case and the overriding objective, the instant application for the claim to continue as if commenced by Claim Form should be refused.
- [18] In relation to hearsay, it was argued that the Executor, Alistair McBeath gave information about the things he did in relation to the property, which is contained in the affidavits of Michael and Douglas Sinclair. It was explained that Mr McBeath has fallen ill and for that reason is unable to give an affidavit. The claimants have stated the basis of their belief and knowledge from the information received. As an Executor, Michael Sinclair would be privy to documents and/or information from the other Executor, Alistair McBeath and it is in that capacity that he is able to speak to the actions of Mr McBeath. (See **JPS v Francis and Columbus Communications Limited (trading as Flow)**).¹⁰ The defendant has responded

⁹ para [18]

¹⁰ [2017] JMCA Civ. 2

to the paragraphs of which she complains and in so doing has waived her right to object to them as hearsay.¹¹ She has also relied on hearsay in her own affidavit at paragraph [22] and unlike the claimants, she has not stated the source of information as is required. This is a matter for the court in its discretion.

- [19] The open justice principle also does not avail the applicant as the criteria for this matter to be in open court has not been identified, the matter is party and party with no public interest element.

Discussion

- [20] This is an action to recover land, to “recover” is widely defined to mean to “obtain any land by judgment of the Court”: (See **Williams v Thomas** [1909] 1 Ch 713 at 730, Buckley LJ.)

- [21] The main issue to be decided by a trial judge in this case is whether, in law and in fact, there is evidence to properly ground an order for recovery of possession before the court. This application is based on that same evidence.

Issues

- [22] The issues before this court are:

- (1) Whether the FDCF is the appropriate process to commence this claim.
- (2) Whether there are substantial disputes of fact.
- (3) Whether an executor can give evidence of the acts of a co-executor in an affidavit.

¹¹ para [21] of the defendant’s affidavit

Whether the FDCF is the appropriate process to commence this claim.

[23] The relevant rules are Rule 8.1 (1), (2), (3) and (4) (b) and (d) of the CPR which state:

“8.1 (1) A claimant who wishes to start proceedings must file in the registry of the court at The Supreme Court, King Street, Kingston (or at such other as the Rules Committee may determine) the original and not less than one copy for each defendant (for sealing) of

(a) the claim form; and

(b) unless either rule 8.2(1)(b) or 8.2(2) applies-

(i) the particulars of claim; or

(ii) where any rule or practice direction so requires or allows, an affidavit or other document giving the details of the claim required under this Part.

(2) Proceedings are started when the claim form is filed.

(3) A claim form must be in Form 1 except in the circumstances set out in paragraph (4).

(4) 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.”

[24] In **Manfas Hay**, Hart-Hines, J(Ag.)(as she then was) stated:

“[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.”

- [25] The learned Master(Ag) reviewed several cases including the Privy Council case of **Eldemire v Eldemire**,¹² in which it was held that the general rule is that “an originating summons is not an appropriate machinery for the resolution of disputed facts.”
- [26] She went on to say that this statement was adopted by our Court of Appeal in **Georgia Pinnock v Lloyd Developments Ltd.**¹³, a case in which it was held that the Fixed Date Claim Form could have been ordered to proceed as if it had begun by Claim Form. There were substantial disputes of fact to be resolved as to which agreement for sale was first in time, whether either or both of the parties had come to court with clean hands, and in whose favour the court should have exercised its discretion in spite of the delay in the completion of the transactions. The Court of Appeal upheld the decision of Marsh, J to proceed with the matter as commenced by way of FDCF and said that the relevant procedures relating to discovery and the filing of witness statements, would take place and no prejudice would have been suffered.
- [27] In **Div Deep Limited**, the Court of Appeal said that Part 8 of the CPR deals with the commencement of proceedings in the Supreme Court.

¹² (1990) 38 WIR 234

¹³ [2011] JMCA Civ 9

*“The claim form must be in Form 1 except in the circumstances set out in rule 8.1(4). This latter rule makes it mandatory for Form 2 to be used in certain cases. Among these cases are claims for possession of land.”*¹⁴(Emphasis added.)

[28] The Court of Appeal held that the claimant **must not may** file his claim using Form 2 which is the FDCF. Thereafter the procedure follows rule 27.2.¹⁵ I understand **Div Deep** to be saying that a claimant cannot decide or elect to file an ordinary claim in a recovery of possession case. A FDCF must be filed and this is mandatory pursuant to rule 8.1(4)(b). Whether there are substantial disputes of fact or not, this type of claim has to be commenced by way of FDCF.

[29] The law is clear, a claim for possession of land must commence by way of FDCF. The applicant cannot successfully argue given the holding of the Court of Appeal that the claimant ought to have done otherwise. The claimant has commenced this claim using the correct procedure as is mandated by the rules.

Whether there are substantial disputes of fact

[30] The question of whether substantial disputes of fact are raised on the evidence needs to be answered before the court can proceed, as this is hotly contested between the parties. This requires a consideration of the material presented to the

¹⁴ paragraph [14]

¹⁵ Rule 27.2 makes clear what is to happen when a Fixed Date Claim is issued. First, the registry must fix a date, time, and place for the hearing of the claim. Rule 27.2(2) to (6) deals with the timelines. The court has the power under rules 27.2(7) and (8) to treat the first hearing as a case management conference in addition to its other powers, treat the first hearing as the trial of the claim if it is not defended or dispose of the claim summarily should the court so consider.

court as well as rule 8.14(d) which says, “*where the claimant seeks the court’s decision on a question which is unlikely to involve a substantial dispute of fact.*”

[31] The use of the FDCF by the claimant is not the same as saying there are no substantial disputes of fact, as to my mind that is a separate issue. It is only after the commencement by FDCF for recovery of possession, (which is the only way to commence such a claim) that a defendant may raise the issue of whether the claim involves substantial disputes of fact. It is not open to the defendant to state that the claim involves substantial disputes therefore a claimant should commence the claim by ordinary claim form as these are separate considerations under different sub-rules. The submissions of counsel Mrs Steadman-Wilkinson on this point are persuasive. The argument made by counsel for the applicant conflates rules 8.14(b) and (d) and fails.

[32] A court may in the exercise of its discretion given the nature of the claim before it, continue the claim as if it had commenced by ordinary claim. It seems to me that it is for the applicant in this case to persuade the Court that the claim should continue by way of ordinary claim.

[33] The defendant in the instant application has set out the facts and issues which arise on the evidence. This has been answered by the claimants who argue that there are only two issues which arise for determination. The first is whether the deceased and/or his executors abandoned the disputed lots and the second is whether the alleged steps taken by the defendant demonstrate the physical custody and control as well as the intention to possess the disputed lots for her own behalf and benefit.

The Law

[34] I understand the law to be this, the right to possession of the property is subject to the statute of limitations and so it is for the claimants and not the defendant, to adduce evidence to discharge both the evidential and legal burdens placed on

them by evidence that the title on which they are relying subsists and has not been extinguished by operation of law.

[35] This is contrary to the submission of counsel for the claimants/respondents which that the burden rests on the defendant to prove that she has dispossessed the paper owners. The general principle of law is that he who asserts must prove coupled with the authorities regarding claims for recovery of possession which do not support this reversal of the burden of proof.

[36] Given that this is the legal position; it is for the evidence to be examined by the court. The following facts are undisputed:

- i. Hepburn Alexander Sinclair died testate May 6, 2000 and a grant of Probate was issued on October 17, 2001 to his son, Michael Sinclair (the 1st claimant herein), and Alistair MacBeath (“the Executors”).
- ii. Lots 338 and 339 (“the disputed lots”) were not included in his Last Will and Testament dated October 20, 1983; however, by way of a residuary clause, the deceased left the remainder of his real and personal estate to his three children – Douglas Sinclair, Michael Sinclair and Carol Delapenha.
- iii. The Executors were registered on transmission on or about May 30, 2007.
- iv. The disputed lots are vacant with no buildings.
- v. The claimant’s attorneys issued a cease and desist letter to the defendant dated May 27, 2021 concerning her payment of property taxes for the disputed lots.
- vi. Lot 380 adjoins the disputed lots and is owned by Mr Wayne Williams.
- vii. The Executors made attempts to sell the disputed lots.¹⁶

¹⁶ Affidavit of Michael Sinclair filed April 11, 2022

- viii. A caveat numbered 2340373 was lodged by the second claimant on or about September 27, 2021 with notices to the executors by the Registrar of Titles.
- ix. On February 4, 2022 the Registrar of Titles issued a return report for each instrument of transfer to the beneficiaries of the estate of Hepburn Sinclair.
- x. The defendant applied to the Registrar of Titles for title by way of adverse possession and filed declarations in support of her application.
- xi. The defendant received provisional approval of her application from the Referee of Titles on November 30, 2022. The relevant notices were published in the Gleaner on February 8 & 15, 2022.
- xii. A caveat was lodged on or about March 9, 2022 on behalf of the second claimant to warn the Registrar of Titles about his beneficial interest in the relevant properties.
- xiii. The defendant met Robert Moyston, agent of the claimants, and would see him drive by, sometimes daily, to check on the disputed lots.
- xiv. A fence was erected by the claimants, and a fence was erected by the defendant.
- xv. Each side paid property taxes.

[37] In dispute is the location of the fences and when they were erected. Whether Mr Moyston stopped driving by to check on the lots if at all. Whether there were visitors to the land on behalf of the Sinclair family. Whether the Sinclairs bushed the land. Whether a valuator attended upon the land to carry out a valuation. Whether the lots were put up for sale. Whether the defendant bushed and maintained the land at her own expense; planted fruit trees and used wood from it to make the boundary fence. Whether the defendant permitted persons to put goats on the land and to park upon it as she alleges.

[38] The claimants' submission that cross-examination in the instant case may be ordered by the court is well founded. The nature of the claim is one in which the court may make an order for cross-examination on the affidavit evidence and limit the length thereof. Given the evidence presented to the court, there are no substantial facts in dispute which would necessitate the conversion of the FDCF need not be converted to an ordinary claim.

Open Justice

- [39] The principle of open justice does not apply to this case as in the discretion of this court, the weighing up of the evidence will not be curtailed and no prejudice is accorded to either side by the claim proceeding as filed. The saving of time and cost to the parties is a factor to be considered which advances the overriding objective of dealing with cases justly. The case of **SmithKline Beecham Biologicals SA v Connaught Laboratories Inc.**¹⁷ is authority for the proposition that saving time in court is not just permitted, but is a requirement.
- [40] **SmithKline Beecham** was cited with approval by the Court of Appeal in **William Clarke v The Bank of Nova Scotia Jamaica Limited**¹⁸ where the learned judge of appeal said that a public hearing is not required at all stages of all proceedings as it is a matter for the discretion of the court to determine what justice requires:

“The authorities clearly show that it is for the court to determine what open justice requires. The court is the administrator of the open justice system, all proceedings being under its control. In the interests of expediency and good administration, it is for the court to determine the appropriate procedure to adopt in a particular case. It follows therefore that the court may depart from the strictures of a public hearing where in a particular case, economy and efficiency so dictate.”

- [41] In deciding between expediency and good administration in furtherance of the overriding objective, no prejudice or breach of the principles of fairness has been shown to affect the applicant if this matter proceeds to a trial in Chambers over a trial in open court.

¹⁷ [2000] FSR 1

¹⁸ Harris, JA [2013] JMCA App 9 at para [60]

Whether an executor can give evidence of the acts of a co-executor in an affidavit

- [42] Rule 30.3(1) provides that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge. In addition to being the truth, an affidavit must contain evidence from only the witness' own knowledge. A witness cannot give evidence in an affidavit on behalf of someone else or retell someone else's experiences, as this constitutes hearsay. If the witness personally did not see or hear then he/she cannot swear to this evidence, the exception would be in an interlocutory application.
- [43] The hearsay rule is applicable to both sides. However, only one application was made to have offending paragraphs struck out. In this application, the purported hearsay evidence is contained in the affidavits in support of the FDCF for use at trial. The affidavit of Michael Sinclair gives evidence as an executor on behalf of a co-executor.

“In the case of co-executors each has entire control over the property and his acts in many cases bind the others... In the absence of rebutting circumstances notice to one executor will, perhaps, be presumed to have been communicated by him to his co-executors, unless he renounced before acting.”¹⁹

- [44] Michael Sinclair is a beneficiary under the will as well as an executor. Michael Sinclair and Alistair MacBeath are co-executors and bound to administer the estate of Hepburn Sinclair. Given this statement of the law from Phipson on Evidence, in my view, the hearsay rule does not apply to the evidence Michael Sinclair has given of acts done by Alistair MacBeath as an executor. There was no evidence

¹⁹ Phipson on Evidence, 17th ed. para 38-07

of rebutting circumstances to suggest that there was no communication between them nor renunciation by either of them.

[45] The affidavit of Douglas Sinclair does not fall into this category. The offending paragraphs are 12, 13, 14 and 15 which do not state the source of the information given and have run afoul of the hearsay rule.

[46] The affidavit of Robert Moyston contains a conversation with Mr Williams. Both sides refer to this latter witness as the adjoining landowner who has also given an affidavit. The claimants assert that he is a longstanding member of the community where the relevant lots are situated. The defendant asserts that Mr Williams has a certain vantage point from his adjoining land. The evidence of what he has to contribute is being relied on for the truth of its contents. He is being called as a witness by the claimants. The evidence complained of in the affidavit of Robert Moyston does not fall into the category of hearsay.

[47] Orders

1. The application for the Fixed Date Claim to proceed as if by ordinary claim is refused.
2. Paragraphs 12, 13, 14 and 15 of the affidavit of Douglas Sinclair, the second claimant, are struck out as inadmissible.
3. The second claimant shall file and serve an affidavit which shall become known as the revised affidavit of Douglas Sinclair without the paragraphs set out at order number 2 herein, no later than fourteen days of the date of this order.
4. A trial date is to be fixed on the date of delivery of this decision.
5. Costs of the application are awarded to the claimants to be taxed, if not agreed.
6. Claimants' attorneys-at-law shall prepare, file and serve these orders.