

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 00153

BETWEEN ANN MARIE VIRTUE CLAIMANT
AND AUDREY JOHNSON DEFENDANT

Claimant unrepresented.

Mr. Errol Gentles for Defendant

Heard: May 2 and 10, 2006

McDonald J. (Ag.)

The claimant seeks an inquiry in the Supreme Court to ascertain what damages she has suffered by reason of an interim and interlocutory injunction granted in the Resident Magistrate’s Court for the parish of Saint Mary which restricted her from continuing any further construction on her property until the determination of the action.

The action in the Resident Magistrate’s Court was commenced on March 26, 2002 by Audrey Johnson against Ann Marie Virtue, Daphne Davis and Bryan Barrett for trespass to property and claimed as a relief “an order in the nature of an injunction and damages in the sum of one hundred thousand dollars.”

On November 19, 2004 plaint no. 468/2002 filed in the Resident Magistrate's Court was withdrawn and with costs to the Defendants to be agreed or taxed.

There is no evidence that an application was made in the Resident Magistrates Court for damages under the undertaking. Instead separate claims were filed in the Supreme Court on January 18, 2005 by Ann Marie Virtue, Daphne Davis and Bryan Barrett against Audrey Johnson for damages for loss suffered as a consequence of the granting of the injunction.

In the Particulars of Claim Ann Marie Virtue stated inter alia that as a consequence of the granting of the said injunction she has suffered extensive loss and damage, inclusive of the inconvenience not having a bathroom facility during the duration of the said injunction.

A Defence was filed on April 5, 2005 and on April 19, 2005, the Defendant Audrey Johnson filed Notice of Application for Court orders seeking the following order:- that the Claim Form and Particulars of Claims be struck out as disclosing no cause of action.

The Claimant has filed no affidavit in response neither has she nor her Attorneys-at-law on the record appeared on the two Court dates fixed for hearing.

Mr. Gentles submitted that no good reason has been shown or justification on the pleadings why this matter has been brought in the Supreme Court.

He said that any damages which would have been suffered by the aggrieved party would fall for assessment at the time of withdrawal or discontinuance in the Resident Magistrates Court.

Further that the undertaking having been given to the Court and not to the Respondent is therefore not a matter in respect of which the claimant can sue independently of seeking the aid of the Court to enforce the undertaking:- the undertaking is not one that the claimant can seek to enforce as a matter of right. There is no separate right of action based on the undertaking.

Halsbury's Laws of England 3rd edition Vol. 21 para 887 states:-

“An undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for it, and it ought to be required on every interlocutory order except possibly, in a clear case of fraud. By the undertaking the party obtaining the order undertakes to abide by any order as to damages

which the Court may make in case it should afterwards be of the opinion that the defendant has by reason of the order sustained any, which such party ought to pay.”

The undertaking is given to the Court and is not a contract between the Claimant and the Defendant.

Newcomen v. Coulson (1878) 7 Ch. D. 764 establishes that the claimant’s undertaking as to damages remains in force notwithstanding its discontinuance.

In my view a discontinuance would have the same effect in law as a withdrawal of the action. The jurisdiction of the Court is not lost by reason of the withdrawal and the undertaking continues in force and can be enforced.

Newby v. Harrison (1861) 3 De G.F. & J 287 concerns the effect of an undertaking in the case of dismissal of the action. In my view the dicta of Lord Justice Knight Bruce in that case is applicable to the instant case.

He stated at 290:-

“After a party has voluntarily entered into such an undertaking, it does not lie in his mouth to say that, because the suit is out of Court, the Court has no jurisdiction over him; for the jurisdiction does not arise from the suit but from his own undertaking.”

I find that the proper Court for the Claimant to have initiated the action for damages according to the undertaking was in the Resident Magistrate's Court.

I find support for this view in "Re Hailstone, Hopkinson v. Carter (1910) LT 877 CA. The headnote reads as follows:-

"Where an interlocutory injunction has been granted by the Probate Division on the usual undertaking as to damages and an application is subsequently made to enforce that undertaking, such application should be to that division, and not to the Chancery or King's Bench Division.

Although it cannot be said that under no circumstances ought delay in making the application to be an element to be considered, yet the right to enforce an undertaking as to damages is not lost if the application was not made when the injunction was dissolved or when the action came on for trial; but all the circumstances of the case must be taken into account."

The injunction is not a cause of action; it is the undertaking to the Court which is the basis of bringing the action. The aggrieved party can seek the aid of the Court to enforce the injunction but cannot bring a separate action against the parties because the undertaking is given to the Court and is not a contract between the parties which either party can sue upon or be sued upon. I find that the claim filed discloses no cause of action.

Order granted in terms of paragraphs 1 and 2 as amended of Notice of Application for Court orders dated April 14, 2005.