

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 2762/2007

BETWEEN	DAVID WEST	1 st CLAIMANT
	CHRISTOPHER WEST	2 nd CLAIMANT
	DOUGLAS WEST	3 rd CLAIMANT
	MARSHALEEN FORSYTHE (NEE HENRIQUES)	4 th CLAIMANT
	JEROME SMITH	5 th CLAIMANT
	RICHARD SMITH	6 th CLAIMANT
AND	JAMES WYLIE	1 st DEFENDANT
	LORNA WYLIE	2 nd DEFENDANT
	RICHARD SMITH	3 rd DEFENDANT

Allan Wood and Seyon Hanson instructed by Livingston Alexander & Levy for
Respondents/Claimants

Owen Crosbie for Applicants/Defendants

Heard: September 27, October 12, and 19, 2007

Amendment – Irregularity in Execution of Certificate of Truth

Sinclair-Haynes J

On the 11th day of July 2007, an application was made by way of Fixed Date Claim Form (FDCF) in which the claimants sought, *inter alia*, injunctive relief and recovery of possession of property against the defendants. The certificate of truth was signed by Miss Sheila Smith as the agent of the claimants.

Mr. Owen Crosbie, attorney-at-law for the defendants, raised an objection in *limine*. He submitted that the Fixed Date Claim Form (FDCF) should be struck out for the following reasons:

- 1) It breached rule 22.1 of the Civil Procedure Rules (CPR) 2002.
- 2) It breached the law of agency with special reference to section 149 of the Registration of Titles Act which requires the grant of a power of attorney in the circumstances.

An adjournment was granted to Mr. Seyon Hanson, the attorney-at-law for the claimants. On the 3rd day of October 2007, the claimants filed an amended Fixed Date Claim Form in which the certificate of truth was signed by Mr. Hanson.

Submissions by Mr. Owen Crosbie

Mr. Owen Crosbie submits that the claim form is fundamentally flawed. He submits that compliance with rule 22.1 of the CPR is one of the conditions precedent to the commencement of proceedings, the other being the filing of the FDCF. A fundamental breach, he submits, cannot be cured. Consequently, the claim is void. He submits that the claim may also be struck out as an abuse of the process of the courts because the claim was filed contrary to the law by persons without lawful authority. He relied on (*Nixon v. Loundes*), [1909] 2Ir.R.1.

Submissions by Mr. Allan Wood

Mr. Allan Wood submits that rule 26.9 permits the matter to be rectified. The rule, he submits, expressly provides that a failure to comply with a rule does not invalidate the proceedings unless the court so orders. Further, he submits, rule 26.9 allows the matter to be regularized without an application. Non-compliance with procedural rules will not be

treated as nullifying proceedings. The court has discretion to have the matter rectified, where no prejudice is caused to the other party. He relies on Halsbury's Laws of England, (vol. 37 para. 36). It is his submission that rule 8.1 (4) (b) permits a claim for possession of land to be brought by way of FDCF, which sets out the relief being sought and does not speak to the facts. He also submits that the **Supreme Court Annual Practice** of 2007 of the United Kingdom clearly states that the failure to have proper certificate of truth is an irregularity that can be cured. He also relied on the CCJ case of **Gladston Watson v. Rosedale Fernandez** [2007] CCJ1 (AJ) which was delivered on the 25th January 2007.

The Law

Rule 22.1 of the CPR states:

"Subject to the provisions of this part and part 23 (minors and patients), any person may begin, defend or carry on proceedings in person or by an attorney-at-law."

The pertinent question is, whether the signing of the certificate of truth by Miss Sheila Smith, rendered the proceedings a nullity, as submitted by Mr. Crosbie or whether it is an irregularity which is curable.

The signing of the certificate of truth by Miss Sheila Smith is a procedural error. The consequence of non-compliance with rule 22.1 has not been specified by any rule, practice direction or court order (see rule 29.9. [1]), in the circumstances rule 26.9 (2) is applicable. Rule 29.3 (1) states as follows:

"An error of procedure, or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings unless the court so orders."

It is therefore axiomatic that non-compliance with rule 22.1 is an irregularity which does not render the proceedings a nullity. Remedy of the error is therefore within the court's discretion.

This exercise of discretion must seek to give effect to the overriding objective of enabling the court to deal with the case justly. An important consideration in so determining is whether the defendants have suffered or will suffer any prejudice as a consequence of the court acceding to the request of the claimants to remedy the error. It has not been submitted that the defendants have suffered any prejudice.

The CCJ case of **Watson v. Fernandez**, an appeal from the Cooperative Republic of Guyana, offers guidance. That case was substantively a dispute between parties concerning land. However, the issues for the court's consideration were questions of practice and procedure. They were as follows:

- 1) whether an attorney who was not on record was entitled to sign a notice of appeal on behalf of his client;
- 2) if he wasn't entitled, what were the consequences?

Upon analyzing the rules of the Guyanese court, the CCJ felt that the attorney, in the circumstances which existed, was entitled to sign the notice of appeal. The court however, felt constrained to express its views on the consequences of non-compliance with rules of court. It examined both the rules of the High Court and the Court of Appeal of Guyana and came to the following conclusion:

"Both the rules of the High Court and the Court of Appeal rules require the interests of justice to be an overriding concern in the application of these rules."

Order 54 of the High Court Rules of Guyana states:

'Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceedings void unless the court or a judge shall so direct but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit.'

The consideration is therefore similar to rule 1 of the CPR. The chief concern is to give effect to the overriding objective which is to ensure that matters are dealt with justly.

The CCJ was critical of the Guyana Court of Appeal's decision to "deprive the applicant of a hearing of his appeal on its merits" because of a procedural irregularity (see paragraph 36).

The statements of the CCJ are enlightening and I consider it useful to quote their Lordships extensively:

"We consider that it should indeed be rare that such a course be taken, especially when there are a variety of options open to the court for dealing adequately with the technical breach. The case could have been adjourned for a short period to permit the breach to be remedied and an order made that the wasted costs be paid by the appellant or Mr. Gibson personally. But to shut out the litigant entirely from arguing his appeal could not be in the interests of justice."

At paragraph 49 it continued:

"Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical breach committed by their attorneys. With great respect to the court below, we disagree that there is anything to suggest that there is a time limit on the courts ability to excuse non-compliance with the rules or permit it to be remedied, if the interests of justice so require. The court retains that jurisdiction at all times."

In **Baptist v Supersad**, Chief Justice Wooding cautioned that, *'the law is not a game nor is the court an arena. It is... the function and duty of a judge to see that justice is done as far as may be according to the merits'*. Indeed, as Musmanno J has said, *'the attainment of true justice is over the highway of realities and not through the alley of technicalities.'*

In the instant case, the ends of justice will not be served by striking out the claimants' case because of a procedural irregularity where it had not been shown that the defendants have or will suffer any prejudice.

In the circumstances, the defendants' application to strike out the claimants' FDCF is dismissed.