[2024] JMSC Civ 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2023 CV02049

BETWEEN	**ETHLYN WILSON**	**1st CLAIMANT**
AND	**CARLTON WILSON**	**2nd CLAIMANT**
BETWEEN	**PETER CHIN (as Representative in the Estate of Herbert Chin, Deceased)**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Omar Oliphant instructed by ZDO Law for the claimants/respondents

Jerome Spencer for the defendant/applicant

HEARD: 30 MAY & 25 JULY 2024

Civil Procedure – Jurisdiction of court to order stay of proceedings in subsequent action in circumstances where costs ordered in previous action between similar parties have not been paid

MASTER C. THOMAS

INTRODUCTION

[1] The defendant in these proceedings is seeking a stay of the instant proceedings on the basis that costs awarded in previous proceedings commenced by the 1st claimant have not been paid.

BACKGROUND

[2] The instant proceedings were commenced by the claimants by way of fixed date claim form filed on 26 June 2023, seeking the following orders: -

i. That the Claimants have an in [sic] interest in Lot 52 of Eltham in the parish of St. Ann;

ii. A declaration that the Claimants have acquired a possessory Title and are the owners of Lot 52, which they have occupied;

iii. A declaration that the transfer of Title should not have been effected while a caveat was registered against the property;

iv. Such further and other relief as this honourable court deems fit;

v. Costs to be costs in the claim.

[3] The orders were sought on the following bases: -

(I) That there is a serious issue to be tried in that the Claimants' interests in Lot 52 need to be recognised and established;

(II) That the relevant property is situated at Lot 52 Part of Eltham in the parish of St. Ann and has been occupied by the Claimants in excess of thirty years;

(III) That by way of Suit No. E-41A of 1988, an interlocutory injunction restrained the Claimants from trespassing upon Lots 49, 50 and 51 from mining or carrying away for sale or otherwise any marl aggregate from the said lots; no order was made in respect of Lot 52;

(IV) Notwithstanding Caveat No 100095 lodged on July 20, 1987, Duplicate Certificate of Title registered at Volume 1446 Folio 587 was transferred on Application No. 1528801 to Mr Herbert Chin concerning Lot 52 on

adverse possession, though the [sic] not in possession of the property;

(V) That the Claimants have been paying the relevant taxes for the land as required by the Government of Jamaica;

(VI) That the Claimants have lived in open, quiet and undisturbed possession of the property in excess of twelve years;

(VII) That the Claimants have built their houses on the relevant property, fenced in and have had this as their home for generations;

(VIII) That damages would not be an adequate remedy;

(IX) That the Defendant would be adequately protected by the Claimants' undertaking as to damages;

(X) It is just and equitable in all the circumstances that the orders sought be made.

[4] The evidence as contained in the affidavits filed in support of the fixed date claim form indicate that the 1st claimant is the widow of Mr Claude Oliver Wilson (also referred to Claudius Wilson) (hereinafter referred to as the deceased) and the 2nd claimant is her son. The defendant is the nephew of the deceased. As has been suggested by the orders being sought, the claim to Lot 52, Eltham, St Ann ("the subject property") is based on title acquired by virtue of the 1st claimant's and the deceased's "quiet, open and undisturbed possession occupation" of the subject property from 1969. The 2nd claimant's evidence is that he became acquainted with the property in 1970 and at the age of 20 years old, witnessed his parents building a five-room apartment; that he assisted in the construction; and that subsequent to the deceased's death on 25 January 1973, he lived at the subject property permanently until early January 1988 when he removed from the subject property because of the threats from the defendant and since then he has been going to the property daily sometimes in the company of the 1st claimant to attend to the subject property.

[5] It is the evidence on behalf of the claimants that in the 1980s after the death of the deceased, the 1st claimant received a letter regarding a Will purporting to

be that of the deceased. This letter allegedly indicated that the defendant had ownership or an interest in part of the subject property. In or around 29 July 1987, the 1st claimant lodged a caveat on the property, which was registered at Volume 632 Folio 56. However, in 2011, when the claimants went to have the title of the property registered in the 1st claimant's name, the 1st claimant was informed that the defendant had, despite a caveat being lodged, acquired a title to the subject property by virtue of adverse possession.

[6] An acknowledgment of service was filed by the defendant and was shortly followed by the filing of the instant application on 7 February 2024. The application sought a number of orders including an order striking out the claim apparently on the basis of a failure to comply with various provisions of the Civil Procedure Rules ("CPR"). This sparked the filing of an amended claim form and supplemental affidavit in support by the 1st claimant on 5 March 2024, which have not changed the substance of the claim. At the hearing of the application, Mr Spencer indicated to the court that he would only be proceeding with the aspect of the application which concerned the relief sought for a stay of the proceedings. The particular relief being sought is encapsulated at paragraph 3 of the application as follows:

> **"… an order that the claim be stayed until all costs due to the defendant from the claimants, or either of them, is paid."**

[7] The application was supported by the affidavit of Shameka Bryan, in which she deponed at paragraphs 4 and 5 that the instant claim is substantially the same claim as another previously brought, that is, Claim No SU 2022 CV 02983 **Ethlyn Wilson v Howard Chin (As Representative in the Estate of Herbert Chin, Deceased)** ("the 2022 claim"). She stated that in that claim the 1st claimant had sued the defendant for the same remedies as are now being sought and on the same grounds. The only difference between the two claims is that in the 2022 claim, the 2nd claimant was not a party, although he had sought to be added as one. The first claim was struck out and costs awarded to the defendant. To date, those costs have not been paid. She also deponed that she had been advised by the defendant's attorney-at-law, Mr Spencer that

costs of $30,000.00, which were awarded to the defendant at an adjourned first hearing on 24 January 2024, had not been paid.

[8] In the Affidavit of Novlette Davey in Response to Affidavit of Shameka Bryan, which was filed on 15 April 2024, at paragraph 9 it is asserted on behalf of the claimants that the matter of the outstanding payments totalling $90,000.00 has been resolved and that the delay was due to the inability to reach the defendant's attorney and not being able to make transfer of the funds without the required details.

[9] In his written and oral submissions, Mr Spencer made it clear that what was at issue was the outstanding costs payable in the 2022 claim.

SUBMISSIONS

[10] Mr Spencer submitted that though there is no provision in the CPR conferring jurisdiction on a court to make the order being sought, the court has an inherent jurisdiction to grant such a stay. For this submission, he relied on the case of **Investment Invoice Financing Ltd v Limehouse Board Mills Ltd** [2006] EWCA Civ 9 and **Samuel Rose v Galaxy Leisure and Tours Ltd v Boshievel** [2021] JMSC Civ 93.

[11] Mr Oliphant submitted that the case of **Investment Invoice Financing** is distinguishable in that the claimants in the instant case are not seeking to abuse the court's process as a means of delaying payment as was the circumstance in that case. Further, the claimants were not provided with a Bill of Costs. The court having not set a cost to the matter, the claimants would have relied upon the Bill of Costs being provided by the defendant.

[12] Mr Oliphant referred to rule 65.18(2) of the CPR, which provides that the Bill of Costs must be filed and served not more than 3 months after the date of the order or event entitling the receiving party to costs. He also referred to rule 65.19(1) of the CPR, which stipulates that the paying party may apply for an order requiring the receiving party to commence the taxation process, that is,

by providing a Bill of Costs with the aim of having the matter settled. He submitted that the defendant in providing no costs associated with the first claim, was in breach of rule 65.18 of the CPR. As such, the claimants could not have acted blindly or ignorantly nor are the claimants at liberty or obligated to initiate that that information be directed or provided. Rule 65.19, he submitted, uses discretionary language in setting out the paying parties' role in settling costs.

[13] In response, Mr Spencer relying on **Samuel Rose v Galaxy Leisure and Tours Ltd v Boshievel** [2021] JMSC Civ 93, submitted that the fact that no Bill of Costs had been filed and served by the defendant in the previous proceedings did not operate as a bar to the order being made. He submitted that the claimants could have proceeded under rule 65.19 of the CPR which permitted the claimants to seek an order requiring the defendant to commence taxation. His submission was that the non-compliance with the order for costs, grounds the stay and not the lack of quantification of the costs.

DISCUSSION AND ANALYSIS

[14] Mr Oliphant has not disputed the evidence of Ms Bryan concerning the interconnection between these proceedings and the 2022 claim. It is therefore fair to say that these assertions are uncontradicted; consequently, the application will be considered against the background of this evidence. Also, Mr Spencer has made it clear that the costs ordered against the claimants in favour of the defendants in the instant proceedings have been paid. In the light of these facts, it seems to me that the single issue in this application is: should the court state these proceedings on the basis that there are outstanding costs owing to the defendant which have yet to be paid by the claimants in the previous proceedings?

[15] Mr Spencer did not point the court to any statutory provision or provision of the CPR. The case of **Samuel Rose** on which he relied, applied rule 37.7 of the CPR, which is applicable where previous proceedings were commenced by a party and a Notice of Discontinuance was filed in the previous proceedings after

the filing of a defence and subsequent proceedings are commenced by the same party before the payment of costs in the previous proceedings. However, Mr Spencer has relied on **Investment Invoice Financing Limited** to support his submission that the court has the inherent jurisdiction to make such an order.

[16] The facts of that case are in brief that a company, Papermac Ltd, ("PSL") brought a petition for winding up of the defendant company. The application was refused and PSL was ordered to pay the defendant's costs of Eighteen Thousand (£18,000) Pounds. PSL then brought an action for sums due and then assigned its right of action to the claimant. The court ordered the claimant to make payment into court in respect of the costs due to the defendant arising from the previous action. The claimant's appeal on the basis that the court had no jurisdiction to make such an order was dismissed.

[17] Lord Justice Moore-Bick in considering the jurisdiction of the court to grant such an order stated:

> 27. This principle was approved and applied in **M'Cabe v The Governor and Company of the Bank of Ireland** (1889) 14 App Cas 413 in which an action was brought by the appellant in the Exchequer Division in Ireland to recover certain stock from the Bank of Ireland. The action was tried and judgment given for the defendant with costs. A second action was later begun in the Chancery Division on the basis that the original action had been brought in the wrong Division. An order was made that the action should be stayed until the appellant had paid the costs of the first action which was held to be a proper order made in accordance with the general principle. Lord Herschell said at page 415:
>
>> The only question remaining is whether the order was right in so far as it stayed the proceedings in the second action until the costs of the first action had been paid. Now, my Lords, I find that it was laid

> down in a recent case in the Court of Appeal **Martin v Earl Beauchamp** (1) that "the rule is established that where a plaintiff having failed in one action commences a second action for the same matter the second action must be stayed until the costs of the first action have been paid." And even although the actions were not between precisely the same parties or persons suing in the same capacity, the case was held to be within the rule inasmuch as the plaintiff there was "suing substantially by virtue of the same alleged title … that rule, which I apprehend is not in any respect confined to the Courts in England but applied as well to the Courts in Ireland, arising as it does out of the inherent power which resides in the Court to prevent a second suit being brought upon the same cause of action until the costs incurred in the first action have been paid…

[18] Lord Justice Moore-Bick later observed at paragraph 34 that the grant of an order for a stay of the second proceedings is concerned with "preventing an abuse of the court's process" and that cases in which such an order was made "all make it clear that the purpose of making such an order is to do substantial justice between the parties". He later stated at paragraph 46:

> 46. Mr Price was inclined to accept, rightly in my view, that an application for a stay pending satisfaction of an order for payment of costs of earlier proceedings could be made at any stage. However, the later such an application is made, the greater will be the risk that the claimant will have incurred costs himself or will have taken some steps in the new proceedings in the expectation of being allowed to continue them that make it unfair for the court to accede to an application that might have been unanswerable if made at an earlier stage. The jurisdiction to stay proceedings for this purpose is discretionary and the

court must consider all the circumstances when deciding whether to make an order of that kind.

[19] Among the cases which were considered by Moore-Bick LJ was the case of **Sinclair v British Telecommunications plc** [2001] 1 WLR 38. In that case, Judge LJ in delivering his judgment observed as follows:

> Mr Malcolm Chapple was unable to draw our attention to any expression in the Rules of the Supreme Court, or indeed in the current Civil Procedure Rules 1998, which unequivocally and directly demonstrated the existence of this power. In the end his argument was that the order could properly be made under the inherent jurisdiction of the court. When extensive and detailed provision is made for the conduct of civil litigation, and no express power can be found to sustain a particular course of action, an appeal to the court's inherent jurisdiction may sometimes, but not always, underline that, in truth, the jurisdiction does not exist at all.
>
> Approaching the problem with an appropriate degree of caution, the starting point in this case is the well-established principle that:
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> > "if a litigant had brought an action or made a motion against another and had failed, he should not bring a fresh action or renew his motion until he had paid the costs of the previous proceeding." **Morton v Palmer** (1882) 9 QBD 89, 92.

[20] More recently, in **Changizi v Changizi and Anor (Executors of Estate of Parviz Changizi)** [2024] EWHC 6 (Ch) Deputy Master Marsh in examining the law in this area stated at paragraphs [34] – [37]: -

> 34. The question for the court to consider is whether it is abusive for the claimant to be able to proceed with a new claim without having discharged costs orders made in previous proceedings to

persons who were parties to the previous claim, or claims. The court must have regard to:

> (1) The nature of the earlier proceedings and their degree of connection with the later proceedings;
>
> (2) The outcome of the earlier proceedings;
>
> (3) All the surrounding circumstances;
>
> (4) The fact that the power to stay is discretionary. The court should ask itself whether it is unjust to require the defendants to incur the costs of defending the proceedings whilst earlier costs orders have not been met.

35. It is not essential for the court to decide whether:

> (1) The claimant will be able to pay the costs of the current proceedings: **Investment Invoice Financing** at [47]. The inherent power is not an alternative to security for costs.
>
> (2) The conduct of the first claim was abusive although abuse in the earlier proceedings will be a circumstance to be taken into account.

36. It is also open to the court to impose a deadline for the payment of the outstanding costs failing which the new claim will be struck out – see **Investment Invoice Financing** at [47] and Briggs J in **Wahab v Khan** [2011] EWHC 908 (Ch) at [19].

37. The final element of the jurisdiction concerns the claimant's ability to meet the outstanding costs and whether or not a stay and/or striking out would stifle the new claim. This issue was considered by HHJ Walden Smith (sitting as a High Court Judge) in **JEB Recoveries LLP v Binstock** [2017] EWHC 1123 (Ch) [22]

> 'If the party responding to such an application were impecunious, then the court would be particularly concerned

> that litigation was not being stifled by reason of costs orders. Consequently, it is important for the court, hence the importance of ensuring that a party is not paying because it made a decision not to pay rather than the party not paying because it simply is not in a position to pay…'.

[21] So, it may be said that, as was observed by the court in **Sinclair v British Communications plc**, there are no express provisions in the CPR which empower the court to order a stay in these proceedings until the costs in the 2022 proceedings have been made. However, as a part of the court's inherent jurisdiction to prevent an abuse of its process and to ensure fairness between the parties, the court has the discretion to grant such an order taking into account all the circumstances including those outlined in **Changizi**.

[22] Mr Oliphant has not challenged that there lies such a jurisdiction. However, the fulcrum of his resistance to the order being made is that the failure of the defendant to provide any costs associated with the previous proceedings (which the claimants have never been averse to paying) so as to put the claimants in a position to pay the costs is a bar to the grant of the stay. His position, in essence, is that the claimants cannot be accused of failing to pay the costs of the previous proceedings in circumstances where they did not know the amount to be paid. Mr Spencer has not denied that no Bill of Costs or other indication of the costs of the previous proceedings was filed or given to the claimants. However, his submission is that the claimants could have proceeded under rule 65.19 of the CPR which permitted the claimants to seek an order requiring the defendant to commence taxation.

[23] It is true that, as was submitted by Mr Spencer, in **Samuel Rose** the claimants having discontinued a previous claim brought against the defendant, the court granted a stay of proceedings in the subsequent proceedings in circumstances where there is no indication that costs had been quantified. However, I think it is important to note that it appears that the court made the order of its own motion and there is no indication from the judgment that arguments were made by the parties on the impact of the lack of the

quantification of costs, if any, on the order being made pursuant to the provisions of the CPR. To that extent, I am of the view that the case is of limited assistance.

[24] The issue of the impact of the failure to quantify costs of previous proceedings on a stay being granted in subsequent proceedings until the payment of the costs in the previous proceedings have been paid, has, however, been considered in the case of **Thames Investment and Securities plc v Benjamin** [1984] 1 WLR. In that case, Goulding J considered the case of **Bellchambers v Giani** (1819) Madd 550, 56 ER 607 in which he observed that the footnote by the reporter recorded that "If the costs are not taxed, non-payment is no objection. *Anon*. before V.-C., 20 June 1821, MS". Goulding J then stated:

> I have no further information as to that but it supports my view that there is no such failure as might prevent a new application from proceeding if the amount of the costs directed to be paid is not known… I cannot say that the defendants as applicants must pay costs to the plaintiff as respondent before the new motions can go forward because that is to direct an impossibility: the amount of the relevant costs has never been fixed. On the other hand, if I say, because there has been no failure to comply with the court's order in any way by the defendants, therefore they can go ahead with a repetition of the previous application and the plaintiff has to take its chances, with all the uncertainties of litigation, of getting the costs of the failed application in the future, I may be doing an injustice to the plaintiff.

[25] Goulding J relied on the approach of the court in **Bundell v Hay** (1863) 33 Beav 189, 55 ER 338 in coming to the view that he could order that a "sufficient amount" be paid into court, which was "a fair way of dealing with the situation". In determining the appropriate sum, he considered what appeared in the evidence and what he was told by counsel had happened in the previous motions and using his "own ideas, [his] own limited knowledge of current costs, to think what might have been the proper figures". He therefore ordered that

that sum or "such smaller sum as shall be agreed or taxed" be paid into court or otherwise secured to the satisfaction of the plaintiff.

[26] The approach of Goulding J in **Thames** was referred to with approval by the Court of Appeal of the Turks and Caicos Islands in **Alexander Vik v Shane Crooks & Ors; Sarek Holdings Ltd & Anor v Sebastian Holdings** CL – AP 2 & 3/2018 in which the court stated:

> [25] In **Thames**, the reasoning given by Goulding J, which the court accepts as sound, is that if the costs are not taxed so that they have not yet been ascertained then before proceedings with the 2nd identical action an amount as estimated by the court should be paid into court or otherwise secured to the satisfaction of the plaintiff. This was in fact the order which he made in **Thames**. Nothing has been drawn to our attention which has invalidated this approach.

[27] Counsel were invited to make submissions on **Sinclair**, **Changizi** and **Thames**, which were authorities unearthed by the court in its own research. Mr Spencer's position is that the authorities support the defendant's position. Mr Oliphant's position remains the same that the defendant has breached rule 65.18 of the CPR. He has urged the court not to stay the proceedings as the parties agreed costs on 28 June 2024 and staying the matter would be an injustice to the claimants to have their matter delayed particularly where they are not at fault for the specific matter being ventilated via the defendant's application.

[28] As the matter stands presently, I have no evidence that the costs have been agreed and paid. I will therefore proceed to consider whether the application should be granted in accordance with the law as established by the foregoing authorities including **Thames,** as no argument has been advanced to suggest that the reasoning and approach of Goulding J in **Thames** should not be applied in this jurisdiction.

[29] Applying the factors adumbrated in the authorities, as I previously indicated there is no denial that both the instant claim as well as the 2022 claim concern the same subject matter and are based upon the same facts and grounds and the only substantial difference between the two is the addition of the 2nd claimant as a claimant in these proceedings. There is nothing before me on which I can make a determination that the intent of the claimants in bringing this claim is to abuse the court's process. However, I also consider that the previous proceedings having been struck out must have been due to some fault on the part of the claimants. In addition, the application for stay has been made at an early stage of the proceedings. In the light of these circumstances, I am of the view that it would be fair to require the claimants to pay the costs of the 2022 proceedings before requiring the defendant to expend his time and resources to mount a defence to what is in substance the same claim.

[30] The only issue that remains is the determination of an appropriate sum to be paid in the absence of the costs being quantified. In my view, the objective in determining such a sum should be to arrive at a figure that is not too much of an overestimation of the sums which would be ordered at taxation as this might work injustice to the claimants while seeking to avoid arriving at so paltry a sum as would render the order meaningless. In determining an appropriate sum, I note that counsel who appeared in this matter for the defendant also appeared in the 2022 claim and I take judicial notice of the fact that he has some number of years of experience at the Bar. I am of the view that based on the Practice Direction on Costs 2018, his hourly rate would be somewhere in the range of $36,000.00 to $45,000.00. I consider that he would have spent time perusing the claim documents and meeting with the defendant to take instructions. Also, he would have taken the necessary action to have the claim struck out and then attended and made submissions at the hearing at which the court made the determination that the claim should be struck out. Taking all of this into consideration, I am of the view that an appropriate sum would be $250,000.00.

[31] I therefore order as follows:

1. The instant claim is stayed until the sum of $250,000.00 or such other sum as may be agreed between the parties be paid into court or otherwise secured to the satisfaction of the defendant.
2. The claimants are to pay the sum ordered in paragraph 1 of this order by 6 September 2024.
3. The defendant shall file an affidavit in answer within 28 days of 6 September 2024 or upon receipt of proof of payment by the claimants of the sum of $250,000.00 or such other sum as agreed by the parties if the latter dater is later in time.
4. Upon the expiry of 28 days from the date of proof of payment of the sum of $250,000.00 or any other agreed sum, the claimants or the parties are at liberty to approach the registrar for a date on which the first hearing of the fixed date claim form is to take place or continue.
5. Costs of this application to the defendant to be taxed, if not agreed.