



[2016] JMSC Civ. 242

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 02305

BETWEEN	DEMETRI JOBSON	1ST CLAIMANT
AND	MAX GILBERT JOBSON	2ND CLAIMANT
AND	THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR OF THE ESTATE) (OF GILBERT BARON JOBSON)	1ST DEFENDANT
AND	NEW FALMOUTH RESORTS LTD.	2ND DEFENDANT

Denise Senior-Smith and Olivia Derrett instructed by Oswest Senior-Smith and Company for the Claimants

Ransford Braham Q.C, for the 1st Defendant

Juliet Mair-Rose, instructed by Riam Esor and company appears for the 2nd Defendant

Geraldine Bradford, Attorney-at-law, appears as a representative of the 1st Defendant

HEARD: November 30 and December 9, 2016

APPLICATION BY 1ST DEFENDANT TO STRIKE OUT CLAIM – LEGAL PRINCIPLES TO BE APPLIED – ABUSE OF PROCESS – CLAIM SEEKS RELIEFS FOR ALLEGED NEGLIGENCE PERTAINING TO ADMINISTRATION OF DECEASED’S ESTATE – WHETHER REMEDY FOR BREACH OF TRUST CAN PROPERLY BE PURSUED AS A NEGLIGENCE CLAIM – SECTIONS 39 AND 40 OF THE ADMINISTRATOR GENERAL ACT – FAILURE TO COMPLY WITH DUTIES OF TRUSTEE – NEED TO SET OUT CAUSE OF ACTION IN CLAIM FORM

ANDERSON, K. J

- [1] The 1st defendant's application for summary judgment was withdrawn during court hearing on November 30, 2016.
- [2] The 1st defendant has applied in their amended application for court orders which was filed on April 18, 2016, to strike out the claimant's claim made against that office holder – The Administrator General for Jamaica. The claimant has opposed that application, whereas the 2nd defendant has expressed neither opposition to, nor support for same.
- [3] The application to strike out, is contending, pursuant to **rule 26.3 (1) (c) of the Civil Procedure Rules (C.P.R)**, that the claimants' statement of case discloses no reasonable grounds for bringing a claim. As stated by Cooke J. A., who gave the leading judgment in the case – **Stewart & Issa** – Supreme Court Civil Appeal No. 16 of 2009, the consideration under **rule 26.3 (1) (c)** is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to divine the outcome of a properly cited claim (see paragraph 14).
- [4] In the **Stewart and Issa** case, *supra*, the Court of Appeal thus carefully drew the distinction between an application to strike out a claim, pursuant to **rule 26.3 (1) (c)** and an application for summary judgment, pursuant to **rule 15.2**. It is only in respect of the latter-mentioned type of application, that it is properly open to this court, to consider whether the claimants' claim has any realistic prospect of success at trial. At first instance in the **Stewart and Issa** case, Sykes J., apparently did not recognize that distinction and accordingly, his order striking out the claimant's claim for damages, interest and costs, for libel, was overturned, on appeal to the Court of Appeal.
- [5] On that same point, see judgments of this court: **Victor Hyde and E. Phil and Son A.S Ltd. and Attorney General of Jamaica** consolidated with **Mitsy**

Stewart and E. Phil and Son A.S Ltd. and Attorney General of Jamaica –
[2015] JMSC Civ. 150 and **City Properties Ltd. v New Era Finance Ltd. –**
[2013] JMSC Civ. 23.

- [6] Striking out of a statement of case, should only be done, in plain and obvious cases. See: **S & T Distributors Ltd. and anor. v C.I.B.C Jamaica Limited and anor.** SCCA No. 112/2004.
- [7] Looking at the claimants' statement of case, the starting point would be the document which was filed on August 12, 2013 and intitled as: 'Claim form,' although it is clearly an amended claim form, since the original fixed date claim form was in fact filed on April 20, 2012.
- [8] The amended claim form, is defective to an extent. It has set out a description of the parties and it has set out all of the orders being sought by the claimants, arising from their claim.
- [9] What it has not set out in clear terms, is the cause of action underlying their present claim. Instead, what this court has had to do, is carefully consider each of the 36 reliefs sought, for the purpose of determining whether any of those reliefs disclose a cause of action. **Rule 8.7 (1) of the C.P.R** requires a claimant in a claim form, to include a short description of the nature of the claim and specify any remedy that the claimant seeks. The claimants really have not provided any short description of the nature of their claim, which is the equivalent of what, in legal parlance, would be termed as their, 'cause of action.'
- [10] The claimant have though, sought as one of the 36 specified reliefs, sought – 'damages for negligence' and 'damages for breach of trust and fiduciary duty.' Accordingly, this court has been able to conclude that the claimants' cause of action is founded upon alleged negligence and breach of trust and fiduciary duty.' Mrs. Senior-Smith, for the claimants, during the oral submissions which she

made upon this court's hearing of the 1st defendant's application, did then make it abundantly clear, that that was so.

[11] Accordingly, in the claimants' 2nd further amended particulars of claim, as required, the claimants have set out therein, particulars of the alleged breach of duty and negligence, on the part of the 1st defendant. In paragraph 12 of that document, (2nd further amended particulars of claim), immediately prior to having set out those particulars, it is averred as follows: '*The claimants assert that the 1st defendant failed in her statutory duties to the estate in that she failed to well and truly administer the estate of Gilbert Baron Jobson.*' To this court's mind, that is the foundation of the claimants' claim.

[12] A large number of particulars of negligence alleged, pertain to negligence in respect of and/or surrounding the obtaining of a court order pertaining to the then proposed sale of a parcel of land known as 'Orange Grove' in the parish of Trelawny, comprised in a Certificate of Title registered at Volume 29 Folio 7 of the Registrar Book of Titles. The application for that court order, specifically sought this court's authorization, 'to ratify the sale' of that land parcel, to the 2nd defendant.

[13] It is undisputed that following upon that court order having been made, that parcel of land was transferred to the 2nd defendant, by the 1st defendant. That court order, which was made by Rattray, J on April 25, 2005, was made the subject of an application on to set aside same. It should also be noted that the application for this court's order to ratify the sale of that land parcel, was made *ex-parte*. On the application to set aside that order, Ms. Justice Simmons had refused to set aside same. See: **Demetri and Max Jobson and Administrator General for Jamaica and New Falmouth Resort Ltd.** – [2015] JMSC Civ. 253. That order is now the subject of an appeal to the Court of Appeal. Simultaneously therefore, the claimants are pursuing this claim and in this claim, they are also challenging what they contend as being the bases upon which the order of Rattray, J was obtained by the Administrator General. That in and of

itself could perhaps be viewed as an abuse of process, as it constitutes more than one legal process being used simultaneously, in an effort to challenge this court's order, as was made by Rattray, J. Since that contention has not been raised by the 1st defendant for present purposes though, this court will not make much further comment as to same.

- [14] The 1st defendant is contending, for the purposes of their present application, that no claim can be made against them, for damages for negligence, arising from the sale of the parcel of land now the subject of dispute.
- [15] The 1st defendant had sought, by means of their present application, to strike out the claim, or such portions thereof, as this Honourable Court deems fit to be struck out. On that basis, it would be properly open to this court, to strike out the claimant's claim for damages for negligence, whilst leaving as extant, the claimants' claim against the 1st defendant, for breach of fiduciary duty. It is of course though, also open to this court, to either not strike out any aspect of the claimants' statement of case, or to strike it out, entirely.
- [16] For their part, notwithstanding the content of their written submissions, which suggest otherwise, upon the hearing of this matter, which I had presided over, on November 30, 2016, the 2nd defendant's counsel then made it clear to this court, that they are neither in opposition to, nor supportive of the 1st defendant's application. Their position is that, provided that, if the claim remains in existence against the 2nd defendant only, because, arising from the 1st defendant's present application, the claimant's claim against the 1st defendant is wholly struck out; the 1st defendant is named by the court, as an 'Interested Party' in respect of this claim, they would have no position, one way or the other, as to how this court should rule on the 1st defendant's present application. Accordingly, this court will not, in these written reasons make any further mention of any aspect of the 2nd defendant's written submissions and it should be noted that upon the last court hearing, the 2nd defendant's counsel made no oral submissions in respect of the 1st defendant's present application.

- [17] For the purposes of their present application, the 1st defendant's lead Counsel – Mr. Ransford Braham, Q.C. relied heavily on the cases: **Business Computers International Ltd., v Registrar of Companies and ors.** – [1988] 1 Ch 229 and **Martine v South East Kent Health Authority** – 20 BMLR 51 and **Jain and anor. v Trent Strategic Health** – [2009] 1 AC 853.
- [18] Lead counsel for the claimants though, has submitted that those cases bear no similarity to the present claim now under careful consideration by this court, in terms of the factual underpinnings of those cases, as compared with the factual underpinning of this claim.
- [19] For my part, I agree with the claimants' counsel, in that respect. The **Jain and Martine** cases, *supra*, are cases in which it was determined by the U.K House of Lords and Court of Appeal of England, respectively, that in England, the purpose of the statutory power granted to a health authority, which is, for the purposes of the **Registered Homes Act 1984**, a registration authority in an area where nursing homes are operated, did not owe a duty of care to the proprietors of that nursing home, in making an application to the court, pursuant to **section 30 of the Registered Homes Act 1984**, for the cancellation of the registration of that nursing home.
- [20] In those cases, respective courts concluded that the purpose of the statutory power granted to the registration authority, was the protection of residents of nursing homes and those courts refused to extend the registration authority's duty of care, at common law, so as to have such an authority owe a duty of care to anyone other than the residents of nursing homes.
- [21] Those cases are not, at all, apposite for application by this court, in deciding as to whether the 1st defendant owes the claimant any duty of care, because there can be no doubt, that the 1st defendant, who is the administrator of the deceased's estate, is a trustee of and in relation to that estate.

[22] Thus, I would also adopt dicta which was earlier applied by my sister Judge – Simmons, J in the **Demetri Jobson** case, *supra*. That dicta emanated from the case – **Clifton St. Hill v Augustin St. Hill**, which is an unreported judgment of the O.E.C.S Supreme Court and which is recorded as: Civil Suit 402 of 1996. At paragraph 13 of the Court’s judgment in that case, Mitchell J is recorded as having stated:

‘An Administrator of an intestate’s estate is a trustee. It is always the duty of an Administrator to satisfy the beneficiaries that he is properly administering the estate. He is required to act at an even higher level than he would in protecting his own interests. He must report and account. More than that, he is well advised to seek consensus and approval. If he tries and fails to secure the consent and approval of a particular beneficiary, he is opening himself up to a lawsuit. He is not well advised if he then relies on the statutory powers given to him by the act and acts unilaterally. He is expected in such a case to apply to the court for directions on the administration of the estate. He is not safe in acting unilaterally. Only the shield of directions of the court will protect him absolutely from a lawsuit being brought by a discontented beneficiary.’

[23] I would only, for my part, wish to make clear, that it is my understanding that the duty of care owed by a paid trustee, such as is the Administrator General, is higher than that of an unpaid trustee. See: **National Trustee Co. of Australasia v General Finance Company of Australasia** – [1905] AC 373, esp at 381, per Sir Fred North (PC). In his statement as quoted immediately above, it is my understanding that in referring to an ‘Administrator,’ his Lordship Mitchell J., was in reality, referring to a paid trustee, such as, for instance, the Administrator General for Jamaica.

[24] What there can be no doubt about though, is that the Administrator General owes /owed a duty of care, while administrating the deceased’s estate. That duty varies to some extent, depending on whether the Administrator General is paid or unpaid, for carrying out the duties of that office, as imposed by the **Administrator General Act**.

[25] As has been stated by Philip Pettit, in his text, entitled: Equity and the Law of Trusts, 4th ed., 1979:

'Failure to comply with any of the duties of a trustee as trustee, whether by a positive act, for instance, investing the trust funds in unauthorized investments, or by a failure to act, for instance, neglecting to get the trust funds transferred into his name, constitutes a breach of trust, for which the trustee will be liable. The liability extends to all loss thereby caused directly or indirectly to the trust estate, the onus being on the plaintiff beneficiary to prove a causal connection between the breach of duty and the resulting loss, and, even where no loss can be shown, to any profit which has accrued to the trustee. It is equally a breach of trust whether committed fraudulently by a trustee for his own purposes, or innocently, for the benefit of the trust estate and ignorant of the fact that it was a breach of trust.' (Cap. 12, p.376)

[26] In the text: Underhill and Hayton Law of Trusts and Trustees (15th ed., 1995), the learned authors state as follows:

'A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation. Any act or neglect on the part of a trustee which is not authorized or excused by the terms of the trust instrument, or by law, is called a breach of trust. The control of the trustee may, under the terms of a trust, be subject to fiduciary or personal powers vested in another person, who may sometimes be expressly designated a 'protector' or who may simply be the settler or the settler's widow, brother or eldest son.' For his part, **Megarry VC, in Tito v Waddell** (No. 2) – [1977] 3 All ER 129, at 246-248, concerned himself with two (2) American formulations: i) 'every omission or violation by a trustee of a duty which equity lays on him is a breach of trust.' and ii) 'a trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries.'

- [27] One of the leading cases from this jurisdiction, as regards breach of trust, concerns matters pertaining to the administration of the estate of the person commonly known as, 'Bob Marley.' See: **Makeda Jahnesta Marley and ors. v Mutual Security Merchant Bank & Trust Co. Ltd.** [1990] 39 WIR 237.
- [28] In the present claim, as it now stands before this court, arising from the filing and service by the claimants, of their second further amended particulars of claim, the claimant have specifically set out particulars of negligence and 'breach of duty.' Accordingly, it is open to them, by means of their claim, to seek to prove that the 1st defendant breached that office's duty as a trustee, to the claimants, who are beneficiaries of the deceased's estate. That is at least one part of what their claim is all about.
- [29] In that regard therefore, this court agrees with the submission made by counsel for the claimants, that whilst a part of the claimants' claim seeks reliefs for negligence, there is another part of this claim, which pertains to allegations of breaches of duty by the Administrator General. It was of course though, accepted by the claimants' counsel, that it is open to this court, pursuant to the 1st defendant's application, to strike out part of the claimants' statement of case.
- [30] See: **Allen v Imlett and Nicholls** – [1817] Holt NP 641; and **Re Lake, ex parte Dyer** – [1901] 1 KB 710, at 715, per Rigby, L.J. It is settled law, that, as stated in Halsbury's Laws of England, 4th ed., at paragraph 942, '*A breach of trust in itself is merely a violation of an equitable obligation; the remedy for it, therefore, lies in equity only and must be sought in a court of equitable jurisdiction.*'
- [31] The Supreme Court of Jamaica, is a court of common law and equitable jurisdiction. See **sections 27 and 38 of the Judicature (Supreme Court) Act** in that regard. Where there is alleged though, a breach of duty by a trustee, the remedy lies in equity only. Accordingly, a claim founded on the tort of negligence, cannot properly be pursued, in such a circumstance, since negligence is a tort which has come into being, solely via the common law.

- [32] In the circumstances, the claimants' statement of case founded on the tort of negligence constitutes a statement of case which discloses no reasonable grounds for bringing that claim – being the claimants' negligence claim, against the 1st defendant.
- [33] On that basis therefore, the claimants' claim for damages for negligence, is struck out.
- [34] It is though, the legal view as expressed by lead counsel for the 1st defendant, that it is the entire claim that should be struck out and in that respect, they also relied heavily on their submission that the provisions of **sections 39 and 40 of the Administrator General Act** exempt the 1st defendant from any liability as alleged against the Administrator General, by the claimants.
- [35] Those provisions, respectively, read as follows:

'39. The administrator General may at any time apply to the Supreme Court for the opinion, advice, or direction of the court or judge respecting his rights or duties with regard to applying for, or obtaining administration of any estate, or trust, or probate of any will, or assuming the management of any estate, or trust, or with regard to any estate or trust vested in or administered by him under this Act, or with regard to any matters arising out of the management or conduct of any such estate or trust.'

'40 The Administrator General obtaining bona fide the opinion or direction of the Supreme Court, or of a judge thereof, or acting bona fide on such opinion or direction, shall be deemed, so far, as regards his own responsibility, to have discharged his duty as administrator, executor, trustee, guardian, committee, or receiver, with regard to the estate or trust with respect to which such opinion or direction was given.'

- [36] Prior to addressing the significance of those statutory provisions in the context of, the claimants' claim for, 'breach of duty,' it is imperative that it be noted that several of the particulars pertaining to such alleged, 'breach of duty,' in reality,

pertain to alleged carelessness and overall, neglect on the 1st defendant's part, in having made an application to this court, which was filed by that office, seeking this court's authorization, for the Administrator General to ratify the sale of all that parcel of land known as Orange Grove, in the parish of Trelawny, as originally registered at Volume 29 Folio 7 of the Register Book of Titles and now registered at Volume 1389 Folio 427 of the Register Book of Titles.

- [37] That is undisputed and indeed, indisputable, as also is the fact that this court had, by order made on April 25, 2005, made the order which had been applied for. Furthermore, it is undisputed and indisputable, that said application was made *ex parte* and was heard by Mr. Justice Rattray, *ex parte*.
- [38] It is the contention of the 1st defendant, strongly urged upon this court, by that defendant's lead counsel, that said application was made to this court, pursuant to **section 39 of the Administrator General Act** and that thereafter, having made that application and obtained the court's order as was applied for, the 1st defendant's actions in that regard and in particular also, as regards the sale of that property, by the 1st defendant, to the 2nd defendant, are completely protected and the 1st defendant is immune from any liability in respect thereof.
- [39] In that regard, **section 39** they contend, permits the 1st defendant to make the application which that office did, as regards the land which is now the subject of contention, in this claim and furthermore that it is **section 40** which provides the 1st defendant, with immunity from liability, arising from the 1st defendant having acted in compliance with that court order.
- [40] In response to that submission, the claimants' lead counsel had urged this court not to interpret the provisions of **sections 39 and 40 of the Administrator General's Act**, since, according to her, the manner in which those provisions ought to be interpreted, is presently the subject of an appeal to the Court of Appeal.

- [41] With the greatest of respect to lead counsel for the claimants, I have found myself unable to accede to that urging of the claimants' counsel. That is so because, firstly, that issue of interpretation should not presently be the subject of consideration, or expected consideration, by more than one court, at the same time. That is precisely what this court had, in passing, alluded to earlier, as regards there being separate court proceedings ongoing at the same time, related to the same issue and those proceedings are being pursued by the same parties. That in and of itself, may constitute an abuse of process, but as I have not, for present purposes, been called upon to decide that, I will make no further reference to same, other than to the limited extent as referred to immediately hereafter, in these reasons.
- [42] Since it is the claimants who are pursuing those separate court proceedings, which largely relate to matters surrounding the obtaining by the 1st defendant of the aforementioned court order, it hardly lies within the purview of the claimants to contend, with any force whatsoever, that if, in response to those proceedings, the 1st defendant has raised the provisions of **sections 39 and 40 of the Administrator General Act**, then it should be the claimants to decide as to which court should first provide its view as to the interpretation of those provisions.
- [43] There is no doubt that ultimately, if the Court of Appeal's interpretation of those provisions, differs from this court's interpretation of same, then, it will be the Court of Appeal's interpretation, which will prevail. That does not mean though, that this court should not interpret same, if the circumstances dictate that it should do so.
- [44] As things presently stand in respect of this matter, this court has no option properly available to it, to avoid interpreting those provisions, since, if this court were to do so, it would then mean that this court would not have properly adjudicated on the 1st defendant's application to strike out the claimant's claim, which is founded on one, of the grounds set out in the 1st defendant's amended

notice, that being that the applicant relies on **sections 39 and 40 of the Administrator General Act**. In the circumstances, this court will, for present purposes, now provide its interpretation of same, particularly though, for the purpose of deciding as to whether those provisions can properly be applied in favour of the 1st defendant, so as to render them immune from any liability as alleged in the claimants' statement of case.

[45] It is this court's view that the provisions of **section 39 of the Administrator General Act** can and do avail the 1st defendant. That office applied for an order of this court that the Administrator General was authorized to ratify the sale of the relevant parcel of land, for a specific purchase price, to the 2nd defendant. This court made that order and could only properly have done so, pursuant to the provisions of **section 39 of the Administrator General Act**. This court is presumed as knowing and always applying the law, when making its orders. If this court erred in having made that order, then the appropriate recourse must be by way of appeal from that order, or at the very least, some form of legal challenge to this order, as distinct from the pursuit of a claim against the 1st defendant arising either from how that order was applied for, or arising from the 1st defendant having obtained that order.

[46] In the circumstances, only for those reasons, the claimants' claim must be and is struck out in its entirety as the claimants' statement of case has, on the face of it, disclosed no reasonable grounds for bringing a claim against the 1st defendant.

[47] Whilst the 1st defendant has also contended, in one of their grounds in support of their present application, that this claim is an abuse of process and is frivolous and vexatious, suffice it to state for present purposes, that it is largely unnecessary to address that issue, because of the conclusions which this court has reached on other pertinent issues.

[48] This court's orders therefore, will be as follows:

- (i) The 1st defendant's amended application for court orders which was filed on April 18, 2016, is granted and the claimants' claim against the 1st defendant is struck out.
- (ii) The costs of the 1st defendant's said Amended Application and the costs of this claim are awarded to the 1st defendant and shall be taxed, if not sooner agreed.
- (iii) The 1st defendant shall file and serve this order.

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Hon. K. Anderson, J.