



[2018] JMCC COMM 20

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. 2017 CD 00629**

<b>BETWEEN</b>	<b>CHARLES MCLAUGHIN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SHERRIE GRANT</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>COLLIN SMITH</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>SHERRIE GRANT</b>	<b>1<sup>ST</sup> ANCILLARY DEFENDANT</b>
<b>AND</b>	<b>COLLIN SMITH</b>	<b>2<sup>ND</sup> ANCILLARY DEFENDANT</b>

**Striking Out – Application by First Defendant – Further, Further Amended Particulars of Claim- No leave to file obtained - Whether new cause of action – Whether Limitation bar- CPR Rules 20.4; 26.3 and 26.9.**

Mr. D. Sterling instructed by Global Law for Claimant

Mr. Lamar Neale instructed by NEA/LEX for 1<sup>st</sup> Defendant

Tashell Powell for 2<sup>nd</sup> Defendant

**IN CHAMBERS**

**HEARD: 30<sup>th</sup> May 2018**

**COR. BATTS J.**

- [1] On the 30<sup>th</sup> May 2018, I made the following orders:
- (i) Application to strike out Further, Further Amended Particulars of Claim dismissed.
  - (ii) Further, Further Amended Particulars of Claim will stand as filed.
  - (iii) Application for Summary Judgment in relation to further Amended Claim is withdrawn.
  - (iv) Permission to appeal is granted.
  - (v) No order as to the costs
  - (vi) Case Management Conference fixed for the 24<sup>th</sup> July 2018 at 10:30 am for one (1) hour.

I promised then to put my reasons in writing. This judgment fulfills that promise.

- [2] On the morning of the hearing, I was advised that the Ancillary Claimant and its attorneys on record had been excused from attending today's hearing which did not directly concern them.

- [3] The application is brought by the 1<sup>st</sup> Defendant. It seeks to firstly strike out the Further, Further Amended Particulars of Claim and also Summary Judgment. Mr. Neale who appeared for the 1<sup>st</sup> Defendant candidly indicated that if the Further, Further Amended Particulars of Claim were not struck out, then his application for Summary Judgment could not succeed.

- [4] Mr. Neale urged that the Further, Further Amended Particulars of Claim were filed after the Case Management Conference and without the permission of the Court. This was contrary to the rules and therefore it ought to be struck out. He submitted further that, the purported amended pleading introduced new causes of action being breach of contract, fraudulent misrepresentation and unjust enrichment which were all now barred by limitation of action. He relied on Rules 26.3 (1)(a) and 20.4(2).

- [5] Rules 26.3 (1) (a) is as follows:

**“In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-**

**(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings”.**

**Rule 20.4 (2) states: “statements of case may only be amended after a case management conference with the permission of the court”.**

**[6]** I reminded counsel that Rules 26.9 (1)(2)(3)and(4) are also relevant. These rules are as follow:

- **“26.9 (1) this rules applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction of court order.**
- **26.9 (2) 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.**
- **26.9 (3) where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.**
- **26.9 (4) the court may make such an order on or without an application by a party”.**

**[7]** It bears repeating that these Rules of Civil Procedure were enacted with the overriding objective of allowing the court to deal with cases justly, see Rule 1.1(1) and (2). In this regard, it is important for parties to bear in mind that court proceedings are not, as one English judge famously said, like a game of “snap”. In the Jamaican context we would say a game of “catch you fool”. These rules are not traps in which one party waits for the other to fall and thereby wins. On the contrary, the primary purpose is to facilitate fairness and a fair trial. This is why Rule 26.3(1) is permissive (the Court may) and Rule 26.9 exists. I would adopt without further gloss the recommendation of Stuart Sime contained in the Fifth Edition of his treatise **“A Practical Approach to Civil Procedure”** at page 276:

***“A party not in default faced with an opponent who has not complied with the court’s directions is not entitled to try to make matters worse for the defaulting party by sitting back and allowing further time to go by. Nor is***

***the party not in default entitled to jump the gun by making an immediate application for an order with sanctions. Instead, the correct procedure is for the innocent party to write to the defaulting party referring to the default, asking for it to be rectified within a short reasonable period (usually seven or 14 days), and giving warning of an intention to apply for an order if the default is not rectified”.***

- [8] Fairness in any given circumstances involves several considerations. It is impossible to note them all as they vary in number and weight dependant on the circumstances of the case. The public interest, in an efficient system of justice and a fair allocation of resources has also to be considered.
- [9] In this case, the circumstances material to the application are that:
- (a) There is as yet no date fixed for trial or which might be impacted adversely.
  - (b) The Further, Further Amended Particulars of Claim were filed after a Case Management Conference without the permission of the Court.
  - (c) The Further, Further Amended Particulars of Claim were filed subsequent to the application for Summary Judgment.
  - (d) The application for Summary Judgment was filed in relation to the Further Amended Particulars of Claim.
- [10] The claim concerns the sale ,on or about the 17<sup>th</sup> day of February 2006, of a motor vehicle by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Claimant. That motor vehicle was, on the 9<sup>th</sup> day of March 2012, seized by the Ancillary Claimant from the Claimant. The Ancillary Claimant is a bank which had a bill of sale over the vehicle. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not discharged the bill of sale. This, it is alleged, was not reflected on the title produced to the Claimant at the time of sale.
- [11] The claim was filed on the 18<sup>th</sup> June 2013 and was brought against the Defendant bank (now the Ancillary Claimant) for detinue and conversion, although those words do not appear in the claim. It was a complaint about an alleged wrongful seizure of the car by the bank. The bank filed a defence and at the same time commenced an ancillary claim against the two (2) named individuals who had sold the vehicle to the Claimant. The bank’s defence asserted that it had a registered bill of sale over the motor vehicle and that any transfer of title was fraudulent. The Ancillary Defendants

each filed a defence. Each Ancillary Defendant blamed the other and alleged fraud. It is in this context that the Claimant elected to involve the Ancillary Defendants as Defendants. This was the purpose and intent of the Further Amended Claim and the Further Amended Particulars of Claim. The claim although commenced in the Common Law/HCV Division was transferred by an Order made on the 29<sup>th</sup> November 2017 to the Commercial Court. The Further Amended Particulars of Claim were filed on the 2<sup>nd</sup> October 2017 and inserted Paragraph 7:

**“ The 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendants sold the said motor vehicle whilst a Bill of Sale was registered to the 1<sup>st</sup> Defendant and whilst sums were allegedly owing to the said 1<sup>st</sup> Defendant”.**

- [12] The Further, Further Amended Claim and Particulars of Claims remove the bank as a Defendant and expressly allege breach of contract, fraudulent misrepresentation and unjust enrichment and particularize the allegations. It was filed without, as I said, the permission of the Court.
- [13] The Claimant's response to the application was to suggest that, as the matter had been transferred to the Commercial Division, and there had not as yet been a Case Management Conference in that division, there was no breach of the rule. I thought the submission untenable and invited the Claimant's counsel to orally apply for an extension of time. This he did. Whether or not the extension had been applied for, now that I have considered the matter, it would have been appropriate for the Court to make such orders of its own motion as would put matters right.
- [14] Counsel for the respective Defendants, their differences on the substantive claim notwithstanding, found common ground on the procedural matters. It was, they said, unfair to allow the amendment to stand because a new cause of action was being introduced. That cause of action is now barred by statute of limitation. Fraud and breach of contract could only be claimed within six (6) years, they said. A complaint was also made as to the sufficiency of the particulars pleaded. The amendment without permission of the Court should therefore be struck out.

- [15] I asked, but neither could provide, the statutory basis for a six (6) year limitation on fraud. I have not found it; whether it exists or not, however, it is clear that the amended plea is for fraudulent misrepresentation and unjust enrichment. These are equitable claims. If barred, it would be by reason of laches. Jamaica's Limitation of Actions Act was enacted in 1881. It does not speak to a limitation bar for torts, generally, as does the English Act of 1939. Negligence has a time bar of six (6) years because it is an action" on the case", see **Lance Melbourne v Christina Wan (1985) 22 JLR 131**. It seems to me, as at presently advised, that the equitable claims of unjust enrichment and fraudulent misrepresentation here in Jamaica, have no statutory time bar. The time bar on a simple contract is to be found in section 46 of the Limitation of Actions Act which adopts and applies an English statute which is some 400 years old that is, 21 James I Cap 16 . Judges in this Supreme Court and Court of Appeal have repeatedly, and apparently in vain, called for its revision.
- [16] In any event, the issue of a time bar often carries with it the ancillary question: "When did the cause of action accrue?" The answer to which often depends on factual determinations such as : When did the fraud or breach of contract occur, or, when did the Claimant become aware of the fraud or breach of contract, or, when was the loss suffered. These matters are often best left for determination at a trial. This is particularly so in a case such as the present, where a person entered into a transaction in which several others are making competing allegations, and that innocent person has no real way of knowing when how or why things have gone awry .Similarly when laches is to be considered a court of equity considers all the circumstances .It is best in this case that the question of limitation and/or laches be dealt with at trial.
- [17] There is, be it noted, no application to strike out the Further Amended Particulars of Claim which introduced the claim against the First and Second Defendants. Paragraph 7 in that statement of case alleged that the Defendants sold the vehicle while the bank held a bill of sale which had not been discharged. In the context of that allegation the Further, Further Amended Particulars of Claim were merely expanding on an assertion already made against the Defendants in the Further Amended Statement of case.

- [18]** It seems to me therefore that, had the Claimant applied for permission to file the Further Further Amended Claim and Particulars of Claim, a judge would have reasonably granted such permission. There is no demonstrated prejudice to the Defendants because any limitation bar alleged would have already been germane at the time the Further Amended Claim was filed. The Defendants can plead, and have litigated, any limitation defence they think applicable. My observations in that regard are stated to demonstrate that, insofar as these issues are factual and complex, in the circumstances of the case now before me they ought to be resolved at trial.
- [19]** It is worth noting also that the allegations of fraud are not entirely new in the context of the case as a whole. The Defendants are not taken by surprise in the sense of having to locate evidence and such like. This is because the bank, in its Ancillary Claim, had from the outset alleged fraud against the Ancillary Defendants who are the same persons now named as Defendants. There is therefore no prejudice consequent on the Further Further Amendment being allowed to stand.
- [20]** In these circumstances therefore I made the orders outlined in paragraph 1 of this Judgment.

**DAVID BATTS**  
**PUISNE JUDGE**