



[2024] JMCC Comm 08

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2021CD00089

BETWEEN	BEWELK EQUIPMENT AND CONSTRUCTION LIMITED	CLAIMANT
AND	KIRK CHIN	1 st DEFENDANT
AND	BRIAN CHIN	2 nd DEFENDANT
AND	LOUIS CHIN	3 rd DEFENDANT
AND	MORANT BAY QUARRY LIMITED	4 th DEFENDANT

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mr. Hadrian Christie instructed by HRC Law for the Claimant

Mr. Christopher Dunkley & Ms. Tiffany Sinclair instructed by Phillipson Partners
Attorneys-at-Law for the 1st and 4th Defendants

Ms. Shantel Jarrett instructed by Zavia Mayne & Company for the 2nd, 3rd and 5th
Defendants

Heard: 30th January, 1st and 1st and 21st February 2024

BROWN BECKFORD J

ORAL JUDGMENT

[1] The Claimant's amended notice of application for Court Orders filed January 16th 2024, seeks Orders as follows:

1. The Claimant be permitted to amend its statements of case to include a relief for recovery of possession of 2 Red Hills Road and 2 Morant Road, Morant Bay In the Parish of Saint Thomas.
2. The ordinary witnesses to be called by the Claimant be increased from three (3) to five (5).
3. An injunction restraining the Defendants, whether by themselves, their servants, and/or their agents, from interfering or tampering with or dissuading or attempting to dissuade the Claimant's witnesses from giving evidence in this matter, including but not limited to: Jo-Ann Chin; Brian Chin, Jr.; and Markland Chin.
4. The Issues of liability and damages be tried and determined separately with the issue of liability being tried on the already scheduled trial date of 11 - 15 March 2024, after which the Court gives directions for an assessment of damages.
5. Costs to be taxed if not agreed.

APPLICATION FOR INJUNCTION

[2] I had previously refused the oral application of Ms. Jo-Ann Chin through her Attorney-at-Law, Mr. Bertram Anderson, to be given time to file an affidavit in response to the affidavit of Ms. Aimee Mitchell. The Court reasoned that Ms. Chin was aware of this application for an injunction and had sufficient time prior to the hearing to do so. The Court also considered that it could not at this stage resolve any conflicts in the affidavit evidence given that it would not be subject to cross-examination. The Defendants have also indicated through Counsel that they would not put in her affidavit on their case. This ofcourse brings the Court to the reminder that the courts in civil proceedings act in personam between parties to an action and may make Orders against parties only.

[3] This application for an injunction invited the Court to exercise its inherent jurisdiction to control its processes. The applicable law is captured in a extract from Halsbury's Laws of England Volume 11 (2015) quoted in **Chen-Young (Paul) et al v Eagle Merchant Bank Jamaica Ltd and anor** [2018] JMCA App 7.¹

Unlike all other branches of law, except perhaps criminal procedure, there is a source of law which is peculiar and special to civil procedural law and is commonly called the 'inherent jurisdiction of the court'. In the ordinary way, the Supreme Court, Court of Appeal, and the High Court, are superior courts and as such no matter is deemed to be beyond their jurisdiction (including the general administration of justice within their territorial limits, and powers in all matters of substantive law) unless it is expressly shown to be so. The County Court, although an inferior court, also has an inherent jurisdiction to regulate its own procedures, provided that the exercise of his power is not inconsistent with statute or statutory rules.

The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil, properly and effectively, its role as a court of law. It has been said that the overriding feature of the inherent jurisdiction of the court is that it is a part of procedural law, both civil and criminal, and not a part of substantive law; it is exercisable by summary process, without a plenary trial; it may be invoked not only in relation to parties in pending proceedings, but in relation to any one, whether a party or not, and in relation to matters not raised in the litigation between the parties; it must be distinguished from the exercise of judicial discretion; and it may be exercised even in circumstances governed by rules of court (although a claim should be dealt with in accordance with the rules of court, rather than by exercising the court's inherent jurisdiction, where the subject matter of the claim is governed by those rules). The term 'inherent jurisdiction' is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute or rules of court. Even in an area which is not the subject of statute or statutory procedural rules, the court's inherent jurisdiction to regulate how the proceedings should be conducted is limited because (subject to certain established and limited exceptions) the court cannot exercise its power in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice.

In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure

¹ [2018] JMCA App 7, para 27

the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[4] A useful starting point to consider this application is against the background that actions aimed at interfering with witnesses and their testimony compromises the testimony of witnesses, put cases in peril, and impede due process. It also undermines the rule of law/administration of justice generally and weakens the credibility of the court. Such interference may take the form of threats, physical harm, extortion, bribery, or other more benign forms of coercion.

[5] This is the background against which the Court has to determine whether there is a sufficient basis to exercise its discretion to grant the injunction. Without making a finding as to exactly what occurred in the conversations between Ms. Chin and Ms. Mitchell, there are some facts that are not in dispute. These are itemized below:

1. Ms. Jo-Ann Chin is the sister of the virtual complainant and the 1st to 3rd Defendants.
2. Ms. Chin attended the offices of HRC Law and gave a statement on the 12th December 2023, which she signed and certified to be correct.
3. In this Statement, Ms. Chin asserts that she receives financial support from Mr. Kirk Chin and Mr. Louis Chin, the 1st and 3rd Defendants, having no other source of income.
4. Ms. Chin returned the following day to the offices of HRC Law in connection with that statement. It is reasonable to assume that this visit had to do with the statement she gave the day before.
5. Ms. Chin has retained the services of an Attorney-at-Law who indicated her unwillingness to participate in the trial.

[6] This is sufficient for me to make the assumption that she returned to the offices to withdraw her statement which was at the very least prompted by her interactions with her

brothers. In circumstances where she is financially dependent on the 1st and 3rd Defendants, there exists a real risk that her testimony could be compromised by her refusing to attend court or refusing to give evidence. This is an impending peril which the Court should use its inherent jurisdiction to derail.

[7] With respect to Mr. Markland Chin and Mr. Brian Chin, there is no material before the Court to suggest any interference with their testimony by the 1st and 3rd Defendants.

APPLICATION FOR AMENDMENT

[8] The Court is being guided by the following expositions on the law:

1. **Beep Beep Tyres, Batteries and Lubes Ltd v DTR Automotive Corp** where the Court of Appeal opined that:²

[53] Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court's overriding objective. The factors for the court's guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge's consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide.

(i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties;

(ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed;

(iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late stage, for example close to the trial date with the result that there may need to be an adjournment or

² [2022] JMCA App 18, para 53

if the application is made after trial has commenced, it should be considered with greater scrutiny;

(iv) whether there was delay in making the application to amend, the extent of the delay and the reason(s) for the delay;

(v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment;

(vi) whether any prejudice to the parties may be appropriately compensated by an order for costs;

(vii) the arguability of the proposed amendment;

(viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice;

(ix) the reason(s) advanced by the applicant for seeking an amendment; and

(x) the importance of having finality in litigation.

2. Attorney General of Jamaica (The) v Vassell (Cleveland) where the Court of Appeal opined that:³

[16] It is noted that for the purposes of the Act, an amendment to add or substitute a new party, or a cause of action is deemed to be a separate claim and to have commenced on the same date as the original claim. Therefore, if the original claim was commenced within the relevant limitation period (six years) and an amendment is allowed, adding a party or cause of action after the expiry of the limitation period, a defendant will be deprived of the limitation defence and will usually cause injustice not compensable by an order for costs. The usual rule therefore, is that such amendments are not permitted.

[17] In assessing whether a proposed amendment in fact amounts to a new cause of action, it is necessary to consider the statement of case as a whole. To determine whether a proposed amendment introduces a new cause of action for the purposes of the Act, it is necessary to examine the duty alleged, the nature and extent of the breach alleged and the nature and extent of the damage claimed. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. As Hobhouse

³ [2015] JMCA Civ 47, paras 16-18 & 21-22

LJ stated in **Lloyds Banks plc v Rogers** (1996) *The Times*, 24 March 1997):

“The policy of the section is that, if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.”

[18] In **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639, it is stated that where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action.

...

[21] It is clear that amendments to a statement of case after the limitation period may be appropriate in the interests of justice, provided that they are not new causes of actions. In **Brickfield Properties Ltd v Newton, Rosebell Holdings Ltd v Newton**, the court examined whether the applicable rule permitted an amendment to a statement of case after the limitation period. The court held that an additional cause of action could only be added to the statement of claim where the facts, or some part of the facts necessary to establish the claim made in the writ, would suffice to establish the additional cause of action. The court also noted that where a genuine and excusable mistake had been made and no detriment to the defendant had been shown, the judge had discretion to allow the amendment.

[22] In **Jamaica Railway Corporation v Azan**, K. Harrison JA stated:

“There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management.”

Harrison JA, in the same case, relied on *Lloyd Banks plc v Rogers* and *Savings and Investment Bank Ltd v Fincken* to set out the instances where an amendment may or may not take place after the limitation period has expired. a. If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts. **b. Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition**

of a new remedy, there is no addition of a new cause of action. c. A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded. (emphasis mine)

3. **Albert Simpson v Island Resources Limited** (unreported), Supreme Court, Jamaica, Claim No. 2005HCV01012, judgment delivered 24 April 2007 relied on by the Claimant

[9] This application seeks to add as a remedy an Order for recovery of possession of the properties in dispute. Counsel for the Claimant argued that this remedy was foreshadowed in the application to bring the derivative action, and is addressed in the pleadings by both parties. He also argued that this is not a new cause of action and will not occasion any new evidence. Consequently, there would be no prejudice to the case being prepared/presented by the Defendants. The Defendants argued that this amendment would deprive them of a limitation defence under **The Limitations of Actions Act**, their occupation being in excess of twelve (12) years would have dispossessed the registered owner of the properties in question. I agree with the Claimant that this is an addition of a new remedy and not a new cause of action. Therefore, the application to amend granted.

APPLICATION FOR SPLIT TRIAL

[10] The Court is guided by the principles laid down in **Electrical Waste Recycling Group Ltd and Another v Philips Electronics UK Ltd and Others**⁴ which asks the court to consider the following:

⁴ [2012] EWHC 38 (Ch), paras 5-6

1. Whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established, outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary?
2. What are likely to be the advantages and disadvantages in terms of trial preparation and management?
3. Whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials?
4. Whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case?
5. Whether a split may cause particular prejudice to one or more of the parties (for example by delaying any ultimate award of compensation or damages)?
6. Whether there are difficulties of defining an appropriate split or whether a clean split is possible?
7. What weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process?
8. Generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible?
9. Whether a split would assist or discourage mediation and/or settlement?

[11] The claim is for an accounting and payment of such sums found to be due on such accounts stemming from the use and control of the Claimant's assets, in breach of trust and directors' duties. The Claimant also claimed for damages. Except for possible experts (which was reserved to pre-trial review and for which no application was made) the evidence in both the liability and relief stage of the trial would come from the same

witnesses. There is therefore the risk of duplication of the evidence. It is also not clear to the Court that a clean split is possible.

[12] In any event, the trial court could exercise its inherent jurisdiction to split the liability and accounting phase of the trial. In **Smith (Dayne) v Hylton (William) & Anor** [2014] JMCA App 35, Mangatal JA (Ag), in the context of whether there should be separate hearings for the issue of liability against one tortfeasor and the assessment of damages against another in a personal injury claim, said:⁵

In the English Court of Appeal decision Coenen v Payne, which was referred to by both counsel in their submissions, it was pointed out (at page 1112) by Lord Denning MR that the normal practice is for issues of liability and damages to be tried together. However, under Rules of Court, the courts have power and should so order separate trials of issues of damages and liability whenever it is just and convenient so to do. I also found the judgment of Stephenson LJ helpful. At page 1114 he stated:

“In most personal injury cases the issues of liability and damages, though clearly separate, are rightly tried together. That is so, even where the issue of damages, perhaps because of complicated medical evidence, takes longer to try than the issue of liability. The reason is, I think, that it is usually most convenient for the parties to have all the issues between them decided together and that it helps the judge to assess the credibility of the plaintiff if he can hear what the plaintiff has to say not only about his accident but also about his injuries and his financial loss. I would not disturb that general practice. But the plaintiff has, in my judgment, no right to choose the normal method of trying liability and quantum at the same time, as the judge appears to have thought, and cannot claim any such right by agreeing to pay for the extra expense of his choice. The court has inherent jurisdiction to make any use of the relevant provisions in the Rules of the Supreme Court.... If the court thinks it just and convenient to order separate trials of separate issues or to give judgment for damages to be assessed by another court, the court can and should do so without treating ancient decisions as limiting its powers.”

⁵ [2014] JMCA App 35, para 28

[13] Notwithstanding the foregoing authority, the Court is not of the view that the circumstances of this case warrants a separate trial.

ADDITIONAL WITNESSES

[14] No objection was taken to the application for a split trial, but the Defendants have asked that they also be allowed additional witnesses. The Defendants were allowed five witnesses. They have filed witness statements for three but time to file and serve witness statements has expired. It should not be that they should be required to obtain relief from sanctions where they have already filed all the statements they wished to rely on.

[15] The Claimant will be allowed to increase their ordinary witness by two and the Defendants will be allowed to file two additional witness statements.

ORDERS

1. The Claimant is permitted to amend its statements of case to include a relief for recovery of possession of 2 Red Hills Road and 2 Morant Road Morant Bay in the Parish of Saint Thomas. The Claimant is to file and serve its Amended Statement of Case by the 22nd of February 2024.
2. The Defendants are to file and serve their Amended Defence by 1st March of March 2024.
3. The ordinary witnesses to be called by the Claimant is increased from three to five. The additional witness statements of Aimee Mitchell and Jo-Ann Chin filed on the 20th of December 2023 are permitted to stand.
4. The Defendants are permitted to file and serve two additional witness statements by 1st of March 2024.

5. An injunction is granted restraining the Defendants whether by themselves, their servants and/or agents from interfering or tampering with or dissuading Ms. Jo-Ann Chin from giving evidence in this matter.
6. The application that the issues of liability and damages be tried separately is refused.
7. Leave to appeal is granted with respect to Order No. 4.
8. Skeleton submissions and List of Authorities to be filed and served by each party by the 6th of March 2024.
9. Costs to be costs in the claim.
10. The Claimant's Attorneys to prepare, file and serve these Orders.

Brown Beckford J
Puisne Judge