



[2022] JMCC COMM 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017 CD 00451

BETWEEN	MAURICE GABAY	CLAIMANT
AND	CHRISTOPHER CARGILL	1ST DEFENDANT
AND	JAMES GODFREY	2ND DEFENDANT
AND	MJC MASTERBUILDERS LIMITED	3RD DEFENDANT

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2018 CD 00274

BETWEEN	MAURICE GABAY	CLAIMANT
AND	MJC MASTERBUILDERS LIMITED	DEFENDANT

The Claimant is unrepresented

Ms. Nerine Small Attorney-at-Law for the 1st and 2nd Defendant

Mr. Christopher Dunkley and Mrs. Kayola Muirhead instructed by Phillipson Partners Attorneys-at-Law for the 3rd Defendant

Civil Practice and Procedure – Striking Out Statement of Case – Rule 26.3 (1) (a), 26.3 (1) (b) and Rule 26.3 (1) (c) of the CPR – Application for Summary Judgment on Defendant’s Counterclaim – Rule 15.2 of the CPR

Heard: 27th of September, 2021 and 24th and 31st of March, 2022

Palmer Hamilton, J.

[1] This is an application made by the 3rd Defendant, MJC Masterbuilders Limited (hereinafter referred to as 'MJC Limited'), for court orders and an application made by the 1st and 2nd Defendants, Mr. Christopher Cargill and Mr. James Godfrey, to Strike Out Claim. The Defendants all filed written submissions regarding their applications while the Claimant did not appear or participate in these applications. Before examining these applications in greater detail, I should set out some of the factual background.

BACKGROUND

[2] The Claimant, Mr. Maurice Gabay, commenced proceedings by way of a Fixed Date Claim Form and Affidavit in Support both dated the 1st day of September, 2017 and filed in this Honourable Court on the 4th day of September, 2017 against all the Defendants, Mr. Cargill, Mr. Godfrey, and MJC Limited.

[3] Mr. Gabay averred that he along with Mr. Cargill and Mr. Godfrey were shareholders and directors of MJC Limited and Mr. Gabay acted as Managing Director pursuant to a Memorandum of Understanding dated the 20th day of July, 2007 and signed by all three directors. Mr. Gabay, was appointed as Project Manager for a project that MJC Limited was working. He stated that it appeared towards to the end of 2016 that the said project was not going to be profitable, but rather break-even. He informed Mr. Cargill and Mr. Godfrey of this. He states that after informing Mr. Cargill and Mr. Godfrey, they both acted in a manner which appeared to be a scarcely disguised attempt to deprive him of the right to protect his interests in MJC Limited as they launched spurious allegations against him, refused to pay him his salary, and purported to remove him as Managing Director of MJC Limited.

[4] Mr. Gabay claimed, *inter alia*, the following:

- i. an order reinstating him as Managing Director of the 3rd Defendant;

- ii. compensation with respect to unpaid salary; and
- iii. costs.

[5] On the 5th day of September, 2017 an Affidavit sworn to by Mr. Cargill was filed in this Honourable Court. Mr. Cargill averred that Mr. Gabay was required to provide regular monthly reports in relation to the abovementioned project that MJC Limited was working on and that he failed to provide said reports to satisfy the obligations of MJC Limited. In or about 2015, Mr. Cargill reviewed MJC Limited's accounts and that review highlighted several issues. One such issue being that a signature purporting to be his was being used to conduct online banking transactions. Both Mr. Cargill and Mr. Godfrey in their capacity as directors of MJC Limited wrote to Mr. Gabay formally seeking answers regarding the several issues that were highlighted from the review. Mr. Cargill further averred that it was due to Mr. Gabay's delay and/or reluctance to provide a response which resulted in a decision being made by the Board to reassign the functions of the Managing Director from Mr. Gabay for a period of six (6) weeks pending an investigation into the issues that were discovered. Mr. Gabay's salary remained unchanged during this period and he was to continue his role as Project Manager. Mr. Cargill further averred that Mr. Gabay was not dismissed nor was he prevented from attending work and it was in fact Mr. Gabay who abandoned his job by failing and/or refusing to attend work.

[6] The following events then took place:

- (i) Mr. Gabay filed in this Honourable Court on the 12th day of September, 2017 an Affidavit in Response to the Affidavit of Christopher Cargill. Mr. Gabay denies the allegations and averred, inter alia, that he was not separately engaged as Project Manager and there has only ever been the role of Managing Director.
- (ii) On the 21st day of September, 2017 Mr. Cargill filed a Second Affidavit;
- (iii) Affidavit of Christopher Cargill filed the 13th day of October, 2017; and

(iv) Third Affidavit of Christopher Cargill filed the 17th day of October, 2017.

[7] On the 13th day of October, 2017, MJC Limited filed a Counterclaim. An Amended Counterclaim was filed on the 19th day of October, 2017. The Amended Counterclaim claimed against Mr. Gabay for breach of his contract of employment and for breach of his fiduciary duty and duty of care as director of MJC Limited causing MJC Limited to suffer loss and damage, and incur expenses. MJC Limited claimed the following:

- (i) an order for an investigation under section 213A of the Companies Act;
- (ii) damages;
- (iii) interest at 12% per annum on damages or at such commercial rate of interest as this Honourable Court deems just; and
- (iv) costs.

[8] On the 13th day of April, 2018 Mr. Gabay filed a Claim Form and Particulars of Claim in this Honourable Court and claimed against the Defendant, MJC Limited, the following:

- (i) a declaration that he is still the Managing Director of the Company;
- (ii) damages for unpaid salary at a rate of \$58,333.33 per day from 31st July 2017 and continuing;
- (iii) interest; and
- (iv) costs.

[9] MJC Limited in response filed a Defence and Counterclaim on the 12th day of June, 2018. On the 18th day of June, 2018 Mr. Gabay filed a Defence to MJC Limited's Counterclaim and claimed that he intends to apply to have the counterclaim struck out on the basis that it amounts to an abuse of the process of the court as it is by and large a replication of the counterclaim they filed in Claim No. 2017 CD00451.

Mr. Gabay's Defence to Amended Counterclaim of MJC Limited was filed on the 18th day of July, 2018.

[10] In 2020 Claim Nos. **2017 CD 00451 and 2018 CD 00274** were consolidated. On the 4th day of May, 2021, the Attorneys-at-Law on record for the Claimant were removed. The Claimant has been unrepresented since then.

THE DEFENDANTS' APPLICATION TO STRIKE OUT CLAIM AND FOR SUMMARY JUDGMENT

[11] On the 30th day of June, 2021 MJC Limited filed a Notice of Application for Court Orders seeking, inter alia, the following orders:

- (i) The Claimant shall pay in full to Phillipson Partners his outstanding one-third share of the total attorney's fee plus general consumption tax...within fourteen (14) days of the date of the service of this Order;
- (ii) Service of this Application and any subsequent order made upon hearing this Application shall be to the Claimant's last known address and by two (2) publications with a seven (7) day interval in the daily Classifieds of the Jamaica Gleaner;
- (iii) Unless the Claimant complies with Order 1 his Statement of Case, including the Claimant's Defence to Counterclaim, shall be struck out for failure to comply with the order of the Court;
- (iv) Summary judgment shall be granted in the counterclaim to the 3rd Defendant;
- (v) Duplicate Certificates of Titles to lands including Volume 980 Folio 544, Volume 1406 Folio 24, Volume 1440 Folio 68 and Volume 1269 Folio 264, belonging to the 3rd Defendant and in the Claimant's possession shall be surrendered to the offices of 3rd Defendant's Attorneys-at-Law, within fourteen days of the date of the service of this Order;

- (vi) Certificates of Titles to motor vehicles including 2006 Nissan Atlas Truck, 1998 Isuzu Truck 1997 Isuzu Truck, 2007 White Toyota Tundra, an Isuzu Trooper and a Land Rover belonging to the 3rd Defendant and in the Claimant's possession shall be surrendered to the offices of 3rd Defendant's Attorneys-at-Law, within fourteen days of the date of the service of this Order;
- (vii) Motor Vehicles purchased in the name of the Claimant with the 3rd Defendant's company-funds shall be transferred by the Claimant into the name of the 3rd Defendant, within fourteen days of the date of service of this Order, failing which an authorized and designated agent of the Commissioner General of Tax Administration Jamaica shall execute the transfer into the name of the 3rd Defendant;
- (viii) The time for service of this Application be abridged to the time of service in compliance with Order 2;
- (ix) Costs of this Application to be awarded to the Defendant;
- (x) Damages in respect of the consolidated Claim and the Counterclaim are to be assessed;
- (xi) Costs and Attorneys costs of the consolidated Claim and Counterclaim to the 3rd Defendant; and
- (xii) There be such further and other relief as the court may deem just.

[12] On the 10th day of September, 2021 Mr. Cargill and Mr. Godfrey filed a Notice of Application for Court Orders to Strike Out Claim. They sought the following orders:

- (i) That the Claim Form and Particulars of Claim dated September 4, 2017 in respect of Claim No. 2017CD00451, be struck out for want of prosecution as against the First and Second Defendants;
- (ii) Further and/or in the alternative, that the Claim Form and Particulars of Claim dated September 4, 2017 in respect of Claim No. 2017CD00451, be struck out as an abuse of process of the Court;
- (iii) Further and/or in the alternative, that the Claim Form and Particulars of Claim dated September 4, 2017 in respect of Claim No.

2017CD00451, be struck out as disclosing no cause of action as against the 1st and 2nd Defendants;

- (iv) Costs to the First and Second Defendants, to be taxed if not agreed; and
- (v) Such further and or other relief as this Honourable Court shall deem fit.

THE 1ST & 2ND DEFENDANTS' SUBMISSIONS

[13] Counsel on behalf of Mr. Cargill and Mr. Godfrey made written submissions in relation to the Notice of Application for Court Orders filed on the 10th day of September, 2021. Counsel made reference to the relevant provisions of the Civil Procedure Rules applicable to their application to strike out. The 1st and 2nd Defendants position was that the Statement of Case of Mr. Gabay did not disclose any reasonable grounds for bringing the claim. They argued that the remedies sought by Mr. Gabay against the 1st and 2nd Defendant are not possible remedies against them. Mr. Gabay's claim was one for reinstatement as Managing Director of MJC Limited and for compensation for unpaid salary. Counsel submitted that his clients were never the employers of Mr. Gabay and it was MJC Limited, who at all material times, engaged Mr. Gabay as Managing Director. Mr. Cargill and Mr. Godfrey were not acting in any personal capacity and at all material times they were acting in their capacity as directors of MJC Limited which exists as a legal entity, separate and apart from its directors and shareholders. Counsel further submitted that any claim for reinstatement and unpaid salary would properly be a claim against MJC Limited. Counsel argues that this is a plain and obvious case for striking out on the basis that the Statement of Case discloses no reasonable cause of action against his clients.

[14] Counsel contends that another issue for consideration is that Mr. Gabay's claim should be struck out on the basis that it is an abuse of the process of the court. This he stated was illustrated by the House of Lords in the decision of **Grovit v Doctor** [1997] 1 W.L.R 640. In that case, the Claimant took no steps to prosecute

the action for defamation over two years. It was held that where the Court is satisfied that a Claimant has commenced or continued litigation with no intention of bringing it to a conclusion he can strike it out as an abuse of the Court's process. Counsel also noted that Lord Diplock in **Birkett v James** [1978] AC 297 at 318 set out that the need for a defendant to show actual prejudice or a risk of a fair trial being impossible as a result of the delay is accordingly no longer a requirement in applications where there has been delay and inaction by a party. Those above principles she submits were applied by the Jamaican Courts in **Keith Hudson, Clandale Sheckleford, Winston Letts & Carmen Letts v Vernon Smith and Alwyn Smith** SCCA No. 35 of 2005.

[15] Counsel also contends that Mr. Gabay's claim should be struck out on the ground for want of prosecution. She submits that Mr. Gabay filed the claim as an attempt to prevent the Defendants from investigating and pursuing the alarming evidence of misconduct and misuse of the financial and other resources of MJC Limited. Although Mr. Gabay had engaged Counsel the Court records will demonstrate that he never responded to overtures regarding mediation and in February, 2019 the Defendants applied for mediation to be dispensed with. After Mr. Cargill and Mr. Godfrey responded to Mr. Gabay's claims, Mr. Gabay disappeared overseas and can no longer be found. Mr. Gabay has absolutely no intention of pursuing his claims in the circumstances. In fact, in May 2021 Counsel for Mr. Gabay successfully removed their names from the record. Counsel for Mr. Gabay were unable to locate him and/or obtain instructions from him for more than a year prior to that. Mr. Gabay has also not complied with the order of this Court to pay one-third of the costs of the Attorney-at-Law appointed by the Registrar to represent MJC Limited and only Mr. Cargill and Mr. Godfrey have paid to date.

[16] Other cases relied on by Counsel are: *Three Rivers District Council v Bank of England* (No. 3) [2003] 2 AC 1, *Tawney Assets Limited v East Pine Management Limited and Others* Civ Appeal HCVAP 2012/007, *Biguzzi v Rank Leisure Plc* [1999] 4 All ER 934, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536, *Biss v Lambeth, Southwark and Lewisham Health Authority* [1978]

1 WLR 38, Annodeus Limited v Gibson (2000) The Times, 3 March, Follet v Briscoe, Mendez, Thomas and Thomas F076 of 1991 (unreported decision delivered on 16th May 2006), Alcan Jamaica Company v Herbert Johnson and Idel Clarke SCCA No. 20 of 2003, Ronham and Associates Limited v Christopher Gayle et al [2010] JMCA APP 17, Michael Lorne v The Gleaner Company et al Suit No. C.L. 047 of 1999, and Attorney General of Jamaica and Roshane Dixon v Attorney General of Jamaica and Sheldon Dockery [2013] JMCA Civ 23.

THE 3RD DEFENDANT'S SUBMISSIONS

- [17] Counsel for MJC Limited filed written submissions on the 22nd day of October, 2021 in relation to their Notice of Application for Court Orders filed on the 30th day of June, 2021. Counsel made reference to Rule 26.3 (1) of the Civil Procedure Rules which provides that the Court may strike out part of a statement of case if it appears to the Court that the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings, or discloses no reasonable grounds for bringing or defending a claim.
- [18] In determining whether to strike out a statement of case under Rule 26.3 (1) (c) the Court must only examine the statement of case, the subject of the application. Mangatal, J. accepted this principle in **Sadie Vaughan v National Water Commission** Claim No. 2007 HCV 03034. Counsel also relied on the case of **Sebol Limited and Others v Ken Tomlinson and Others** HCV 2526/2004 where Sykes, J. (as he then was) stated:

“Let us look at what rule 26.3 (1) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds

for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action.”

- [19] Counsel respectfully submitted that the facts at bar provide sufficient grounds for her client to successfully apply to have Mr. Gabay’s case against it struck out.
- [20] Counsel also made reference to rule 15.2 (b) of the Civil Procedure Rules which provides that the Court may give summary judgment on the claim if it considers that the defendant has no real prospect of successfully defending the claim. Counsel put forward MJC Limited’s Counterclaim against Mr. Gabay.
- [21] Counsel urged the Court to consider, if its Orders are not to be rendered meaningless, that in all circumstances it would be fair and just to make an Unless Order.
- [22] Other cases relied on by Counsel are: **Swain v Hillman** [1999] EWCA Civ J1021-8 and **Lands Allotment Company** [1894] 1 Ch 616.

ISSUES

- [23] The issues for determination are as follows:
- (i) Whether the Statement of Case filed by Mr. Gabay against Mr. Cargill and Mr. Godfrey is to be struck out?
 - (ii) Whether the Court should grant the unless order sought by MJC Limited?
 - (iii) Whether summary judgment should be granted in the Counterclaim to MJC Limited?

LAW AND ANALYSIS

CIVIL PROCEDURE RULE 26.1 (2) (P)

- [24] Counsel for the parties were of the view that this matter was suitable to be considered on paper pursuant to rule 26.1 (2) (p) of the Civil Procedure Rules. Rule 26.1 (2) (p) states that the Court may, except where these Rules provide

otherwise, instead of holding an oral hearing, deal with a matter on written representations submitted by the parties. I agreed with counsel and an order was made by consent that the matter would proceed by way of written submissions. Written submissions for the 1st and 2nd Defendants, and the 3rd Defendant were filed on the 22nd day of October, 2021.

[25] I want to thank Counsel for their submissions which guided the Court in its deliberation of the issues emerging on each application.

STRIKING OUT STATEMENT OF CASE

[26] Rule 26.3 (1) of the Civil Procedure Rules 2002, as amended (hereinafter referred to as 'the CPR') gives the Court the power to 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;
- (b) that the statement of case or the part to be struck out is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings;
- (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
- (d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

[27] The phrase '*statement of case*' is defined in Rule 2.4 of the CPR. It means –

- (a) a Claim Form, Particulars of Claim, Defence, Counterclaim, Ancillary Claim Form or Defence and a Reply; and
- (b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court.

[28] Sime in his text, *A Practical Approach to Civil Procedure*, 22nd Edition, noted that *the jurisdiction to strike out is to be used sparingly, because striking out deprives a party of its right to a fair trial, and of its ability to strengthen its case through the process of disclosure and other court procedures. The result is that striking out is limited to plain and obvious cases where there is no point in having a trial.*

[29] Several factors should be taken into consideration to determine whether there is sufficient reason to justify whether the Court should exercise its discretion to strike out a statement of case. **Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al** [2014] JMCA App 14, noted the factors which a Court takes into consideration in determining whether or not to exercise its discretion to strike out a statement of case. Phillips JA specified the following factors:

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the merit of the case; and
- (d) whether any prejudice may be suffered by the opposing side.”

[30] Counsel for the 1st and 2nd Defendant relied on Rules 26.3 (1) (b) and (c), which I will examine in further detail below.

Rule 26.3 (1) (a) – Failure to Comply with Court’s Rule, Practice Direction, Order and/or Direction

[31] The CPR does not define abuse of the process of the court and as such I turn to case law to assist me in this regard. Kodilinye and Kodilinye in their text *Commonwealth Caribbean Civil Procedure*, 2nd Edition stated that *the phrase ‘otherwise an abuse of the process of the court’ is a catch-all provision which encapsulates the general principle underlying the striking-out rules. Most pleadings which are struck out as being an abuse of process of the Court will either be scandalous, frivolous or vexatious...*

- [32] Whether there is an abuse of process is a question of judgment to which there is only one answer. There are no fixed categories of abuse, there are however, examples of situations which have been held to amount to an abuse of the process of the court. Examples include attempts to re-litigate decided issues, a claim based on a document disclosed in a previous action, and where the claimant delayed in progressing the claim without a credible explanation. (Halsbury's Laws of England, 5th Edition)
- [33] In **Sookdeo v Barclays Bank of Trinidad & Tobago Limited** (1976) High Court, Trinidad & Tobago No 2323 of 1976 (unreported) found on page 172 of Commonwealth Caribbean Civil Procedure, 2nd Edition, Cross J noted that *the Court has an inherent jurisdiction to stay or dismiss actions which are obviously frivolous or vexatious or an abuse of its process*. An action will be stayed if the court is satisfied that no injustice will be done to the plaintiff and that the defendant would be subjected to such injustice in defending the action as would amount to vexation and oppression.
- [34] McDonald-Bishop J, as she then was, said in the case of **Branch Developments Limited Trading as Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited** [2014] JMSC Civ. 003 that delay, even a long delay, cannot by itself be categorized as an abuse of power without there being some additional factor which transforms the delay into an abuse of process.

Rule 26.3 (1) (b) - For Want of Prosecution

- [35] In **Birkett v James** [1978] AC 297 p. 318 it was established that there are two categories under which cases may be dismissed for want of prosecution. They are:
- (a) cases in which there has been disobedience of a preemptory order of the court, or conduct amounting to an abuse of process of the court; and/or
 - (b) cases in which there has been inordinate and inexcusable delay on the part of the plaintiff or his legal advisors, and where such delay will give rise to a

substantial risk that it will not be possible to have a fair trial of the issues in the action or that it is likely to cause prejudice to the defendant.

[36] In the case of **Keith Hudson and ors v Vernon Smith and anor** SCCA 35 of 2005, the appellants appealed the trial judge's decision to strike out a claim for want of prosecution where a period of 20 years had elapsed between the filing of the claim to when it was dismissed for want of prosecution. The Court held that the delay in prosecuting the claim amounted to an abuse of process and that the trial judge was justified under Rule 26.3 of the CPR to strike out the claim even where the defendant could not point to any prejudice arising from the delay. K Harrison JA at paragraph 36 of his judgment quoted from the authors of Blackstone's Civil Practice 2004 edition page 513 which said "*the problems under the old law with dealing justly with cases where there had been delay was one of the main motivating factors in introducing the CPR, and it has been hoped that the old principles, and the considerable case law that developed around them, could be consigned to history. These concepts, however, may still have some life on the basis that even in CPR cases they survive as part of the court's inherent jurisdiction.*" The Court of Appeal upheld the trial judge's decision to strike out the case for want of prosecution.

Rule 26.3 (1) (c) – No Reasonable Ground for Bringing the Claim

[37] Where this ground is argued, no affidavit evidence is admissible. Thus, in my view, as was held in **Wenlock v Moloney** [1965] 1 WLR 1238 one's failure to show a proper cause of action on the pleadings cannot be rectified by affidavit evidence. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

"this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

[38] The above point can also be seen in the **Three Rivers District Council v Bank of England (No. 3)** supra. The Court is therefore constrained to only consider that which has been expressly set out in Mr. Gabay's statement of case. Anderson, K., J. in the case of **Brown v Rodney and Rodney** [2017] JMSC Civ. 32 stated that -

"It is not appropriate for...this court to give any consideration to either the defendants' defence, or their counterclaim, or the respective parties' witness statements, for the purpose of determining, whether the claimant's statement of case discloses any reasonable grounds for bringing the claim. It is either that the claimant's statement of case discloses reasonable grounds for bringing the claim, or it does not. The answer as to whether the same does so or not, must be found from a careful consideration of only that which is, to use a descriptive phrase, 'within the four (4) corners of the claimant's statement of case."

[39] In my view, the Court's main concern is with the adequacy of the statement of case, and whether reasonable grounds for bringing or defending the action are disclosed. Mr. Gabay's claim against the 1st and 2nd Defendant is one for reinstatement as Managing Director of MJC Limited and compensation for unpaid salary. The claim has been brought against the 1st and 2nd Defendants in their personal capacity and Mr. Gabay has not set out the reason for doing so. MJC Limited Mr. Cargill and Mr. Godfrey are the directors of MJC Limited, and as Counsel for the 1st and 2nd Defendant submitted, it exists as a legal entity, separate and apart from its directors and shareholders. In my judgment, the statement of case does not, on the face of it, show that Mr. Cargill and Mr. Godfrey employed Mr. Gabay in any personal capacity. As such, I agree with Counsel for the 1st and 2nd Defendant that the statement of case of the Claimant, Mr. Gabay, discloses no reasonable ground for bringing a claim against them.

"UNLESS ORDER"

[40] Rule 26.4 (1) of the CPR provides that where a party has failed to comply with any of these Rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an "unless order." Pursuant to Rule 26.4 (7), where the defaulting party fails to comply with the terms of any "unless order" made by the Court that party's statement of

case shall be struck out. The effect of an Unless Order is that, where there is non-compliance with the terms of the order within the time specified in the order stated consequences will follow.

[41] In **Hytec Information Systems v Coventry City Council** [1997] 1 W.L.R. 1666 Ward L.J. in his definition of the nature of “unless orders” said:-

“In the light of my observations that each case really should be cited upon its own facts, it may be otiose to try and encapsulate what I understand to be the philosophy underlying this approach. It seems to me it is as follows:

(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.

(2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed...”

[42] Harris JA stated in paragraph 18 of *Attorney General of Jamaica and Roshane Dixon v Attorney General of Jamaica and Sheldon Dockery* [2013] JMCA Civ 23, that:

“It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice. It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties.”

The unless order was made in an effort to secure the compliance of the respondent such that the matter could proceed quickly and efficiently to trial.

[43] L.J. May Kay 22 described the seriousness of unless orders in the case of **R.C. Residuals Ltd. (formerly Regent Chemicals Ltd.) v Linton Fuel Oils Ltd.** (2002) Times. She stated that:

“The sooner parties and their advisers were disabused of the idea that an unless order meant doing something on the last day the better. It was the obligation of parties to comply with unless orders as soon as possible and no later than the deadline provided. In that way the administration of justice was best effected.”

[44] Counsel for the 3rd Defendant submitted that it would be fair and just to grant the Unless Order so that its Orders are not to be rendered meaningless. Batts J made

an order on the 10th day of April, 2019 which stated that the Claimant and the 1st and 2nd Defendants are to pay the costs of the attorney retained for the 3rd Defendant. The Defendants have indicated that Mr. Gabay has not paid his one-third share and only the 1st and 2nd Defendants have done so. At the time when the Attorneys for the Claimant removed their name from the record they indicated to the Court that they have had no communication with Mr. Gabay since the start of 2021.

[45] It has now been over a year since there has been no communication with Mr. Gabay and he is in breach of the Order made by Batts, J in 2019. Having regard to the circumstances I find that in an effort to secure the compliance of Mr. Gabay such that the matter could proceed quickly and efficiently to trial, an unless order is to be made.

SUMMARY JUDGMENT

[46] Pursuant to Rule 15.2 of the CPR the Court may give summary judgment on the claim or on a particular issue if it considers that –

- (a) the claimant has no real prospect of succeeding on the claim or the issue; or*
- (b) the defendant has no real prospect of successfully defending the claim or the issue.*

[47] The court's powers in granting summary judgment is outlined in Rule 15.6 of the CPR, it states: -

“On hearing an application for summary judgment the court may–

- (a) Give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;*
- (b) Strike out or dismiss the claim in whole or in part;*
- (c) Dismiss the application;*
- (d) Make a conditional order; or*
- (e) Make such other order as may seem fit.”*

[48] The long established principle pertaining to summary judgments is that the decision whether or not to grant an application for summary judgment is discretionary. As Lord Hutton in the **Three Rivers case** stated:

“The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give Summary Judgment. It is a ‘discretionary’ power; that is, one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is no ‘real prospect’ he may decide the case accordingly.”

[49] In the case of *National Commercial Bank Jamaica Ltd v Owen Campbell and Toushane Green* [2014] JMCA Civ. 19 Brooks, JA stated:

“In considering applications for summary judgment, the judicial officer is not required to conduct a mini trial but where the case of one party or another is untenable that party should not be allowed to go to trial on that case. There is authority for the principle that parties to litigation must know at the earliest opportunity whether their cases have a real prospect of success. The judicial officer considering the application exercises a discretion whether or not to grant the application.”

[50] An application for Summary Judgment is decided by applying the test of whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly (Stuart Sime - *A Practical Approach to Civil Procedure*, 5th Edition). The phrase “real prospect of success” does not mean “real and substantial” prospect of success. Summary Judgments are not meant to dispense with the need for trial where there are issues which should be considered at trial and these hearings should not be mini trials. They are simply Summary hearings to dispose of cases where there is no real prospect of success. The question of whether there is a real prospect of success is not approached by applying the usual balance of probabilities standard of proof. (See **Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297).

[51] In the case of **Swain v. Hillman** [2001] 1 All E.R. 91, Lord Woolf MR said that the expression ‘real prospect of success’ did not need any amplification, as the words

spoke for themselves. The word real meant that the question for the court was whether there was a realistic prospect of success. Therefore, in order to succeed, the applicant must satisfy the court that the respondent has no real prospect of proving the claim.

[52] In Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others [2006] EWCA Civ 661 Mummery, L.J. stated:-

“Summary judgment procedures, which are designed for the swift disposal of straight forward cases without trial, are only available where the applicant demonstrates that the defence (or the claim, as the case may be) has no “real” prospect of success and if there is no other compelling reason why the case or issue should be disposed of at a trial..Thus, without the assistance of pre-trial procedures, such as disclosure of documents, and without the benefit of trial procedures, such as cross examination, the court’s function is to decide whether the defendant’s prospect of successfully establishing the facts relied on by him is “real”, that is more than “fanciful” or “merely arguable.” The test to be applied was summarised by Sir Andrew Morritt V-C. in Celador Productions Ltd v. Melville [2004] EWHC 2362 (CH) at paragraphs 6 and 7. 5.

Although the test can be stated simply, its application in practice can be difficult. In my experience there can be more difficulties in applying the “no real prospect of success” test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials.”

[53] MJC Limited filed a Defence and Counter Claim in relation to Claim No. 2018 CD 00274 on the 15th day of July, 2020. MJC Limited in their Counter Claim claimed that Mr. Gabay breached his contract of employment and that he breached the fiduciary duty and duty of care as a Director of MJC Limited. The particulars of the breach were set out. I must therefore determine whether MJC Limited has demonstrated to this Court in their Counter Claim that Mr. Gabay has no real prospect of success.

[54] The burden of proof in an application for summary judgment lies with the applicant. The evidential burden is therefore on MJC Limited to put before this Court that Mr. Gabay’s claim has no real prospect of success. It would therefore be for the

respondent in such an application for summary judgment to prove that there is a real prospect of success. The Respondent in this application, Mr. Gabay, is however unrepresented and no response was given to this Court on his behalf. Nonetheless I must consider the application put forward by MJC Limited for summary judgment.

[55] In **Bolton Pharmaceutical Co 100 Ltd v. Doncaster Pharmaceuticals Group Ltd and others** [2006] EWCA Civ 661 the Court of Appeal reversed the decision of the lower court which had granted summary judgment to the claimant. It was held that,

“...The court should exercise caution in granting summary judgment in certain kinds of case, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a trial where, even though there was no obvious conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case...”

[56] In my view, Counsel for the 3rd Defendant has not demonstrated that Mr. Gabay’s claim has no real prospect of success in relation to Claim No. **2018 CD 00274**. I find that based on the evidence there are relevant issues that need to be resolved and I am therefore unable to make an order for summary judgment.

[57] Notwithstanding the refusal of the summary judgment Counsel for the Defendants also sought the return of the following from Mr. Gabay to MJC Limited by way of written submissions. Both Counsel were invited to also make oral submissions in this respect which are adumbrated below:

- (a) Duplicate Certificates of Titles to lands including Volume 980 Folio 544, Volume 1406 Folio 24, Volume 1440 Folio 68 and Volume 1269 Folio 264;

- (b) Certificates of Titles to motor vehicles including 2006 Nissan Atlas Truck, 1998 Isuzu Truck 1997 Isuzu Truck, 2007 White Toyota Tundra, an Isuzu Trooper and a Land Rover; and
- (c) Motor Vehicles purchased in the name of the Claimant with the 3rd Defendant's company-fund.

[58] Mr. Dunkley submitted that the Certificates of Titles to the abovementioned motor vehicles ought on the facts, be transferred to MJC Limited and/or surrendered to MJC Limited or its Attorneys-at-Law for them to dispose as compensation for the unauthorized payment using MJC Limited's company funds. He also submitted that arrangements were previously made for the said Certificate of Titles to be transferred by Mr. Gabay into MJC Limited's name, however Mr. Gabay failed to follow through with same. Counsel believes that the Tax Administration of Jamaica retained said motor vehicle titles.

[59] Mr. Dunkley further submitted that the Defendants have been unable to locate Duplicate Certificate of Title to lands and believes that these are in the possession of Mr. Gabay. Counsel urged the Court to order Mr. Gabay to surrender the said Duplicate Certificates of Titles owned by MJC Limited and to consider Mr. Gabay's conduct to date including the virtual abandonment of his own claim and his continued absence. This conduct, Counsel contends strongly suggest that its orders may fail to compel Mr. Gabay to comply and to surrender all the abovementioned titles.

[60] Ms. Small contended that there is sufficient evidence in the matter that these assets do not belong to Mr. Gabay and he has absolutely no right to them regardless of what position Mr. Gabay takes. She further contended that nobody has heard from Mr. Gabay in more than a year and nobody knows where to find him. Her clients have been unable to do anything with their assets since Mr. Gabay absconded with the titles to the assets.

- [61] Mr. Dunkley also contended that the fact that Mr. Gabay absconded ought not to work as an injustice to the other parties. He also sought an order that to shift custody of the relevant assets from Mr. Gabay to the company.
- [62] MJC Limited is a limited liability company and as such it is a separate legal entity from all individuals involved in the company (shareholders, owners, managers or directors). This is a well established company law principle arising from the case of **Salomon v Salomon and Company** [1997] AC 22. Due to this, the company enjoys or may be subject to enforceable legal obligations and liabilities, such as owning property.
- [63] Mr. Dunkley exhibited copies of the Duplicate Certificate of Title registered at Volume 980 Folio 544, Volume 1406 Folio 24, Volume 1440 Folio 68 and Volume 1269 Folio 264 of the Register Book of Titles. MJC Masterbuilders Limited is noted as the registered proprietor on property registered at Volume 980 Folio 544, Volume 1406 Folio 24 and Volume 1440 Folio 68 of the Register of Titles. Therefore, being the registered owner of the said properties they are entitled to the Duplicate Certificate of Title for same.
- [64] The same applies to the said motor vehicles mentioned at paragraph 57. Even though the motor vehicles are registered in Mr. Gabay's name, MJC Limited is entitled to the beneficial interest. The motor vehicles were purchased by MJC Limited for use by its employees and not for the personal use of Mr. Gabay.
- [65] In my judgment, in light of Mr. Gabay's antecedents and the fact that the properties and the motor vehicles are the company's assets I find merit in the submissions of Counsel for the Defendants. The ownership of the said assets is not in dispute. There is nothing filed on behalf of Mr. Gabay disputing said ownership.

ORDERS

- [66] Having regard to the foregoing, my orders are as follows:

1. The 1st and 2nd Defendants' Notice of Application to Strike Out Claim filed on the 10th day of September, 2021 is granted and as such, the Claimant's Statement of Case in respect of Claim Number **2017 CD 00451** stands as struck out against the 1st and 2nd Defendants;
2. The Claimant shall pay in full to Phillipson Partners, Attorneys-at-Law for the 3rd Defendant, his outstanding one-third share of the total Attorneys' fees plus General Consumption Tax totaling **TWO HUNDRED EIGHTEEN THOUSAND EIGHT HUNDRED AND SEVENTY-FIVE DOLLARS (\$218,875.00)**, in relation to Claim No. **2017 CD 00451** particularized in Phillipson Partners' Fee Note dated the 23rd day of April, 2021, within fourteen (14) days of the date of service of this Order;
3. Unless the Claimant complies with Order No. 2 contained herein, his Statement of Case in relation to Claim Number **2017 CD 00451** stands as struck out;
4. Summary judgment in terms of the Counter Claim dated and filed on the 15th day of July, 2020 in relation to Claim No. **2018 CD 00274** is refused. Case Management Conference to be scheduled;
5. The Claimant is to surrender Duplicate Certificate of Title registered at Volume 980 Folio 544 to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the date of the service of this Order;
6. The Claimant is to surrender Duplicate Certificate of Title registered at Volume 1406 Folio 24 to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the date of the service of this Order;
7. The Claimant is to surrender Duplicate Certificate of Title registered at Volume 1440 Folio 618 to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the date of the service of this Order;

8. The Claimant is to surrender Duplicate Certificate of Title registered at Volume 1269 Folio 264 to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the date of the service of this Order;
9. Should the Claimant fail and/or refuse to comply with Orders numbered 5 to 8 contained herein, then the Registrar of Titles is directed to cancel the Duplicate Certificate of Titles registered at Volume 980 Folio 544, Volume 1406 Folio 24, Volume 1440 Folio 618 and Volume 1269 Folio 264 of the Register Book of Titles and issue new Duplicate Certificate of Titles in the name of the 3rd Defendant, MJC Masterbuilders Limited;
10. The 3rd Defendant is entitled to the entire legal and/or beneficial interest in 2006 Nissan Atlas Truck with Engine No. KA67792826 and Chassis No. HAF23031716, 1998 Isuzu Truck with Engine No. 4HF104636810 and Chassis No. NKR66E7518657, 1997 Isuzu Truck with Engine No. 4HG1472815 and Chassis No. NPR70L7401917, 2007 Toyota Tundra Pick-Up with Engine No. 3UR5043728 and Chassis No. 5TBEV54187S4585 and 1991 Isuzu Trooper with Engine No. AG109036JN and Chassis No. JACCH58R4M8912920;
11. The Claimant shall execute a transfer of Certificate of Title to 2006 Nissan Atlas Truck with Engine No. KA67792826 and Chassis No. HAF23031716 to the 3rd Defendant and deliver up same to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the service of this Order;
12. The Claimant shall execute a transfer of Certificate of Title to 1998 Isuzu Truck with Engine No. 4HF104636810 and Chassis No. NKR66E7518657 to the 3rd Defendant and deliver up same to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the service of this Order;
13. The Claimant shall execute a transfer of Certificate of Title to 1997 Isuzu Truck with Engine No. 4HG1472815 and Chassis No. NPR70L7401917 to

the 3rd Defendant and deliver up same to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the service of this Order;

14. The Claimant shall execute a transfer of Certificate of Title to 2007 Toyota Tundra Pick-Up with Engine No. 3UR5043728 and Chassis No. 5TBEV54187S4585 to the 3rd Defendant and deliver up same to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the service of this Order;
15. The Claimant shall execute a transfer of Certificate of Title to 1991 Isuzu Trooper with Engine No. AG109036JN and Chassis No. JACCH58R4M8912920 to the 3rd Defendant and deliver up same to the offices of the 3rd Defendant's Attorneys-at-Law within fourteen (14) days of the service of this Order;
16. Should the Claimant fail and/or refuse to comply with Orders numbered 11 to 15 contained herein, an authorized and/or designated agent of the Commissioner General of Tax Administration, Jamaica, shall execute the transfer of the motor vehicles into the name of the 3rd Defendant, MJC Masterbuilders Limited;
17. Costs awarded to the 1st and 2nd Defendants in respect of the Notice of Application to Strike Out Claim filed on the 10th day of September, 2021. Such costs to be taxed if not agreed;
18. Costs awarded to the 3rd Defendant, to be taxed if not agreed;
19. The 3rd Defendant's Attorneys-at-Law to prepare, file and serve Orders made herein; and
20. Liberty to apply.

