[2025] JMSC Civ.98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023CV03457

BETWEEN	**IDID INVESTMENT COMPANY LTD.**	**CLAIMANT**
A N D	**ERROL McGAW**	**1ST DEFENDANT**
A N D	**NANCY McGAW**	**2ND DEFENDANT**

IN CHAMBERS (VIA VIDEO CONFERENCE)

Mr. Gordon Robinson with Ms. Dayna Nicole Raynor instructed by Winsome Marsh for the Claimant

Mr. Marc Williams with Ms. Stevie Spence instructed by Williams, McKoy & Palmer for the Defendants.

HEARD: July 1, 2025 and July 31, 2025

Civil Practice and Procedure – Application to Strike Out Counterclaim – Whether the Counterclaim filed against the Claimant should be struck out as disclosing no reasonable grounds for being brought.

Civil Practice and Procedure – Application for Appointment of Expert Witness – Whether Defendants' proposed expert witness is able to give independent and unbiased assistance to the Court to resolve the issues in dispute.

Civil Practice and Procedure – Civil Procedure Rules – Rule 32.4

D. STAPLE J.

BACKGROUND

[1] The Parties are neighbours. What we in Jamaica would call "line and line" neighbours. The Claimant is the owner of Lot 2, Billy Dunn, together with the

undivided shares of common property comprised in Certificate of Title registered at Volume 1304 Folio 474 of the Register Book of Titles. The Defendants own Lot 4.

[2] The Claimant asserts that it bought the property in or around 1995 and thereafter constructed a family home on the said property.

[3] Sometime in 2017, the Claimant became aware of a legal notice issued on the Defendants' behalf advising of their intention to modify a restrictive covenant on their (the Defendants') title. To allow for subdivision of their lot into lots of less than 20,000 square feet. The Claimant objected.

[4] Following negotiations, the parties came to a settlement. The Claimant lifted their objection. According to the pleadings of the Claimant, they were induced by the specific representation by the Defendants that they would construct a retaining wall to prevent any damage to the Claimant's property from the construction/development planned by the Defendants and that the construction would not exceed a certain height.

[5] The Claimants allege that the construction of the retaining wall was completed in February of 2017, but asserted that it was not "properly engineered or constructed".

[6] According to the Claim, in early November 2020, significant damage was done to the Claimant's property due to the negligent manner in which the wall was constructed by the Defendants' servants and/or agents. The Claimant also asserts claims in nuisance and/or trespass.

[7] The Claimant asserts that the actions of the Defendants undermined their perimeter wall and caused; the creation of a large sinkhole; a split in the original retaining wall between Townhouse Numbers 1 and 2 and also between Townhouses 2 and 3; sinking of the Claimant's backyard levels; sinking of the perimeter fence; interlocking pavers in the Claimant's yard to sink or become

uneven and distracted; separation of the concrete steps from the Claimant's house; multiple cracks; and an underground leak.

[8] The Claimant further asserted that the Defendants sheared off the land on their (the Defendants') property without any consideration as to the adverse effects of this action on the Claimant's property. The Claimant further claimed that the Defendants did not construct the retaining wall before commencing the shearing off. Other damage was asserted as a consequence of the shearing off.

[9] The Claimant, by their Amended Claim, seeks Damages for Negligence, Trespass, Nuisance, Misrepresentation, Unjust Enrichment etc.

[10] The Defendants filed a Defence and Counterclaim on the 15th January 2024.

[11] The Defendants counterclaimed against the Claimant that the Claimant, unlawfully (and in breach of their restrictive covenant) the discharged their storm water and sewage onto the Defendants' property. The Defendants relied on paragraphs 6, 10, 11 and 13 of their defence as the factual substratum of their counterclaim.

[12] On the 28th June 2024, the Claimant filed an application to strike out the Defendant's counterclaim on the basis that it discloses no reasonable grounds for bringing the Claim. In the alternative, they asked that the Defendants' counterclaim for Breach of the Claimant's Restrictive Covenant be struck out as disclosing no reasonable grounds for being brought.

[13] The Claimant asserts that the Defendants' counterclaim is vague, general in nature and discloses no specific facts to establish any claim against the Claimant. They assert that none of the paragraphs of the Defence expressly relied upon by the Defendants to establish the Counterclaim included any positive averment to support the counterclaim.

[14] The Claimant asserted that no particular restrictive covenant was pleaded and they have failed to plead the basis upon which they claim to be able to benefit from the unspecified covenant or the basis upon which the Claimant is alleged to bear the burden of the unspecified covenant.

[15] The Defendants have refuted this application on the basis that (as far as can be gleaned from their written submissions filed on the 30th June 2025 at paragraph 10) their counterclaim is not fanciful, vexatious, or devoid of merit.

THE LAW ON STRIKING OUT

[16] The Court's power to strike out a statement of case that discloses no reasonable ground for bringing an action is found under rule 26.3(1)(c). The Court may also strike out a case for failure to comply with a rule, order or practice direction in accordance with rule 26.3(1)(a).

[17] Now, striking out is one of the most draconian actions a court may take in relation to the statement of case of a party to a claim. It should therefore be used sparingly and only in the most obvious of cases.

[18] Borrowing from the dicta of my sister judge Jackson-Haisley J in the case of ***Lozane v Beckford***,[1]

> *"[30] … in S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance SCCA 112/04 delivered 31st July, 2007, in which Harris, J.A. stated at page 29: - "The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."*

[1] [2020] JMSC Civ 106 at paras 30 and 31

> *[31] Similarly, in the case of Drummond Jackson v British Medical Association and Others [1970] 1 WLR 688, Lord Pearson opined at page 695 that: - "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases." [my emphasis]"*

[19] In deciding whether to strike out a statement of case on the basis that it discloses no reasonable ground for bringing a claim, the court must consider whether or not the Claimant has pleaded facts supportive of the cause of action he seeks to establish[2]. So it is not enough for the Claimant to plead the cause of action, there must be a factual basis established on the face of the pleaded case to support the cause of action. There must be a factual basis for going to trial.

[20] I agree with the authority of ***City Properties Limited v New Era Finance Limited***[3] and the statement of the principle of Batts J at paragraphs 9-11 of the judgment.

[21] As Batts J said, what is required is an examination of the statements of case to ensure that the facts as alleged support the cause of action the Claimant seeks to establish.

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[2] See also *Gordon Stewart v John Issa* (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009, at para. 31. "An application to strike out under this rule raises what Gatley (Libel and Slander, 11 th ed., paragraph 32.34) describes as "a pleading point", in respect of which the authorities are clear that the court is required only to ascertain whether, as Dukharan JA put it in *Sebol Limited and others v Ken Tomlinson and others (SCCA 115/2007, judgment delivered 12 December 2008)*, "the pleadings give rise to a cause of action..." (paragraph 18). The difference between the approach on an application to strike out and on a summary judgment application is neatly captured by Eady J in *B v N and L* [2002] EWHC 1692 (QB), in the following passage (at paragraph. 21.22):

- "21. I must focus on the claimant's pleaded case in first instance. That is all I am permitted to do for the purposes of the strike-out application. If I rule against the plea, then that would be the end of the matter.
- 22. As to the Part 24 application, however, I can have regard also to the evidence for determining whether the claimant's case has no realistic prospect of success.""

[3] [2013] JMSC Civ 23

THE PLEADINGS

[22] As this issue turns on the terms of the pleadings in the counterclaim, I will set out the paragraphs from the Defence upon which the Defendants rely to establish the facts that purportedly support their counterclaim.

[23] At the start of the counterclaim, the Defendants said, at paragraph 19, that they repeat paragraphs 6,10, 11 and 13 of the Defence. They then go on to assert that the Claimants have been unlawfully and in breach of their restrictive covenant discharging their storm water and sewage onto the Defendants property and that the Claimants continue to trespass on the Defendants' property and/or to be a nuisance.

[24] I will set out the contents of the paragraph 6 below:

> 6 Paragraph 10 of the Claimant's Particulars of Claim is denied. The Defendants were not in any way negligent in their construction and did not cause damage to the Claimant's Property. The Defendant further avers that:
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> i Upon investigation, the damage alleged to have been caused to the Claimant's property was caused wholly or in part by the poor drainage infrastructure on the Claimant's property, geological impacts (of which the Defendants have no control) and/or acts of God. It was also discovered that there was a leaking pipe which ran through the Claimant's property causing significant damage, owing to the Claimant's poor draining infrastructure.
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> ii After commencing construction in 2018, it was observed that the Claimant and in general the town house development that the Claimant is a part of have been channelling and discharging their storm water *inter alia* on to the Defendants' property in breach of their restrictive covenant.
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> iii the Defendants (through their engineer and contractor) discovered that the Claimants had serious pre-existing drainage issues which they clearly tried to mitigate by abusing the Defendants' land. The Claimants boundary wall had numerous weep holes that constantly dumped a tremendous amount of water onto the Defendants land.
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> iv The Defendants to date continue to see water/moisture coming through their retaining wall and from their assessment the Claimants still have not resolved their drainage issue which will ultimately impact the integrity of the Defendant's property.

v The Defendants have frequently observed that surface drainage and storm water out of the Claimant's property are not effectively intercepted, channelled and disposed of before reaching the roadway and bordering properties bringing with it soil, marl and other debris causing damage.

[25] I will not repeat paragraphs 10, 11 and 13 here as, based on their contents, they are direct responses to the Claimant's allegations and do not contain any facts which would be establishing the claims made.

[26] In my view, then, it was really paragraph 6 of the Defence which contains the material facts upon which the Defendants relied to set up their counterclaim.

[27] The Defendants' counterclaims sound in Breach of Restrictive Covenant, Negligence and/or Trespass and/or Nuisance.

Breach of Restrictive Covenant

[28] In relation to the Restrictive Covenant claim, counsel for the Applicant/Claimant asserted that the particular restrictive covenant was not pleaded and so the claim could have no foundation. He also asserted that no facts were put before the Court to demonstrate a factual basis for the Defendants to be entitled to benefit from the restrictive covenant on the Claimant's title. They cited the recent decision of our Court of Appeal in ***Lyn et al v Chih-Jen Hsia et al***[4].

[29] McDonald-Bishop JA (as she then was) set out the requirements for the benefits of a restrictive covenant to run at law at paragraph 22 of the said judgment. I will set out the paragraph below:

> *[22] For the benefit of restrictive covenants to run at law, three fundamental things must be present: (1) the covenants must directly affect the land of the covenantor by controlling its user; (2) the observance of the covenants must directly benefit the land of the*

[4] [2023] JMCA Civ 16.

> *covenantee; and (3) the original contracting parties must have intended that they shall run with the land of the covenantee at the date of the covenant. The absence of any of these three things would, invariably, lead to a finding that the covenants are personal and so would not be enforceable by or against third parties.*

[30] As the counterclaim stood before the failed attempt at amendment, the specific restrictive covenants that the Defendants assert were breached were not pleaded. As such, the Court does not know the terms of the covenants. Even if I had been minded to take the amendment into account, it merely states the covenant numbers without outlining the terms of the covenants or attaching the relevant title to the amended counterclaim so that the Claimant could be made aware of the specific terms of the covenants on its title, upon which the Defendants relied to set up their counterclaim.

[31] As pointed out by Mr. Robinson in written submissions, there are no facts pleaded to establish that there was any intention on the part of the original contracting parties that the benefits of the covenant should run with the land of the covenantee at the date of the covenant or that the observance of the relevant covenants directly benefit the land of the covenantee. In fact, there is no pleading of facts to establish a covenantor/covenantee relationship between the Claimant and the Defendants.

[32] Mr. Robinson cited the authority of ***JACAP v Restaurants of Jamaica Limited***[5] as authority for the principle that a Claimant must set out all the facts upon which the Claimant relies to establish their cause of action as per rule 8.9 of the CPR.

[33] As such, I agree with Mr. Robinson that the claim for Breach of Restrictive Covenant was not supported by any pleaded facts and as such cannot survive. It is therefore struck out.

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[5] [2023] JMSC Civ 227

Negligence

[34] A claimant must prove three things to establish negligence:

a) There was a duty of care owed by the Defendant to the Claimant;
b) There was a breach of that duty;
c) That breach has caused loss that was foreseeable.

[35] The Claimant's pleadings must therefore contain:

a) facts which show a prima facie relationship between the Claimant and the Defendant of such proximity that would make it just and reasonable to impose a duty on the Defendant to the Claimant.
b) The facts which demonstrate a breach of this duty of the Defendant to the Claimant.
c) The facts which show the damage/loss suffered and that the damage/loss suffered was not remote.

[36] In the absence of such pleaded facts, even if only one set is missing, the tort would not be properly pleaded and must fail.

[37] So trite is this that the Court need not cite any actual authority for same.

[38] It is important to note that according to rule 18.1(2)(a) of the Civil Procedure Rules, an ancillary claim includes a counterclaim and according to rule 18.2(1), an ancillary claim is treated as a claim. Therefore, the rules relating to the contents of the Claim Form and Particulars of Claim under Part 8 apply to Ancillary Claims as well.

[39] It is important to note that a Counterclaim is a separate claim from the Claim and even if judgment is given on a claim, if the counterclaim is not dismissed, it survives. Rule 18.7 makes this clear. Thus, a counterclaim must be capable of standing on its own merit. It must be pleaded in much the same manner as an ordinary claim. The counterclaimant is free to rely upon and incorporate pleadings from the Defence into the counterclaim, but those incorporated pleadings must clearly put forward the facts to underpin the counterclaim.

[40] I examined the facts pleaded at paragraphs 6, 10, 11 and 13 of the Defence, which were adopted as among the factual bases for bringing the Counterclaim in addition to the other paragraphs under the heading Counterclaim in the Defendant's defence.

[41] From the paragraphs relied upon and those pleaded from 19 onwards, the nature of the relationship between the parties is not stated expressly. One is left to draw only inferences and conclusions from the facts pleaded. Is this sufficient for pleadings? I find so. One can reasonably infer that there is a relationship of such proximity between the Claimant and the Defendant to make it just to impose a duty of care on the Claimant. Such assertions are the running of the sewage pipe through the Defendant's property; the fact that there is a shared boundary wall between the properties from which water escapes onto the Defendant's land from the Claimant's land; and the allegation of the channelling of storm water *inter alia* from the Claimant's property onto the Defendant's property.

[42] The Defendant does assert as a fact that the Claimant has discharged storm water and sewage onto their property. Absent from the counterclaim, however, is the statement of the loss suffered as a consequence of the water and/or sewage being discharged. What was pleaded is the cost to effect repairs to the slippage. There is no pleading as to what caused the slippage. Nothing more is pleaded as a loss suffered. They assert that a test was done by the Scientific Research Council that detected sewage flowing from this alleged pipe from the Claimant's property, but there is no pleading of what loss/damage has been occasioned as a consequence.

[43] In light of the absence of pleaded facts to support that there was a duty of care owed by the Claimant to the Defendants and the nature of the duty of care as well as any loss suffered as a consequence of the breach, I can see no basis for a claim in Negligence to be allowed to continue.

Trespass

[44] Trespass is any unlawful or unauthorised interference with the use and enjoyment of ones property. The tort of trespass to land is defined by the learned authors of Clerk & Lindsell on Torts[6], as consisting of "... any unjustifiable intrusion by one person upon land in the possession of another". It is generally described as an interference with possession.

[45] The facts to establish trespass have been pleaded at paragraphs 19(i) by the averment that the Claimant has discharged sewage onto the Defendants' property.

[46] Trespass is actionable *per se* (meaning without proof of actual damage).In the same decision of ***Francis et al v Graham***[7] the Court of Appeal said as follows:

> *To be successful, the plaintiff suing in trespass would also have to prove that the defendant actually entered on the land whilst they were in possession. The tort is actionable per se, so there is no need to prove actual damage, but if there is damage, in order to quantify the amount beyond nominal damages, actual damages will have to be proved. The plaintiff, in an action for trespass, must prove all the elements of the tort to the requisite standard in order to succeed.*

In the circumstances, I find that the substratum for the claim in trespass has been sufficiently pleaded in the counterclaim and it can be maintained.

Nuisance

[47] The celebrated case of ***Sedleigh-Denfield v O'Callaghan***[8] shaped the law of nuisance. Lord Atkin defined nuisance as follows:

> *I think that nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself. The*

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[6] 17th edition, paragraph 17-01. See the decision of *Francis et al v Graham* [2017] JMCA Civ 39 at para 83 which adopted the said definition.
[7] [2017] JMCA Civ 39 at para 86
[8] [1940] AC 880

> *occupier or owner is not an insurer, there must be something more than the mere harm done to the neighbour's property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required which is connoted, in my definition, by the word "use". This conception is implicit in all the decisions which impose liability only where the defendant has 'caused or continued' the nuisance.*

[48] The interference must not be trifling, but consequential in order to be unreasonable. And the duration of the interference is a relevant factor in determining whether the interference is trifling or substantial[9].

[49] The editors of Salmond & Heuston on Tort[10] make the point that the tort of nuisance arises if the nuisance is created by the defendant on land other than their own. They make the further point that a nuisance is usually created by acts done on land in the occupation of the defendant, adjoining or *in the neighbourhood* (emphasis mine) of that of the plaintiff.

[50] The UK Supreme Court in the decision of ***Coventry et al v Lawrence et al***[11] said that,

> *In Sturges v Bridgman (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".* ***Accordingly, whether a particular activity causes a nuisance often depends on an assessment of the locality in which the activity concerned is carried out. (emphasis mine)***

[51] On the facts as pleaded, I do not see any facts which suggest that the interference was of any significance. Yes. They assert that sewage is on their property. But

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[9] See paragraphs 55-57 of the decision of Campbell J in *Hanson v ALCOA Minerals of Jamaica Inc* [2012] JMSC Civ 150

[10] 21 ed at p. 56.

[11] [2014] UKSC 13 at para 4 per Lord Neuberger P

there is no allegation of the quantity, the location on their property onto which the sewage was deposited, the period for which the sewage was being deposited etc. On the face of it, therefore, no actionable nuisance has arisen for the sewage deposits.

[52] I agree with the submissions of Mr. Robinson, in reliance on the decision of ***Karlene Henry et al v Burns Gayle et al***[12] that there is no cause of action against an owner of higher land who allows storm water to flow onto the lower land of another landowner. The owner of the lower land is allowed to take reasonable steps to block the flow of the storm water so long as the blocking is done without intent to injure the property of the owner of the higher land and the actions are neither negligent or unreasonable.

[53] In this regard, therefore, I do not find that the cause of action for nuisance has been properly pleaded and it is therefore struck out.

CONCLUSION ON THE ISSUE REGARDING THE COUNTERCLAIM.

[54] It is my view that the only cause of action that can survive from the Counterclaim is Trespass.

ORDERS:

(i) The causes of action for Breach of Restrictive Covenant, Negligence and Nuisance are all struck from the counterclaim.
(ii) The counterclaim for trespass (but only the claim for the running of the sewage pipe and discharge of sewage on the Defendant's property) may continue.
(iii) Costs to the Claimant/Applicant to be taxed if not agreed but apportioned 75% to 25% on the basis that the Defendant/Counterclaimant was successful on one cause of action out of four.

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[12] Unreported Supreme Court of Jamaica 2005 HCV 01971, September 15, 2006.

THE DEFENDANT'S EXPERT WITNESS

[55] I will briefly address this issue. It is my finding that the Defendant's expert should not be appointed as such in all the circumstances of the case.

[56] The Defendant's expert, based on the uncontradicted evidence of Mrs. Crandon, is the son of the Architect who was heavily involved in the design and construction of the Defendant's project. It is likely that he has an interest to serve to protect his father's work. There was no evidence from the potential expert himself to defend himself or assert his independence.

[57] What is more, the expert report exhibited to the affidavit of Mr. Marc Williams, sworn on the 9th April 2025, is wholly non-compliant with the Civil Procedure Rules with regard to expert reports. It is not addressed to the Supreme Court, it does not contain any of the statements required by rule 32.13(2), nor are the instructions to the expert witness present. It is also missing the critical information that he is the son of the architect who designed and was involved in the construction. This is in direct conflict with his obligations under 32.13(2)(d), which states that the expert must, at the end of the report, give a statement that the expert (among other things):

> *(d) has given details in the report of any matters which to his or her knowledge might affect the validity of the report.*

[58] In all the circumstances, therefore, the report must be rejected.

ORDERS ON APPLICATION FOR APPOINTMENT OF EXPERT WITNESS

1 The Defendant's application filed on the 9th April 2025 is refused.
2 Costs to the Claimant to be taxed if not agreed.

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Dale Staple
Puisne Judge