[2017] JMSC Civ 130

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 02905

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF THE APPLICATIONS BY LOUIE JOHNSON, JOYA HYLTON, LAMOY MALABRE AND ERNEST SANDCROFT ALLEGING BREACHES OF THEIR RIGHTS UNDER SECTION 13 (3) (1) OF THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS (CONSTITUTIONAL AMENDMENT) ACT 2011

AND

IN THE MATTER OF AN APPLICATION BY THE FOUR (4) CLAIMANTS FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE SAID CHAPTER

BETWEEN	**LOUIE JOHNSON**	**1ST CLAIMANT**
AND	**JOYA HYLTON**	**2ND CLAIMANT**
AND	**LAMOY MALABRE** **(by his mother and next friend Phyllipa Blake)**	**3RD CLAIMANT**
AND	**ERNEST SANDCROFT**	**4TH CLAIMANT**

AND **NATIONAL SOLID WASTE MANAGEMENT AUTHORITY** **DEFENDANT**

IN CHAMBERS

Mr William Panton and Mr Kristopher Brown instructed by DunnCox, attorneys-at-law for the Claimants/Respondents

Mr Jalil Dabdoub instructed by Dabdoub Dabdoub & Co. attorneys-at-law for the Defendant/Applicant

Mrs S Reid Jones, attorney-at-law, (watching proceedings on behalf of the Director of State Proceedings)

Ms Tova Hamilton, Legal Officer of Defendant

HEARD: May 5, June 21 and September 22, 2017

APPLICATION FOR ORDER TO STRIKE OUT FIXED DATE CLAIM FORM – RULE 26.3 (1)(C) OF THE CIVIL PROCEDURE RULES (CPR)

LINDO, J

[1] The Claimants are residents of the parishes of Kingston, Saint Andrew and Saint Catherine who have filed a claim alleging that their right to enjoy a healthy and productive environment free, from the threat of injury or damage from environmental abuse and degradation of the ecological heritage was contravened by the Defendant.

[2] They allege that the Defendant has failed to effectively manage the Riverton City Disposal Site and they have suffered injuries as a result of a fire at the said site on February 6, 2016 which lasted for six days. They contend that the emissions and toxic fumes from the fire between February 6 and February 29 resulted in injuries and damage to their health.

[3] The Defendant, the National Solid Waste Management Authority (NSWMA) (The Authority) is a statutory body governed by the provisions of the **National Solid Waste Management Act, 2002**. It is an agency of the Ministry of Local Government and Community Development, whose primary function is the

management of solid waste disposal sites, including the Riverton City Disposal Site in Saint Andrew.

The Claim

[4] On June 16, 2014, the Claimants commenced the matter by filing a Fixed Date Claim Form (FDCF) seeking the following reliefs and orders:

1. A Declaration that the Defendant is in breach of its statutory duty to effectively manage solid waste at the Riverton City Dump in order to safeguard public health in violation of the National Solid Waste Management Act 2001 and amounted to a breach of the Claimants' constitutional right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse as guaranteed by Section and (sic) 13(3)(1).

2. A Declaration that the said breach of statutory duty amounted to a failure to safeguard public health and in so doing breached the Claimants' rights as guaranteed by Section 13(3)(1) of the Charter.

3. Damages

4. Special Damages - medical and transport expenses pursuant to the attached schedule and continuing.

5. Interest on damages.

6. An order that the costs of this claim be the Claimants' to be taxed if not agreed.

7. Such further and other relief be given as this Honourable Court deems fit.

[5] The FDCF is supported by the affidavits of the four Claimants who are alleging that the Defendant has breached its obligations under the National Solid Waste Management Act and that in so doing has breached their constitutional rights as guaranteed by Section 13(3)(1) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011.** (The Charter)

[6] The FDCF came on for first hearing on July 29, 2014 at which time several orders were made including that "the claim shall be heard by a Judge in Open Court for three (3) days, commencing December 1, 2015 at 10:00am each day".

[7] The precise progress of the matter after July 29, 2014 is somewhat uncertain from the court's file although on that date, on the first hearing of the FDCF, orders were made for the matter to be heard in open court. It is noted however, that subsequent to this, applications for extension of time to carry out certain orders of the court were made by the parties as well as an application for the variation of orders made on July 29, 2014 by the Claimant. At a hearing on October 23, 2015, the matter was adjourned to December 3, 2015 "for a determination on the issue of whether the matter is to be heard by the Full Court..." Written submissions on that issue were filed on behalf of the Attorney General and the Claimant.

[8] Although not a named party in this matter, the Attorney General, on December 20, 2015, in the written submissions, opined that the claim was one seeking constitutional redress and stated that "the proper forum for constitutional redress is the Full Court of the Supreme Court". It is also noted that on July 15, 2016, the parties through their respective Counsel as well as Counsel from the Attorney General's Chambers, filed a "Consent Order" which reads as follows: "The Claim herein shall be heard by the Full Court on a date(s) to be fixed."

[9] This order does not appear to have been perfected although on October 7, 2016 the court ordered, *inter alia*, that the trial is fixed for the 8th – 10th days of May, 2017 before the Full Court.

The Application

[10] By Notice of Application for Court orders filed on February 20, 2017 the Defendant seeks an order that the FDCF be struck out and costs be awarded to it. The Notice of Application for Court orders was subsequently amended and the amended notice was filed on April 20, 2017. The Amended Notice indicated that

reliance was being placed on the affidavits of the Claimants as well as on the affidavits of Kristopher A. Brown and Percival Stewart. The grounds on which the application is made, as stated in the notices are as follows:

> *"1. The Claim is frivolous and vexatious and;*
>
> *2. The Claim is an abuse of the process of the Court."*

It is this application to strike which is being addressed in this judgment.

Applicant's Submissions

[11] Mr Dabdoub, on behalf of the Applicant, submitted that the FDCF is seeking constitutional redress and has failed to disclose a cause of action "in the constitutional court". He stated that the cause of action as brought in the Constitutional Court and as pleaded is "obviously and almost incontestably" bad. In support of this submission he relied on **Dyson v The Attorney General** [1911]1KB 410 which was applied in the Court of Appeal decision of **Rudd v Crowne Fire Extinguishers Services Ltd,** (1989) 26 JLR 563. Counsel noted that in Dyson, at page 419 it was stated that:

> *"Differences of law, just as differences of fact, are normally to be decided by trial after hearing on court, and not to be refused a hearing in court by order of the judge in chambers. Nothing more clearly indicated this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind, it is evident that our judicial system never permit a plaintiff to be "driven from the judgment seat" in this way without any court having considered his right to be heard,* ***excepting in cases where the cause of action was obviously and almost incontestably bad."*** *(emphasis supplied)*

[12] He contended that a reading of the FDCF clearly shows that the prayers sought by the Claimants are for declarations that NSWMA is in breach of its statutory duty and that this breach amounted to a breach of the Claimants' constitutional rights under section 13(3) of the Constitution. Counsel examined the evidence contained in the four affidavits of the Claimants filed in support of the FDCF and stated that if the facts contained in those affidavits are true, they raise a cause of action in negligence and in particular, nuisance and not a claim seeking constitutional redress.

[13] He expressed the view that there are limits within which constitutional redress can be claimed and stated that there was nothing pleaded in relation to damages which would flow from a claim for constitutional redress. He therefore submitted that it is trite law that the common law recognised a cause of action in nuisance as far back as in the case of **Rylands v Fletcher** [1868] UKHL 1 and contended that the facts as presented represent a classic case of negligence arising through nuisance. He cited the cases of **Hanson v Alcoa Minerals of Jamaica Incorporated** [2012] JMSC 150 and **Desmond Bennett v Jamaica Public Service Company Ltd.** [2013] JMCA Civ 28 as examples of cases where the courts have so recognized these types of actions.

[14] Counsel urged the court to exercise its powers under the Constitution in striking out the claim, making specific reference to section 19(4) which states as follows:

> *"Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its power and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law."*

[15] He pointed out that the scheme of the Constitution speaks to circumstances in which the court should hear a claim for redress therefore the Claimants cannot say their sole method of redress is in the Constitution as there are other adequate means of redress for the claims alleged.

[16] He submitted that there is no basis to bring a constitutional claim as the affidavits in support of the claim fail to disclose any fact or feature which would indicate that it was appropriate "to take the constitutional route..."

[17] Mr Dabdoub cited the Privy Council case of **Attorney General of Trinidad & Tobago v Ramanoop,** PCA No 13 of 2004, delivered March 25, 2005, noting that Board said, *inter alia*:

> *"...constitutional relief should not be sought unless the circumstance of which the complaint is made includes some feature which makes it appropriate to take that course"*

He also indicated that at paragraph 25 of the judgment their Lordships said:

> *"As a general rule, there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional redress in the absence of such a feature would be a misuse, or abuse, of the court's process."*

[18] Counsel therefore suggested that the correct approach in the instant case was for the Claimants to have filed a claim in negligence seeking the common law remedy available. He therefore urged the court to strike out the claim "as disclosing no cause of action and being an abuse of the process of the court pursuant to the Constitution of Jamaica ..."

Submissions on behalf of the Claimants/Respondents

[19] Mr Panton on behalf of the Claimants/Respondents maintained that the Authority has repeatedly breached its obligations under the **National Solid Waste Management Act, 2001** and has failed repeatedly to "take all such steps that are necessary for the effective management of solid waste at the Riverton City Disposal Site in order to safeguard public health and in doing so contravened the Claimants' constitutional rights as guaranteed by section 13(3)(1) of the Charter".

[20] Counsel suggested that due to the importance of the landfill and the impact on the Claimants, a simple claim by them for compensation would not meet the gravamen of the situation because the Constitution speaks about environmental abuse.

[21] He cited the case of **Banton & Ors v Alcoa Minerals of Jamaica & Ors** (1971) 17 WIR 275 at 305 where Parnell J, in delivering the judgment of the Full Court, stated:

> *"...the mere allegation that a fundamental right of freedom has been or is likely to be contravened is not enough. There must be facts to support it. The framers of the Constitution appear to have had a careful long look on several systems operating in other countries before they finally agreed to Chapter III as it now stands."*
>
> ...
>
> *Before an aggrieved person is likely to succeed with his claim before the Constitutional Court, he should be able to show:*
>
> ...
>
> *That there is no other avenue available whereby adequate means of redress may be obtained. In this connection, if the complaint is against a private person, it is difficult if not impossible, to argue that adequate means of redress are not available in the ordinary court of the land.* ***But if the complaint is directed at the state or an agent of the state it could be argued that the matter of the contravention alleged may only be effectively redressible in the Constitutional Court****." (emphasis supplied)*

[22] He indicated that when dealing with a claim based on environmental abuse there is only one place for the matter to be determined and it should not be in the private civil court and that Section 19 of the Constitution ground the circumstances for constitutional redress

[23] Mr Panton further submitted, in reliance on the case of **Three Rivers DC v Bank of England (No. 3)** [2001] UK HL 16, that "the courts power to strike out an action... under its inherent jurisdiction to prevent abuse of process... should only be exercised in very plain and exceptional circumstances and in plain and obvious cases". He also argued that "abuse of process" is not defined in the CPR but that it has been explained, in another context, in the case of **Attorney General v Barker** [2000]1 FLR 759 D.C., as "using that process for a purpose or in a way significantly different from its ordinary and proper use".

[24] He submitted that the instant case is one which is of such importance that it ought properly to be considered and heard by the Constitutional Court. He drew the court's attention to the submissions from the office of the Director of State Proceedings in relation to the importance of the matter, and submitted that it was not appropriate to strike out a claim in an area of developing jurisprudence, since in such areas, decisions as to novel points of law should be based on actual findings of fact.

[25] Counsel added that a statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence and that such an application should not be granted unless the court is certain that the claim is bound to fail. He therefore suggested that the application to strike out was ill-conceived, and urged the court that the matter was worthy of consideration and should go before the Full Court.

The Law

[26] The court's power to strike out a claim is derived from Section 26.3(1) of the CPR.

It states as follows:

> "*(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*

(a) .....

(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."

[27] The learned authors of **Halsbury's Laws of England,** 4th Edition, paragraphs 430 -435, in discussing the court's power to strike out pleadings, stated, *inter alia*, that :

> *"The powers are derived from two parallel sources. First, they are conferred by rules of court and secondly, they are exercisable under the court's inherent jurisdiction..."*

Additionally, it is stated that:

> *"However, the summary procedure under this provision will only be applied to cases which are plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable... Nor will a pleading be struck out where it raises an arguable, difficult or important point of law."*

[28] A court hearing an application to strike out a claim is therefore exercising a discretionary jurisdiction. According to the authors of Halsbury's, *supra*,

> *"this discretion will be exercised by applying two fundamental, although complementary, principles. The first principle is that the parties will not lightly 'be driven from the seat of judgment', and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done', so as to prevent the parties being harassed and put to expense by frivolous, vexatious or hopeless litigation."*

In exercising its discretion in an application of this nature, however, the court cannot seek to try the claim on the affidavit evidence when the facts and issues are in dispute, to determine whether the Claimant has a cause of action.

[29] Where a statement of case discloses no reasonable grounds for bringing or defending it, it will ordered struck out or amended, if it is capable of amendment under **Part 20 of the CPR**. Rule 26.3(1)(c) however, will only be applied to cases which are "plain and obvious, where the case is clear beyond doubt, where the cause of action or defence is on the face of it obviously unsustainable, or where the case is unarguable".

Discussion

[30] Before embarking on the discussion, I will make the following two observations which I find useful to note.

[31] Firstly, the application under consideration was filed on February 20, 2017, almost six months after the parties had, on July 15, 2016, filed a "consent order" for the matter to be heard by the Full Court. This "Consent order" although not 'perfected' was followed by an order of the court made on October 14, 2016, setting a trial date and giving directions. Additionally, submissions were filed by the Attorney General on December 2, 2015 in which the court was urged to have the matter listed for hearing before the Full Court based on the nature of the claim.

[32] Secondly, the grounds on which the Applicant rely in seeking the order for striking out as set out in the Notice of Application filed on February 20, 2017, are listed as follows:

> "1. The Claim is frivolous and vexatious and;
>
> 2. The claim is an abuse of the process of the court."

[33] No submissions were made in relation to the first ground, save and except in response to the Respondent's reference to the case of **AG v Barker,** where Counsel for the Applicant indicated that the terms "frivolous and vexatious" are used together although they are different principles and stated that you need not be a vexatious litigant for your claim to amount to an abuse of process. However, it is noted that in the Skeleton Arguments filled on behalf of the Applicant on May 2, 2017, it states that the prayer is "that this claim be struck out as disclosing no cause of action and being an abuse of the process of the court pursuant to the Constitution of Jamaica..."

[34] Turning to the substantive aspect of the application, I am reminded that the court's power to strike out a claim is derived from **Rule 26.3(1) of the CPR.** I will also adopt the approach of the Court of Appeal in the case of **Rudd** where Downer JA, stated that:

> *"...Even if the case is not a strong one, it merits an examination of the law and facts. The proper test was laid down in the interlocutory proceedings in the great case of Dyson v The Attorney General (1911) 1KB 410, the headnote reads:*
>
> *'Order XXV.,r.4,--which enables the court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action was never intended to apply to any pleading which raises a question of general importance, or serious question of law.'"*

[35] Downer JA also quoted with approval from the case of The **Republic of Peru v Peruvian Guano Company,** 36 Ch. D 496**,** thus:

> *"If notwithstanding defects in the pleading, which would have been fatal on a demurrer, the court sees that a substantial case is presented the court should, I think, decline to strike out that pleading, but when the pleading discloses a case which the court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation."*

[36] The **Rudd** case cited by Counsel for the Applicant is apposite, but it does not assist him. In that case it was held that where there is an arguable case disclosed on the pleading it should not be struck out

[37] I accept that the above principles represent the correct approach in treating with an application of this nature and accept that the court is only required to have regard to the statements of case and to come to a decision based on the terms and contents of the statements of case. It is also clear from the authorities that before a court can strike out a claim it must be obvious that no reasonable cause of action is disclosed.

[38] In assessing the Claimants' statement of case to determine whether it is an abuse of process there is no factual basis on which I could make such a finding. It was submitted on behalf of the Claimants, and I am in agreement, that their claim involves novel points of law which requires actual findings of fact. Based on this, coupled with the constitutional issues raised on their case, I am of the view that the proper forum for the hearing and determination of the matter is the Full Court.

[39] The statement of case, on the face of it, is one seeking constitutional redress and this in my view does not demonstrate an abuse of the process of the court and as such the Claimants ought not to be "driven from the seat of judgment".

[40] The statement of case as pleaded, also cannot in my view be said to be "obviously unsustainable" and neither can it be said to be "unarguable". If I understand correctly the gravamen of the applicant's submission, the contention is not that the statement of case discloses no reasonable ground for bringing a claim, but rather that the claim lies in common law rather than for constitutional redress. Counsel cited **Attorney General of Trinidad & Tobago v Ramanoop,** to support the contention for striking out based on an absence of constitutional features in the statement of case. I do not however find that this case assists the

Applicants as it is clear that they prayed for declarations seeking constitutional redress under the Charter.

[41] Generally, claims can only be brought for environmental harm where private parties' interests are involved, such as damage to their property. These claims are usually based on the common law and the actions are brought for nuisance or negligence by those who suffered directly. With the introduction of the Charter, I am of the view that the avenues for redress have been broadened. The provisions on the enforceable right to a healthy environment are clear. The Charter provides for the right to "enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;" thereby recognising a substantive right to a healthy environment and also recognising infringements on human rights through adverse environmental conditions.

[42] This right can be enforced not only for harm that has occurred but also where there is a threat of harm. Section 19(1) of the Charter states as follows:

> *"19. (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."*

[43] The type of relief available for constitutional claims is not specified. However, the Charter empowers the court to grant any orders it regards as necessary to enforce or secure the enforcement of any rights. Section 19(3) and (4) provide as follows:

> *"(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this*

Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law."

Conclusion

[44] Having considered the rival arguments of counsel for the respective parties, and having made a critical examination of the statements of case and the provisions of the Charter, it is my view that the statement of case "raises an arguable, difficult [and] important point of law" and should not be struck out at this stage especially not having received the benefit of a hearing before the Full Court, as is the usual practice in this jurisdiction and this is a matter which ought to be heard and determined by the constitutional court.

[45] As far as this court is aware, there has been no matter of this nature prior to this and the subject matter is one which has been played out nationally during the period referred to by the Claimants. I am of the view that a remedy may be available on facts which show, for example, significant physical or psychological health risks or impact and as severe environmental pollution may affect individuals' well-being and affect their private and family life, a determination of whether this violation had occurred in the situation as pleaded by the Claimants, should be determined by the court.

Disposition

[46] The application to strike out the Fixed Date Claim Form is therefore dismissed with costs to the Claimants to be agreed or taxed. Leave to appeal is refused.

[47] In the exercise of my powers of case management, the matter is set down for a further pre trial review hearing to be held on the 6th day of February 2018 at 3 p.m. for one hour. The matter is set for hearing by the Full Court on May 14 – 17, 2018.