



[2022] JMSC Civ 53

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 06761

BETWEEN	LASCELLES MELHADO	CLAIMANT
AND	RICHARD HYLTON	1ST DEFENDANT
AND	TYRONE BROWN	2ND DEFENDANT
AND	THE ATTORNEY GENERAL	3RD DEFENDANT
AND	THE TRANSPORT AUTHORITY	4TH DEFENDANT
AND	THE ISLAND TRAFFIC AUTHORITY	5TH DEFENDANT

IN OPEN COURT

MR. RAYMOND SAMUELS instructed by **Samuels Samuels Attorneys-at-Law** for the Claimant

MS. FAITH HALL instructed by the Director of State Proceedings for the 1st, 2nd 3rd and 4th Defendants

Heard: April 25 and 26, 2022

Tort – Wrongful Interference with Goods – Whether such cause of action exists in Jamaica.

Civil Procedure – Amendment to Statement of Case – Amendment to Statement of Case after Limitation Period passed to add/substitute a cause of action – Late Applications to Amend Statement of Case – Whether Application to Amend at trial should be granted – Principles Applicable – Application for Amendment Refused

Civil Procedure – Late service of witness statement - Whether filing and serving a notice of filing of witness statement under Rule 29.7 is compliant with Order for Service – whether Claimant should have served witness statement once confirmed at Pre-Trial Review that no other witness statement/summaries were coming from other parties – whether Claimant should have applied for relief from sanctions before trial – whether Court may grant permission to Claimant to rely on witness statement at trial.

D. STAPLE, J (AG)

BACKGROUND

- [1]** On November 23, 2010, the Claimant took his motor vehicle registration number 0265 DH to the motor vehicle examiner for an examination to be conducted for him to be issued the necessary documents to certify that the said vehicle was fit to be used on the road.
- [2]** Following a series of events, the Claimant's vehicle was first taken, then returned to him. His motor vehicle documents were taken, but never returned and he received no certificate of fitness.
- [3]** According to the Claimant, the 2nd Defendant was asserting that the vehicle had been tampered with and was to be scrapped. The 1st Defendant, according to the Claimant, said he was not going to issue any certificate of fitness as the 2nd Defendant said the vehicle had been tampered with and was to be scrapped.

- [4] He claims he suffered loss and damage and incurred expenses as a consequence of all these events. To this end he has sued the Defendants for Wrongful Interference with Goods being;
- a) The documents pertaining to the use of the Claimants vehicle on a road; and
 - b) The Claimant's motor vehicle 0265 VH.
- [5] In response, the Defendants asserted in the Defence filed on the 22nd January 2013 that the 1st and 2nd Defendants acted lawfully.
- [6] They say that the Claimant's vehicle was inspected and certain suspicious findings were made which triggered the need for a forensic examination. This examination was done and it was found to have been tampered with.
- [7] The Defendants went on to say that as a consequence of these findings, an E1 Certificate of Defect was issued by the 1st Defendant which was sent to the Collector of Taxes for the chassis number to be blocked. This had the effect of rendering the vehicle unfit to be driven on the road until the issues could be regularized and, as such, a certificate of fitness could not be issued.
- [8] At this point the vehicle was returned to the Claimant and he was told that the vehicle was deregistered. In the circumstances, the Defendants said they have done nothing wrong and the Claimant is not entitled to the relief sought.

MISCELLANEOUS ISSUES BEFORE TRIAL

The Cause of Action – Was it Correct and Can the Claim Continue?

- [9] There is no cause of action known to the common law applicable in Jamaica as Wrongful Interference with Goods. The cause of action known as Wrongful Interference With Goods is a creature of the UK **Torts (Interference with Goods) Act 1977**.

[10] The statute abolished the common law tort of detinue and consolidated the torts of trespass to goods, conversion (also known as trover) and detinue into one cause of action known as wrongful interference or wrongful interference with goods¹.

[11] Halsbury's Laws of England² states as follows,

“Until 1978, two main causes of action lay for the protection of proprietary interests in goods. These were trover (now more commonly called 'conversion') and detinue. The Torts (Interference with Goods) Act 1977 abolished the former tort of detinue but expanded the scope of conversion, which now lies in every case in which detinue formerly lay before it was abolished. Today the law on wrongful interference encompasses the specific torts of conversion, trespass to goods, and negligence so far as it results in damage to goods or to an interest in goods, and any other tort so far as it results in damage to goods or to an interest in goods.”

[12] There is no statutory equivalent of the **Torts (Wrongful Interference with Goods) Act** in Jamaica. As such, the common law torts of Trespass, Detinue or Conversion (Trover) and Negligence are what are available to persons to get relief from what they feel are wrongful interference with their goods.

[13] The Claim for Wrongful Interference with Goods is therefore not known to the laws of Jamaica and are therefore not actionable in this Court.

[14] As such, the Claim is liable to be struck out as disclosing no cause of action.

Further to this, the Claimant indicated that he wished to apply to amend the Claim Form and Particulars of Claim. I gave directions for him to file the Application and Affidavit in Support and serve both on the Defendants on the 25th April 2022 for hearing on the 26th April 2022. Time was abridged for service.

¹ See s. 1 **Torts (Wrongful Interference with Goods) Act 1977 UK**

² (Volume 97 (2015)) at paragraph 602

Whether to Amend or No?

- [15] The Claimant has now applied to amend his statement of case to substitute the cause(s) of action trespass to goods, conversion and/or detinue by application filed on the 25th April 2022 on the Court's direction.
- [16] The Civil Procedure Rules makes it possible for amendments to statements of case to add or substitute causes of action after a relevant period of limitation has expired.
- [17] Rule 20.4(2) of the Civil Procedure Rules states that a statement of case can be amended after the case management conference with the permission of the Court.
- [18] Rule 20.6 makes provision for addition or substitution of a **party** (emphasis mine) after a limitation period has passed. But this is not the section under which the Claimant's application is to be considered.

The Source of the Power to Amend After a Limitation Period Has Expired

- [19] Counsel for the Defendants argued that under rule 20.6, the Court is limited in granting amendments after a limitation period has passed only to the correction of errors in names of parties.
- [20] An interesting point to note is that under the English CPR Rule 17.4(2), the Court is expressly empowered to amend a statement of case after a relevant limitation period has expired to add or substitute a new claim.
- [21] There is no such provision in the Jamaican Civil Procedure Rules.
- [22] I agree with counsel that the only amendments spoken of in rule 20.6 (amendments after a limitation period has expired) are amendments to correct the name of a party.

[23] However, this point was addressed by Karl Harrison JA in ***Jamaica Railway Corp. v Mark Azan***³. He determined, in essence, that though there is no express provision in the Jamaican Civil Procedure Rules that would speak to amendments to statements of case to add/substitute a cause of action after a limitation period has expired, it could be done in furtherance of the overriding objective and through the general powers of case management.

What is the Court to Consider in Deciding on the Amendment to Add/Substitute Causes of Action after a Limitation Period has expired?

[24] A leading authority on this question is *Attorney-General of Jamaica v Aaron Hutchinson et al*⁴. In this case, the Claimant/Respondent had sued the Defendants/Appellants to recover damages for Assault and Battery arising out of an incident involving him being beaten, imprisoned and prosecuted by the 2nd Defendant a police officer.

[25] After the limitation period had passed, the Claimant applied to the Court for permission to add the causes of action for False Imprisonment and Malicious Prosecution which had not been originally pleaded, but arose from the case as pleaded in the further particulars of claim. Campbell J allowed the amendments and the Defendants appealed the decision. It was held on appeal that the amendments were permissible.

[26] Harrison JA, in the case of ***Jamaica Railway Corporation***⁵, set out the instances where an amendment may or may not take place after the limitation period has expired. These are:

(1) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. If factual issues are in any event going to be litigated

³ Unreported, SCCA 115/05, February 16, 2006.

⁴ [2015] JMCA Civ 47

⁵ Id n4

between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.

- (2) Where the only difference between the original case and the case set out in the proposed amendments is a further instant of breach, or the addition of a new remedy, there is no addition of a new cause of action.
- (3) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as to give rise to a cause of action already pleaded.

[27] However, there are other material factors the Court must weigh before granting the application. There is no exhaustive list, but some are found in the decision of the Court of Appeal in *Epstein v NHT et al*⁶. The Court of Appeal favourably considered a list of factors adumbrated by Barnaby J in the Court below⁷ and I will reproduce the list here:

- (i) The stage at which the case has reached at the time the application for permission to amend is being sought;
- (ii) Whether there is an arguable factual basis for the proposed amendment;
- (iii) Where the amendment is proposed to be made late in the day, whether it has a prospect of success;
- (iv) Whether the amendment is sought in good faith, as it is impermissible for a party to raise by amendment allegations which are unsupported by evidence and which are tantamount to a backtracking on allegations of fact;
- (v) The court should permit an amendment where it would enable the real matters in controversy to be determined;
- (vi) The effect of the amendment on the opposing party;
- (vii) The allocation of court resources; and
- (viii) The extent to which costs would be an adequate remedy.”

The Late Stage Application for Amendment and Allocation of Court’s Resources

[28] The later the request for amendment, the less likely it is that it should be granted. It is now well settled that the foundation of the Court’s power to grant amendments

⁶ [2021] JMCA App 12

⁷ Id at paragraph 33

to statements of case in Jamaica is pursuant to the overriding objective and the Court's general case management powers. This position was reaffirmed in *Epstein v National Housing Trust*⁸.

[29] At paragraph 39 of the said judgment, McDonald Bishop JA stated that a Court's tolerance to late amendments may undermine the Court's ability to manage the litigation process effectively.

[30] In the case at bar, the Claimant's application is being made at the start of the trial. In the *Epstein* case the application was being sought prior, but very close, to the trial. In the case at bar, the Claimant had already amended the pleadings once, gone through a case management conference and two pre-trial reviews prior to the trial. The Claimant would have benefited from a tremendous amount of the Court's already meagre resources.

[31] The consequence of granting such a late stage amendment would necessarily mean an adjournment of the trial to facilitate service of the amended pleadings, the fixing of a case management conference date and a long wait for a trial. So the court would have wasted four precious trial days. This, in my view, is an unreasonable and unfair allocation of scarce court resources to this case in particular that has had such a history. It would not be furthering the overriding objective in dealing with cases justly for all litigants and not just this litigant in particular.

[32] In *JRF v Banton*⁹ the Court of Appeal of Jamaica stated that the Applicant who is making a late stage application for amendment has a **heavy burden** (emphasis mine) "to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court...A heavy burden lay on the applicant to establish that the late amendment he was seeking

⁸ [2021] JMCA App 12 at para 36.

⁹ [2019] JMCA Civ 12 at para 26

was in keeping with the overriding objective to deal with the case justly, bearing in mind all the elements that make up the overriding objective as set out in part 1 of the CPR.”

[33] The Applicant here has not satisfied me that he has met that heavy threshold. There is no sufficient reason in the affidavit in support of the application for amendment for the Applicant not to have done due diligence to discover whether or not the cause of action as pleaded was proper. A valid cause of action is a fundamental first step in commencing litigation in any court of law. Without one, you cannot approach the court.

[34] The amendment at this stage to correct such an error is unreasonable.

The Factual Basis and Prospects of Success

[35] I am of the view that there is a factual basis to amend the Claim to add a claim for trespass to property. But none exists for detinue or any other proposed cause of action.

[36] The gravamen of the Claimant’s factual challenge rests in the refusal of the 1st Defendant to issue the Claimant with a certificate of fitness.

[37] The Claimant’s draft Further Amended Claim Form and Further Amended Particulars of Claim are, in my view, inadequate. The causes of action are just lumped together and so the Court could not disaggregate what comprised the claim for trespass, what comprised the claim for detinue and how the conversion was made out.

[38] Whilst the seizure of the car and documents is actionable as a trespass, the refusal in paragraph 38 above is not. Nor is it actionable as trespass to property or conversion as pleaded. It is a fundamentally different cause of action from those in the draft amended pleadings which would rely on new discrete factual pleadings and remedies – none of which were expressly placed before the Court despite the amendment being sought.

[39] The Court was not sure whether the detinue concerned the vehicle documents taken as this was not plainly set out. If it did, the Claimant needed to have been more precise as to which documents were the subject of this action. Even if it were, the real complaint, as demonstrated in the pleadings, is the failure of the 1st Defendant to issue the Claimant with a certificate of fitness after the Claimant said he paid the fee for same, not the failure of the 1st and 2nd Defendants to return the certificate of fitness and/or registration certificate. None of the causes of action now pleaded address this issue.

[40] In those circumstances, the substantial substratum of the Claimant's case and claim for damages has still not been placed before the Court in a proper claim. What is more, the Court has no idea the evidential basis on which the Claimant has provided his figures for damages to the Court.

[41] The prospect of successfully establishing his damages, even if the narrow amendment were allowed, is in my view non-existent.

Whether Costs Would be an Adequate Remedy

[42] I am not of the view that costs would be an adequate remedy for the following reasons:

- (i) The Claimant would have occasioned a loss of 4 trial days. Trial days that could have been better allocated to other court users. Costs cannot compensate them as those users are not entitled to those costs and cannot benefit from an award of costs.
- (ii) Costs can not truly make up for time lost in the context of this case. The matter has been before the Court for close to 11 years. It has consumed, in my view, it's fair share of the Court's time and resources. There is no way that dollars can make up for those lost resources and further resources that would have to be expended to regularize the claim.
- (iii) I would also have to consider the financial resources and ability of the Claimant to pay an award of costs. The costs in this matter would be substantial and would be the Claimant's to bear in any event. I see no evidence that he has the means to pay same. So an award

of costs would be detrimentally more punitive to the Claimant than compensatory to the Defendant.

[43] In those circumstances, I am not satisfied that costs is an adequate remedy.

Conclusion on Whether to Grant Amendment

[44] Having considered the factors stated, I am of the view that the factors to refuse the amendment at this stage outweigh the factors for granting the amendment. The application is accordingly refused.

QUESTION ON WHETHER THE CLAIMANT IS ESTOPPED FROM RELYING ON HIS WITNESS STATEMENT?

[45] If I am wrong on the amendment issue, at the commencement of the trial, Ms. Hall for the Defendants objected to the Claimant relying on his witness statement and giving evidence at the trial as there was a breach of Rule 29.11. The Claimant had not served his witness statement on the Defendant until April 21, 2022.

[46] She relied on the authority of *Oneil Carter et al v Trevor South et al* [2020] JMCA Civ 54.

[47] Mr. Samuels countered with the assertion that the Claimant, relying on rule 29.7, had filed and served a notice of filing of witness statement and was not obliged thereby to disclose the witness statement until after the “defaulting” party had certified that they were in a position to disclose all of their witness statements.

[48] The main issue for determination is whether or not the Claimant has complied with the requirement to serve his witness statement within the time limited by the Orders of the Court.

[49] The simple answer is that he has not. At the Case Management Conference on the 15th June 2018, the learned Judge at order 6 ordered that witness statements were to be filed and exchanged by April 26, 2019.

[50] As a consequence, when the Defendant filed the witness statement under seal on February 4, 2021 and served his notice of filing of witness statement on the 4th February 2021, there was no compliance with Rule 29.7 on his part.

[51] Rule 29.7 says as follows:

29.7(1) This rule applies where:

- (a) one party (the first party) is able and prepared to comply with the order to serve witness statements; and
- (b) the other party fails to make reasonable arrangements to exchange witness statements.

(2) The first party may comply with the requirements of this Part by:

- (a) filing the witness statements in a sealed envelope at the registry by the date directed; and
- (b) giving notice to all other parties that the witness statements have been filed.

(3) The statements filed pursuant to paragraph (2) must not be disclosed to any other party unless that party certifies that witness statements or summaries in respect of all witnesses upon whose evidence that party intends to rely have been served.

[52] So in order to be in compliance with rule 29.7, the Claimant would have to demonstrate that at the time of filing the witness statement in the sealed envelope and service of the notice that he had so filed, he was able and prepared to comply

with the order to serve witness statements. He would then have to file the witness statement in the sealed envelope **by the date directed** (emphasis mine).

[53] In the case at bar, he was not so prepared and able. He filed the statement grossly out of time. He had not applied for relief from sanction.

[54] However, by the Court's order made at the Pre-Trial Review on the 1st November 2021 this situation would have been regularized. There was no appeal from this order and so it remains in effect in so far as it concerns the witness statements. So notwithstanding the authority of *Carter* above, an order is a valid one until a court of competent jurisdiction says otherwise. There was no express challenge to this Order from the learned Master.

[55] But then arises the lateness of the service of the witness statement itself. Counsel for the Claimant sought to shield himself under the cover of rule 29.7(3) by saying he had served the certificate and was not required to disclose until he received a certificate from the other party saying they had served all witness statements/summaries on which they intended to rely.

[56] However, in my view, by the time of the 2nd Pre-Trial Review in March 3, 2022, all parties would have been in a position to indicate that their cases and evidence were all in place. No orders were made for further extension to time to file and serve witness statements at that pre-trial review. The clear inference being that the Defendant had given all that it was going to give. In my view, at this stage, the Claimant would have been under an obligation to serve the witness statement.

[57] He could no longer rely on 29.7(3). To do so would not have been in furtherance of his obligations under the overriding objective to deal with the case justly. What is more, there is no evidence that he was ever served with the Defendant's certificate when he eventually served the witness statement on the 21st April 2022. So this makes his argument under 29.7(3) rather hollow.

[58] In my view therefore, he would not have been in compliance with the order at the Pre-Trial Review on the 1st November 2021 to comply with all Cases Management Conference Orders by February 28, 2022. In those circumstances, he ought to have applied for relief from sanction once he realised, at the Pre-Trial Review held on the 3rd March 2022, that nothing more was forthcoming from the Defendant. He ought not to have waited until the 11th hour to serve the witness statement.

What Can the Claimant Do?

[59] We are at the trial stage. Rule 29.11 provides that the trial Court may give permission to the person who seeks to rely on a witness statement that was not served in compliance with the court's order provided that the person seeking to rely on the witness statement shows the court "good reason" for not complying with rule 26.8 (relief from sanctions).

[60] In the *Carter* case it was recognised that the words "*at the trial*" in rule 29.11(2) are contextual since a court may grant permission in different contexts and at different stages.

[61] There is no procedure as to how the permission is to be sought at trial. This is unlike the pre-trial stage where rule 26.8 is the applicable rule. Rule 29.11 is silent concerning what is to happen at the trial. So then we have to go back to the general principle that the application can be made orally.

[62] Unlike rule 26.8 which requires an affidavit in support for an application for relief from sanction, rule 29.11(2) has no such requirement. However, I would think that affidavit evidence of the "good reason" would be needed to support the application.

[63] I say this as it would be quite incongruent for there to be a lower threshold at the trial stage for getting permission than at the pre-trial stage. It almost invites parties to just avoid the strictures of 26.8 altogether and then make the applications for

relief at trial. Further, the court would need an evidential basis on which to exercise its discretion¹⁰.

[64] There was no affidavit filed by the Claimant to show good reason for not applying for relief from sanction before. In the circumstances therefore the Court is not in a position to consider whether it should give the Claimant permission to rely on his witness statement.

[65] Accordingly, this permission would have been refused.

DISPOSITION

[66] I hereby make the following orders:

- (1) Application to amend Amended Claim Form and Amended Particulars of Claim dated and filed on the 25th April 2022 is refused.
- (2) The Claimant's Claim is struck out as disclosing no cause of action.
- (3) Judgment is entered for the 1st, 2nd, 3rd and 5th Defendants.
- (4) Costs to the Defendants to be taxed if not agreed.
- (5) Leave to appeal granted.
- (6) Claimant's attorneys-at-law to prepare file and serve this Order.

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Dale Staple
Puisne Judge

¹⁰ *Ratnam v Cumarasamy et al* [1964] 3 All ER 933 at 935