[2021] JMSC Civ.51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016 HCV 04378

IN THE MATTER OF MEDFORD PETERS LEWIS

AND

IN THE MATTER OF THE MENTAL HEALTH ACT

AND

IN THE MATTER OF THE INHERENT JURISDICTION OF THE SUPREME COURT

AND

IN THE MATTER OF THE JUDICATURE (SUPREME COURT) ACT

MEDFORD PETERS V THE MENTAL HEALTH ACT AND OTHERS

Mr. Hugh Small QC and Mr. Chadwyck Goldsmith instructed by Mr. Alton Morgan and Co. for the Applicant

Mr. Gordon Steer and Mrs. Judith Cooper Batchelor instructed by Chambers Bunny and Steer for the Respondents

Heard: January 25, 2021 and March 12, 2021

Civil Procedure - Part 37 of the CPR – Setting aside a notice of discontinuance - Whether the filing of the notice of discontinuance amounts to an abuse of process.

CARR, J. (AG.)

Background

[1] Mr. Medford Lewis (now referred to as the applicant) has three adult children namely, Heather Lewis, Marcia Lewis and Gary Lewis (now referred to as the respondents). On the 21st of October 2016 the respondents collectively filed a fixed date claim form seeking an order from the court under the Mental Health Act, to appoint them to act as a committee to handle the affairs of the applicant.

[2] The claim was challenged by the applicant and he filed an affidavit in response outlining among other things that he was now married and that his children therefore were not the proper persons to make such an application. An amended fixed date claim form was then filed on the 13th of October 2017 seeking an order that the respondents be appointed as guardians. By way of a further amended fixed date claim form the respondents sought to have Mrs. Elaine Lewis (Mr. Lewis's present wife) added to the claim and an order declaring that the applicants' marriage was null and void.

[3] On the 19th of October 2019, Jackson Haisley, J made an order by consent that the applicant was to be examined by independent doctors as to his mental capacity. Subsequently a report dated November 6, 2019 was submitted by Dr. Aggrey Irons in which he indicated:

> *"Mr. Lewis continues to be an elderly man who shows no evidence of severe psychiatric disorder. His aging process has continued over the past two years and his memory problems have increased from mild to moderate short term memory*

lapses. He can handle his own affairs with the appropriate cooperation of all his family members."

[4] In the midst of all of this the applicant filed a notice of application on the 14th of September for accounts to be provided. He wanted information about the joint accounts and investments held with the respondents, which he claimed he had no access to. In his affidavit in support of this application he averred that the respondents had abused a power of attorney he had entrusted them with. He wanted an account of all the money they held on his behalf subsequent to his withdrawal of that authority.

[5] The applicant through his attorneys also filed two separate applications to strike out the claim.

[6] On the 20th of November 2019 Y. Brown, J made an order as follows:

1. An assessment of the mental health of Mr. Melford Lewis done by Dr. Aggrey Irons and filed on the 15th of November, 2019 concluded inter alia that Mr. Lewis "can handle his own affairs with the appropriate cooperation of all his family members", hence an interim order is made for Mr. Melford Peters Lewis to have conduct and control of all his affairs including his financial assets until the determination of the Further Amended Fixed Date Claim Form filed on the 14th of March, 2018.

2. Mr. Medford Peters Lewis' children are to submit an affidavit to him, listing all his assets under their control within fourteen (14) days from the date herein. This affidavit is to be accompanied by documents where necessary. The said Affidavit is to be filed by the Claimant's Attorneys-at-Law within fourteen (14) days from the date herein.

3. The hearing of the Further Amended Fixed Date Claim Form filed on the 14h March 2018, is adjourned to the 24th and 25th of March 2020 at 10:00 am each day.

4. Dr. Aggrey Irons is to be present at the further hearing of the Further Amended Fixed Date Claim Form to be cross examined, as well as all other affiants in this matter.

5. Orders made herein are to be prepared, filed and served on all interested parties by Claimant's Attorneys-at-Law.

[7] On the 20th of December 2019 the respondents filed a notice of discontinuance wholly discontinuing the Fixed Date Claim form filed on the 21st of October, 2016, Amended Fixed Date Claim form filed on the 13th of October 2017, and the Further amended Fixed Date Claim Form filed on the 14th of March 2018 and all claims in the matter against the defendants/ interested parties. The notice of discontinuance was served on the attorneys-at-law for the applicant.

[8] On the 17th of January 2020 a notice of application to set aside notice of discontinuance was filed. An amended notice of application was later filed on the 3rd of March 2020, seeking the following relief:

1. That the Claimants' notice of discontinuance filed on 20 December 2019 be set aside;

2. That the trial dates of 24 and 25 March 2020 previously fixed by the court be preserved, or in the alternative, that the interim order of the Honourable Ms. Justice Yvonne Brown dated 20 November 2019 be made final on the date set for hearing of this application.

3. That the court specify a time and date for the compliance of Order 1 of the interim order of the Honourable Ms. Justice Yvonne Brown dated 20 November 2019;

4. That a penal notice be endorsed on the further interim order, or final order of the Court, as the case may be.

5. That the further interim order or final order of the Court includes an order for the Claimants Heather Lewis, Marcia Lewis, and Gary Lewis to prepare, file and serve, within seven (7) days of the date of this order, full and un-redacted details of all the financial institutions, account

numbers and account holders and/or Trusts, holding, or which previously held, funds obtained from Joint accounts with Medford Peters Lewis and details of any such other institution or Trust holding or having held assets or funds, or records of such assets or funds either obtained from joint accounts with Medford Peters Lewis or acquired and/or converted from the assets or funds held in these Joint accounts.

6. That the further interim order or final order of the Court includes an order that all Institutions and/or Trusts which held or currently hold assets or funds obtained from Joint accounts with Medford Peters Lewis are to release to this Court details and transactional history for the funds or assets so held and serve such copies on the Defendant's Attorneys-at-Law, Alton E. Morgan & Co. (LEGIS).

7. A declaration that the Claimants, Heather Lewis, Marcia Lewis and Gary Lewis are in contempt of Court for failure to comply with the interim order of the Honourable Mrs. Justice Yvonne Brown dated 20 November 2019;

8. Costs to be costs in the Application; and

9. Such further orders as this Honourable Court deems just

The Law

[9] Part 37 of the CPR outlines the procedure to be adopted when matters are to be discontinued.

"The general rule is that a claimant may discontinue all or part of a claim without the permission of the court. However a claimant needs permission from the court if he wishes to discontinue all or part of a claim in relation to which – (1) the court has granted an interim injunction; or (2) any party has given an undertaking to the court."[1]

"To discontinue a claim or any part of a claim a claimant must –
serve a notice of discontinuance on every other party to the claim;

[1] CPR Rules 37.2 (1) and 37. 2 (2) (a)

and file a copy of it. The claimant must certify on the filed copy that notice of discontinuance has been served on every other party to the claim."[2]

The Claimant has the right to apply to set aside the notice of discontinuance in the following circumstances:

"Where the claimant discontinues without the consent of the defendant or the permission of the court, any defendant who has not consented may apply to have the notice of discontinuance set aside."[3]

The effect of a notice of discontinuance is that the matter is brought to an end on the date when the notice is served on the defendant as per Rule 37. (3) (1) (a).

Submissions

On behalf of the Applicant

[10] The applicant's attorneys acknowledged that CPR rule 37. 2 (2) was not applicable in this case. It was their submission that a notice of discontinuance could nevertheless be set aside in circumstances where no leave or consent was required for its filing. The court in such a case should be guided by the decision on a similar issue in the case of **Lashoy Remouna Clacken-Campbell v. Glenford George Campbell[4]** . In that matter Morison, P as he then was concluded that the filing of the notice of discontinuance was a clear abuse of process.

[11] The applicant also sought an order that the respondents be declared as being in contempt of court for not abiding by the order made by Brown, J as to the issue of the filing of an affidavit outlining the assets held by them on behalf of their father.

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[2] CPR Rule 37.3 (1) and (2)
[3] CPR Rule 37.4 (1)
[4] [2017] JMCA App.2

It was argued that the order was not complied with and as such the court should find that they were in contempt of court.

[12] Following that, the court should make a new order specifying the date and time for compliance and attaching a penal notice.

On behalf of the Respondent

[13] Counsel Mr. Steer submitted that the order of Y. Brown, J cannot be read separately. Paragraph two of the order did not indicate that the affidavits were to be filed and served. The affidavits were emailed to the applicants' attorneys and they were subsequently filed. There was no breach of the court's order. The respondents' application was under the Mental Health Act and from the outset the applicant through his attorneys sought to have the matter dismissed. What therefore could be the abuse of process? The applicant never filed a notice of application or a counter claim in the original proceedings. The order of Y. Brown, J and the medical reports provided to the court meant that the children would have had a difficulty satisfying a court as to the merits of their claim. In those circumstances therefore the respondents had no other option but to file the notice of discontinuance.

Analysis and Discussion

[14] The central issue for determination is whether the actions of the respondents in filing the notice of discontinuance amounted to an abuse of process.

[15] There is no dispute that the respondent did not need the consent or the permission of the court to discontinue the matter. There is also no question as to the courts' power to strike out a notice of discontinuance in circumstances where the court is of the view that the filing of the notice would lead to an abuse of process.

[16] Lord Scarman made that clear in the case of **Castanho v. Brown & Root (UK) Ltd. and Anor.**[5] where it was held that;

"The court has inherent power to prevent a party from obtaining by use of its process a collateral advantage which it would be unjust for him to retain: and termination of process can, like any other step in the process, be so used…service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court."

[17] Robert Walker J in the judgment of **Ernst & Young (A Firm) v. Butte Mining PLC**[6] went further to say that the right of a litigant to file a notice of discontinuance was **"subject to the overriding rule that he could not do so if it was an abuse of process."**

[18] Lord Scarman in the **Castanho case** discussed what he termed the 'sensible test' to be applied in these types of cases in this way;

"Was it, then in the circumstances of this case, an abuse? In my judgment it was. A sensible test is that which both the judge and Lord Denning M.R. applied…suppose leave had been required…would the court have granted unconditional leave?" [7]

[19] It is important at this stage to recite the facts of the two cited cases. In the **Castanho case**, the plaintiff filed a claim in the United Kingdom. While the matter was ongoing he received interim payments from the defendant. At some point he was advised that if he brought the action in the United States that he could, if he was successful, receive a greater reward in damages. He subsequently discontinued the action in the United Kingdom and commenced fresh proceedings in the United States. Lord Scarman opined that, **"It is inconceivable that the court would have allowed a plaintiff, who had secured interim payments and**

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[5] [1981] AC 557 at 571
[6] Times Law Reports 22 March 1996
[7] Supra. 5 at p. 572

an admission of liability by proceeding in the English court, to discontinue his action in order to improve his chances in a foreign suit without being put upon terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England."[8]

[20] The collateral advantage in that case is plain. The plaintiff would have obtained interim payments, had the opportunity of an award in another court while still holding the option of commencing a fresh claim in the United Kingdom. No court would have given leave to file a notice of discontinuance in those circumstances without insisting on certain terms prior to its filing.

[21] What of the **Ernst & Young case**[9]? This was a case dealing with the improper actions of counsel. There was a claim by Ernst & Young for the sum of Three Hundred and Fifteen Thousand Pounds from Butte Mining PLC. A default judgment was entered and there was an application to set it aside. An affidavit was filed in addition to this application with a counter claim for the sum of Two Billion Dollars (US). A consent order was subsequently filed setting aside the default judgment and giving the defendants time to file their defence and counter claim. Counsel for Ernst & Young were to file and serve the order. They then filed the consent order with a notice of discontinuance of the claim. It was held that the notice of discontinuance filed by the attorneys on behalf of Ernst & Young would have had the effect of preventing Butte from pursuing against Ernst & Young a counter claim. **"Since the damages sought in the counter claim were so much larger than the sum awarded in the default judgment it was understandable that Ernst & Young might conclude that they would willingly relinquish the latter in order to scotch the former, because a fresh action by Butte, to recover those damages would be statute-barred."**

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[8] Supra. 5 at p. 572
[9] Supra 4.

[22] Although the case did not discuss a test to be applied in determining whether or not this was an abuse of process, similar to the **Castanho case** it is easy to see how the court came to such a conclusion, since Ernst & Young would have had the collateral advantage.

[23] Turning to our own jurisdiction, in the Court of Appeal judgment of **Clacken Campbell v. Campbell**[10] Morrison, P making reference to the two cases previously cited examined the question as to whether or not the applicant had a real prospect of success on appeal of a decision by a first instance judge to set aside a notice of discontinuance. The facts of that case are also worthy of consideration. Briefly the Applicant and Respondent were married. The Applicant filed a petition for divorce and following on that the Respondent filed several notices of application seeking to have his child, who was removed from the jurisdiction, returned and also seeking other orders as to custody. The applicant subsequently filed a notice of discontinuance of the Petition for Divorce.

[24] At paragraph 34 of the judgment it was stated,

> **"Treating firstly with the appeal against the judge's order setting aside the notice of discontinuance filed on 10 May 2017, Mrs Senior-Smith rehearsed the procedural history of the matter, to make the point that the applicant's motive in filing it was to deprive him of access to GC or knowing her whereabouts. While she accepted that the applicant needed no leave to file the notice of discontinuance, Mrs Senior-Smith nevertheless contended that it was an abuse of process for the applicant to have filed the notice in the circumstances of this case."**[11]

[25] In discussing the matter further he said at paragraph 47

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[10] Supra. 4
[11] Supra 10

"**In determining whether there has been an abuse of process, compliance with the rules is not a decisive consideration. As Lord Denning MR observed in Goldsmith v Sperrings Ltd [1977] 2 All ER 566, 574-575): "On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used."**

[26] He went on to examine the purpose for which the notice of discontinuance was filed at paragraph 49;

"In this case, on the same day on which her notice of discontinuance was filed (10 May 2017), the applicant asserted on affidavit that, the matter having been discontinued, "all consequential reliefs sought under such proceedings would also cease to exist or be terminated". From this, it seems to me to be strongly arguable that the notice was in fact filed for the collateral purpose of achieving this very result. If that was so, then that would in my view have been a clear abuse of process fully justifying the judge's decision. Accordingly, I do not think that the applicant has shown an appeal with a real prospect of success on this ground."

[27] In applying the principles as set out above in the referenced cases, the court is compelled to examine what may be considered as the underlying reason for the filing of the notice of discontinuance. Would the respondent have gained a collateral advantage in the circumstances? Is this a case in which unconditional leave would have been granted by a court?

[28] The fixed date claim form with all its amendments was filed under the Mental Health Act. The respondents needed an independent doctor to provide a report establishing that the applicant was a patient under the Act. One of the Doctors agreed upon by the parties, submitted his report that confirmed the mental capacity of the applicant and his ability, with the assistance of those who cared for him, to manage his own affairs. Although the claim could have proceeded it is highly unlikely that the respondents would have been successful.

[29] The applicant has sought in the present application to finalize the interim order made by Y. Brown, J. That order gave him the authority to conduct and control all of his affairs including his financial assets until the determination of the matter. The matter having now been determined by the notice of discontinuance the request for the order to be made final has little or no practical relevance. It would appear that the applicant has gotten all that he has been fighting for all these years. He is now able to conduct his affairs without the interference of his children. This is clearly not a case of the respondents obtaining a collateral advantage.

Disobedience of Court Order

[30] It has been argued that in filing the notice of discontinuance the respondents' true motive was to frustrate the orders of the court for disclosure. Is this a matter therefore in which a court would have granted unconditional leave to file the notice? The present application has amended the order of Y. Brown, J. The order was in terms of a list of all assets under the control of the respondents which was to be accompanied by documents where necessary. The applicant is now seeking an inclusion of an order for the respondents to provide un-redacted details of all the financial institutions account numbers and account holders obtained from joint accounts with the applicant.

[31] It is my considered view that the order of the court was indeed complied with. The respondents were required to serve the affidavit on the applicant, they did so, by serving counsel. They were then to file the affidavits with the court to which they complied. Having complied with the order of the court, there can be no basis for finding that unconditional leave would not have been granted in the circumstances of this case.

Disposition

[32] I find that the claim was properly discontinued. There is no basis upon which the court can find that the filing of the notice amounted to an abuse of process. The respondents in light of the medical report and other affidavits filed could not sustain

their claim. The orders of the court were complied with and the respondents obtained no collateral advantage by filing the notice of discontinuance. The applicant should not be permitted to prolong the matter in order to obtain disclosure in circumstances where he has not filed a claim alleging any misuse of funds on the part of the respondents.

Order

1. The amended notice of application for court orders to set aside notice of discontinuance filed on the 3rd of March 2020 is refused.
2. Costs to the respondents to be agreed or taxed.