[2022] JMSC Civ 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00169

BETWEEN	**SEAN SCOTT**	**CLAIMANT**
AND	**MEVA BROWN**	**1ST DEFENDANT**
AND	**WAYNETTE BROWN**	**2ND DEFENDANT**
AND	**DANIEL ALLEN**	**3RD DEFENDANT**

IN CHAMBERS

Mr. Lance Lamey instructed by Bignall Law Attorneys-at-Law for the Claimant/Respondent.

Miss Monique Thomas holding for Mrs. Suzette Campbell instructed by Burton Campbell and Associates Attorneys-at-Law for the 2nd Defendant/Applicant on June 7, 2022 and Mrs Suzette Campbell instructed by Burton Campbell and Associates Attorneys-at-law for the 2nd Defendant/Applicant on June 22, 2022.

Heard: June 7, 2022, June 22 and June 27, 2022

Application – costs in the claim to successful defendant – striking of claim – abuse of process of the court – stay of duplicate claim until costs paid – wasted costs – CPR 26.2, 26.3, 37.6, 64.6, 64.13 and 64.14

MOTT TULLOCH-REID, J

Background

[1] On December 11, 2013 the Claimant filed claim 2013 HCV 06842 against the 1st and 2nd Defendants as owners of a motor vehicle and the 3rd Defendant as driver of a motor vehicle owned by the 1st and 2nd Defendants and their servant/agent. The claim concerned a motor vehicle accident which took place on June 8, 2013. He alleges he was a passenger in the motor vehicle owned by the 1st and 2nd Defendants and driven by the 3rd Defendant on June 8, 2013. He alleges that as a result of the negligence of the 3rd Defendant in the operation of the motor vehicle, there was a collision and as a result he was injured.

[2] The pleadings in this case are exactly the same as that which was set out in Claim No 2013HCV06842. The only difference is that in the 2013 claim the Claimant is said to be aged 32 but in this claim (the 2019 claim) he is said to be aged 37 which is understandable as people age with the passing of the years.

[3] The 1st Defendant filed an Acknowledgment of Service acknowledging service of the Claim Form and Particulars of Claim on 11 February 2019. This coincides with the date of service as set out in the Affidavit of Service of Howard Wilks, the process server, filed on March 7, 2019. Mr. Wilks evidence is that he not only served the 1st Defendant on that day but he also served the 2nd Defendant. A request for Default Judgment was sought on behalf of the Claimant against the 1st and 2nd Defendants for their failure to file an Acknowledgment of Service. The Acknowledgment of Service was filed on March 7, 2019. It should have been filed on or before February 25, 2022.

[4] The 1st Defendant filed a defence on March 12, 2019 within the 42 days allowed to file a defence. Notwithstanding, a Default Judgment was entered against her on August 2, 2020 after the Defence, which was filed in time, was filed. There was an automatic referral to mediation which could only have been in relation to

the 1st Defendant who had filed a defence, yet a Default Judgment was still entered against her.

[5] On May 9, 2019 the Claimant applied to extend validity of the Claim Form and to dispense with personal service of the initiating documents on the 2nd and 3rd Defendants and for them to be served instead via publication in the Gleaner twice one week apart or by serving Advantage General Insurance Company Limited, the insurers of the 1st and 2nd Defendants' motor vehicle. It is to be noted that the application to extend the validity of the claim form and for specified service also related to the 2nd Defendant, who the process server said he served on February 11, 2019. The application was supported by the Affidavit of Howard Wilks which was filed on May 9, 2019. At paragraphs 3 and 4, Mr Wilks said he went to the 2nd Defendant's address and spoke to his wife but on both occasions the 2nd Defendant's wife said he was not home. He then at paragraph 5 said

> *"I verily believe that any further attempts to find the 2nd [Defendant] … at the said addresses is an exercise in futility and I have not been able to obtain current addresses for the 2nd and 3rd Defendants"*

[6] Mr. Vaughn Bignall's Affidavit also filed on May 9 2022, says he was reliably informed by Mr. Wilks that despite visiting the address [of the 2nd Defendant] he was not successful in serving him. In March, Mr. Wilks said he served the 2nd Defendant and then in May he says he did not. The application to extend the validity of the Claim Form was heard by Master Hart-Hines, as she then was, and refused. Her judgment is recorded as **Sean Scott v Meva Brown and Ors 2020 JMSC Civ 11.**

[7] Given that the Process Server indicated that the 2nd Defendant was not served and the Claimant's lawyer says he was reliably informed that the 2nd Defendant was not served, and must have believed this to be so, or he would not have applied to the Court for the 2nd Defendant to be served by an alternative method, (even with the Affidavit of Service filed March 2019) it is clear that the Default Judgment that was entered against the 2nd Defendant should not have been

entered in the first place and it having been entered ought to have been set aside as of right. The 2nd Defendant and the 3rd Defendant's having not been served, they were to be removed as parties to the claim which would leave the 1st Defendant, Meva Brown as the only party in the claim. However, there is already a claim against Meva Brown concerning the same incident housed in Claim No. 2013 HCV 06842.

[8] On February 26, 2021, the Claimant applied for summary judgment on the issue of liability. When the matter came up for hearing on January 12, 2022 before Master Harris, the application was withdrawn. Master Harris set the matter for January 18, 2022 when it came up before me for hearing. On that day I struck out the claim. The law is clear that identical claims concerning the same parties, incident, cause of action and remedy sought cannot be running at the same time. This is an abuse of the process of the Court. Meva Brown being the sole Defendant in this claim on the incident which happened on June 8, 2013 was and is one and the same as Meva Brown in Claim 2013 HCV 06842 which concerned an accident in which she is alleged to be involved, which took place on June 8, 2013. To have both claims running at the same time is not just an abuse of the Court's process and a waste of the Court's time and resources but also prejudicial to Ms Brown who will be required to defend both claims.

[9] On January 18, 2022 when I struck out the claim, Ms Campbell raised the issue of costs. I adjourned the hearing of that application to June 7, 2022. This is what is now before me for consideration. A Notice of Application concerning costs was filed on behalf Meva Brown on March 7, 2022. It is supported by the Affidavit of Oshane Vasccianna filed on February 28, 2022. I do not understand how the affidavit came before the application but that is a matter I will not address here.

[10] The application seeks the following orders:

a) The Applicant/1st Defendant be awarded the costs of the claim herein.

b) The costs of the claim be summarily assessed in accordance with the Bill of Costs exhibited to the Affidavit in Support of Notice of Application filed herein.

c) All proceedings in the Claim No. 2013 HCV 06842 be stayed until payment of the costs awarded to the 1st Defendant.

d) Costs of application be awarded to the 1st Defendant.

[11] The grounds of the application are set out in the application but I shall not repeat them here as they are expanded on in the submissions of Ms. Thomas which I intend to consider in detail. The Claimant seeks costs in the amount of $547,975 which she asks to be summarily assessed. The Bill of Costs is exhibited to the Affidavit of Oshane Vasccianna. Ms Thomas relies on written submission filed on February 28, 2022. The Claimant/Respondent did not file an Affidavit in Response to Mr Vascianna's Affidavit.

Submissions of counsel for the Defendant/Applicant

[12] Civil Procedure Rules ("CPR") 64.6(1) provides:

> *"If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of successful party."*

[13] Ms Thomas submits that the striking out came because of Counsel's acknowledgment that both the 2013 and 2019 claim could not proceed at the same time. She said it was more akin to a discontinuance than a striking out and that the striking out did not result from an adjudication of the issue.

[14] Ms. Thomas in support of her submission regarding discontinuance argues that CPR 37.6 (1) provides that

> *"Unless*
>
> *(a) the parties agree; or*

(b) the court orders otherwise,

a claimant who discontinues is liable for the costs of the Defendant against whom the claim is discontinued incurred on or before the date on which the notice of discontinuance was served."

[15] She relies on the case of **Conrad Morris v Troy Campbell [2021] JMCA Civ 30** which she argues recognises the presumption was created obliging the unsuccessful litigant to bear the cost of the Court proceedings. The **Conrad Morris case** concerns costs arising after a Notice of Discontinuance was filed. That is not the case before me. What is before me is a striking out of a statement of claim on the Court's initiative because the Court held the view, having considered the documents on the Court's file, that the claim should not proceed against Meva Brown, as there was an identical claim concerning her which was already before the Court. The claim was stuck out its entirety as there was no claim against the 2nd and 3rd Defendants because they were never served and the validity of the Claim Form was not extended to allow the Claimant the opportunity to do so.

[16] CPR 26.2(1) gives the Court the power to exercise Case Management powers on its own initiative. CPR 26.3(1)(b) gives the Court the power to strike out a claim if it is an abuse of the Court's process.

Submissions of Counsel for the Claimant/Respondent

[17] Mr Lamey submits that the 1st Defendant/Applicant is not entitled to any costs as since the initiating of the claim, she did nothing. This is not so. With respect to the 2013 claim, Ms Brown did nothing, but when served with 2019 claim she filed an Acknowledgement of Service and a Defence. Costs would be incurred for not only drafting these two documents but also for taking instructions to facilitate the drafting.

[18] Mr. Lamey said the reason the Claimant was reluctant to withdrawn this claim was because of service. He says that counsel, Ms Green, who appeared for the Claimant before Master Harris on January 12, 2022 and again before me

on January 18, 2022 was asked on several occasions whether she would be continuing with both claims and she was left with no option but to withdraw one. These submissions cannot stand because there is no evidence before me to suggest that that was the case. In any event it seems very unlikely that the Court would opt to force an Attorney to do something which he or she was not instructed to do. Mr Lamey argues that the striking out of the claim was "improperly done" and as such the 1st Defendant/Applicant is not entitled to costs because the key issues that arose from the 2013 claim and 2019 claim remain to be resolved.

[19] He has asked the Court to stay its decision regarding the issue of costs until the issues in the 2013 and 2019 claims have been resolved. He said in both claims Default Judgments were entered which suggests that the Defendants did nothing. He said no costs should be awarded in compliance with the overriding objective of the CPR and the just disposal of the matter.

[20] I must say that I find it peculiar that Mr Lamey has submitted that the Court should consider the overriding objective to achieve the just disposal of the matter and ventilation of issues in both the 2019 and 2013 claims. I find this strange in circumstances where it is his desire to have the identical claims proceed in the Court. This flies in the face of the overriding objective which speaks to:

(a) saving expense (CPR 1.1(2)(b)); and

(b) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources other cases (CPR 1.1(2)(e)).

[21] I will also state that if it was the Claimant's intention to serve the 2nd and 3rd Defendants who had not been served in the 2013 claim, given that there was proof that the Meva Brown was already served in the 2013 claim there was no need to join Meva Brown as a party in the 2019 claim. The only persons who should have been named in the 2019 claim were the 2nd and 3rd Defendants,

Waynette Brown and Daniel Allen. Had those persons then been served with the 2019 claim the next step the Claimant take would be to apply to the court for both claims to be consolidated. This in my view would have been the proper course of action to follow.

[22] The 2019 claim having been struck out for the reasons noted above the unsuccessful party must now bear the costs not only of the application but of the claim. I can see no reason to depart from the general rule that the unsuccessful party is to pay the cost of the successful party.

Costs to be awarded

[23] The issue for me to consider is what costs should be allowed. The Bill of Costs are exhibited to the affidavit in support of Notice of Application. It was served on Bignall Law on March 7, 2022. No affidavits were filed in response nor was the Bill of Cost disputed. Mr Lamey did not respond to the Bill of Costs presented by Meva Bown's attorneys in his submissions so I only have to contend with Ms Brown's Bills of Costs.

[24] Mrs Campbell's hourly rate of $45,000 is submitted as being the rate at which the costs should be summarily assessed. It is true that Mrs Campbell is upwards of 20 years at the Bar but I do not believe that she is as yet at the highest end of the scale as that would be reserved for persons who are her seniors but have not been appointed Queen's Counsel. I believe that a more reasonable figure would be $40,000.00 per hour.

Task	**Date**	**Time Spent**	**Rate per Hour**	**Total**
1. Reviewing instruction letter from 1st Defendant's insurer and perusing documents including motor insurance claim form, Notice of Proceedings Claim Form and Particulars of Claim	28/2/2019	1 Hour	$40,000.00	$40,000.00
2. Meeting with 1st Defendant to review and explain the contents of Claim Form and Particulars of Claim	12/3/2019	2 Hours	$40,000.00	$80,000.00
3. Attendance to file	12/3/2019			
4. Attendance to serve	12/3/2019			$1,000.00
5. Perusing Notice of Application for Summary Judgment and Affidavit in Support, reviewing legal authorities on Summary Judgment, reviewing documents in previous claim	11/1/2022	1.5 hours	$40,000.00	$60,000.00

and preparing for hearing of application.				
6. Attendance at court on hearing of application	12/1/2022	0.5 hours	$20,000.00	$20,000.00
7. Attendance at Court further hearing of application	18/1/2022[1]	0.5 hours	$40,000.00	$20,000.00
8. Reviewing CPR in relation to costs. Researching and reviewing authorities on costs. Preparing Notice of Application for costs Affidavit in Support written Submission.	22/2/2022	1.5 hours	$40,000.00	$60,000.00
9. Attendance to file[2]				$0.00
10. Attendance to serve				$1,000.00
Sub-total				$282,000.00
GCT (15%)				$43,300.00

[1] Bill of Costs said January 12, 2022
[2] No costs were allowed for item described as “attendance to file”

Total				**$324,300.00**

[25] In light of the above, I am of the view that Meva Brown is entitled to costs in the application and costs in the claim in the amount of $324,000 inclusive of General Consumption Tax. The cost of this hearing is also Ms Brown's. Ms. Thomas by virtue of her number of years at the Bar falls within B. The costs allowed for the hearing which took place on June 7, 2022 in Chambers for a duration of one hour, amount to $16,000.

Should a wasted cost order be made?

[26] The next question which I believe is a reasonable one in the circumstances, is whether the Claimant, Sean Scott, is to pay those costs or whether his attorney should pay them as wasted costs. Having regard to the fact that I contemplated making a wasted Cost Order against the Claimant's attorneys-at-law the Registrar was directed to issue a notice to that effect to counsel for the Claimant and for the Defendant pursuant to CPR 64.14(3) – (6). The grounds on which the wasted costs order were being considered were noted in the Notice as follows:-

a. The Claimant's attorneys-at-law knew or ought to have known that Claim No 2013 HCV 06842 already contained a claim against Meva Brown who is the Defendant in the Claim at bar.

b. Claim No SU2019CV00169 is identical in all respects to claim no. 2013HCV06842.

c. The Claimant's attorneys-at-law knew or ought to have known that it was an abuse of the process of the Court to have identical claims proceeding at the same time in the Court.

d. By virtue of the above which are outside of the knowledge and/or competence of the Claimant himself, it is unreasonable to expect the Claimant to pay the costs awarded to the Defendant/Applicant.

[27] Submissions on the wasted costs issue were heard on June 22, 2022. Mr. Lamey submits that the Claimant's attorneys-at-law presented a particular position and did nothing negligent to amount to a wasted cost order being made against it. He is not of the view that either the Claimant or the firm, Bignall Law, should be ordered to pay costs. He argues that the reason both claims were filed was to protect the Claimant's interest in effecting service on two of the parties who had not been previously served when the first claim (i.e. claim 2013HCV 06842) was issued. Mr Lamey submits that the filing of the new claim does not suggest that the Claimant's attorneys-at-law acted negligently which is what must be shown if a wasted costs order is to be made. He argues instead that the filing of the new claim amounts to the Claimant's attorneys doing all they could to protect the Claimant's interest, not to waste the Court's time or prejudice the position of any of the three defendants. He ended his submissions by saying that a wasted costs order would not be appropriate at this time as there is no flaw or fault in the Claimant or his attorneys in the filing of both claims, in particular the 2019 claim.

[28] Mrs Campbell's in her response referred to CPR 64.13 which reads as follows:

> *"(1) In any proceedings the court may by order-*
>
> *(a) disallow as against the attorney-at-law's client; and/or*
>
> *(b) direct the attorney-at-law to pay*
>
> *(c)The whole or part of any wasted costs.*
>
> *(1) '**Wasted costs'** means any costs incurred by a party –*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; or*

(b) which, in the light of any act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay.

[29] She invited me to consider the chronology of matters. She said in 2013 the claim form and particulars of claim were served on the 1st Defendant. A request for Default Judgment was made and entered against her. Mrs Campbell asked if that was the case, why was it necessary for the Claimant's attorneys to file another claim against Meva Brown. She said if the Claimant's attorneys are saying they wanted to serve the 2nd and 3rd Defendants then there would be no need to sue Meva Brown, the 1st Defendant, again. The attorneys only needed to file a new claim against Waynette Brown and Daniel Allen and then apply to consolidate that new claim with the 2013 claim. What the Claimant's attorneys did resulted in them maintaining two identical claims. The claims were identical in terms of the parties, cause of action and relief sought. This, she said, was an abuse of the process of the Court.

[30] Mrs Campbell also argued that Mr Lamey's submissions that the firm wanted to protect the Claimant's interest is untenable as two claims were not necessary to protect the Claimant's interest. She submitted that what compounds the issue is the fact that there was a duplication of the claims, was pointed out to the Claimant's attorneys but they did nothing to discontinue either of the claims. Their failure to discontinue a claim led to the Court having to strike out one of them. She concluded her argument by saying the circumstances show that there was unreasonable and improper conduct on the part of Bignall Law which CPR 64.13 addresses and which she says sets out what the Court is to consider when deciding whether a wasted cost order should be made.

[31] Mr Lamey asked for the opportunity to make a further submission and I allowed him to do so. He submitted that though the claims were identical, the 2019 claim should not have been struck out in its entirety, the Court should have just struck out the claim against the 1st Defendant. Mrs Campbell had no further submissions to make in response to Mr Lamey's further submissions and relied on her previously made submissions in response.

Analysis of submissions on wasted costs

[32] I do not agree with the arguments put forward by Mr Lamey. To avoid being repetitive, I rely on my reasons as set out in paragraphs 7 and 19 above. I find favour with Mrs Campbell's submissions which raise the same issues which I contemplated when deciding whether or not costs should be allowed in the 1st Defendant's favour. It was because I held that view that I invited counsel for the Claimant to make submissions as to why a wasted cost order should not be made against the firm Bignall Law.

[33] I remind Mr Lamey and wish to make it abundantly clear that the reason the 2019 case was struck out in its entirety was because:

(a) there was no evidence that the 2nd and 3rd Defendants were served and the Claim Form could not have been served again at the point of the striking out because the Claim Form had by then expired and there was no order permitting an extension of the Claim Form's validity. In fact, Master Hart-Hines had refused an application to extend the validity of the Claim Form (see paragraph 6 above);

(b) since the 2nd and 3rd Defendants were not served and could not be served because the validity of the claim form had expired, there was no order for its extension and the limitation period had expired, the 2nd and 3rd Defendants could not remain as parties in the claim and as such only Meva Brown remained as a defendant in the claim; and

(c) there was already an identical claim against the Defendant Meva Brown and so another claim was not necessary.

[34] Mr Lamey has not convinced me that the actions of the firm in having identical claims against the same parties was in the interest of the Claimant and was not prejudicial to the Defendants, the 1st Defendant in particular. No steps were taken by the firm to discontinue any of the claims even when the issue of the

identical claims was brought to its attention. I am of the view that the action of the firm can be described as unreasonable[3] and improper[4] and that it would be unreasonable in the circumstances to order the Claimant who would not be able to make the legal decisions concerning his case, to pay those costs. The legal decisions are made by counsel and those are made based on their understanding of the law. When unreasonable and improper legal decisions are made the attorney should bear the costs.

[35] The 1st Defendant has also asked for the proceedings in Claim No. 2013 HCV 06842 to be stayed until costs awarded in this claim have been paid. I am minded to make that order. No order for costs is made for the hearing on wasted costs which took place on June 22, 2022.

[36] My orders are as follows:-

a. The Claimant's attorneys-at-law, Bignall Law, are to pay the Defendant Meva Brown wasted costs in the claim and the application in the amount of $356,500 on or before July 29, 2022.

b. Claim No. 2013 HCV 06842 is stayed until Bignall Law, pays the Defendant, Meva Brown, the costs which have been awarded to her. The said costs are to be paid to the Defendant, Meva Brown, through her attorneys-at-law.

c. When Bignall Law has complied with order 1 above, the firm is to notify the Registrar by filing a Notice of Intention to Proceed and the Registrar is to schedule a Case Management Conference with respect to Claim No 2013HCV06842. The Notice of Intention to Proceed is to be served on Meva Brown.

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[3] "Not guided by or based on good sense" Concise Oxford English Dictionary 10th edition revised.
[4] "Not in accordance with accepted standards of behaviour" Concise Oxford English Dictionary 10th edition revised.

d. Burton-Campbell and Associates are to file and serve the Formal Order.

e. The Claimant’s attorneys-at-law application for leave to appeal is refused.