[2015] JMSC Civ 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 05470

BETWEEN	**THE PEAR TREE BOTTOM LAND OWNERS ASSOCIATION LIMITED**	**CLAIMANT**
AND	**GRAND BAHAI PRINCIPE HOTEL**	**FIRST DEFENDANT**
AND	**HOJAPI LIMITED**	**SECOND DEFENDANT**
AND	**THE BANK OF NOVA SCOTIA JA. LTD**	**THIRD DEFENDANT**
AND	**TANK WELD DEVELOPMENT LIMITED**	**FOURTH DEFENDANT**
AND	**THE BANK OF JAMAICA**	**FIFTH DEFENDANT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**SIXTH DEFENDANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**SEVENTH DEFENDANT**

IN CHAMBERS

Humphrey McPherson for the claimant (absent, claimant absent)

Stuart Stimpson and Hasani Haughton instructed by Hart Muirhead and Fatta for the fourth defendant

Marlene Chisolm instructed by the Director of State of Proceedings for the sixth and seventh defendants

June 15 and July 17, 2015

CIVIL PROCEDURE – APPLICATION TO STRIKE OUT STATEMENT OF CASE – ABUSE OF PROCESS - WASTED COSTS ORDER

SYKES J

[1] Between 1989 and 2014 there has been on-going litigation between persons who say that they have been wrongfully displaced from and Tank Weld Development Limited ('Tank Weld'). The persons either sue in their own names or under the banner of a company known as Pear Tree Bottom Land Owners Association Limited ('the Association'). They say that they were wrongfully dispossessed of land or that their personal property was damaged.

[2] As the litigation has dragged all sorts of defendants have been named ranging from Tank Weld, the Bank of Nova Scotia, the Bank of Jamaica, the National Environmental and Planning Agency, the St Ann's Bay Parish Council, the Attorney General of Jamaica ('AG') to the Director of Public Prosecutions ('DPP').

[3] The first salvos were fired in the Resident Magistrates' Court for the parish of the St Ann ('RMC'). The battle ended disastrously for these persons. Two of them appealed to the Court of Appeal and that appeal ended badly. One would have thought that the war would have ended there. Twelve years after the Court of Appeal made its order, a new attorney in

the form of Mr Humphrey McPherson took up the fight. He tried to have the orders made in the RMC set aside. That effort failed. Then without an appeal, he took the matter to the Supreme Court in 2004 where the first of several claims involving the land was filed. The present claim was filed in 2014. Unsurprisingly, having regard to the history of the matter and the present state of the pleadings, Tank Weld, the AG and the DPP have all applied to have the case struck out against them. Tank Weld took it a step further and asked for a wasted costs order against the attorney. All applications were granted and these are the reasons.

An historical review of the litigation to date

Litigation in the Resident Magistrates' Court and the Court of Appeal

[4] The land is located in St Ann, the parish where it is said that the Genoan explorer, Christopher Columbus, first landed. A few miles down the coast in the direction of Montego Bay from where Columbus made land fall is the location of the disputed property. The area is known as Pear Tree Bottom.

[5] From the evidence presented the land was registered in the names of Juliet Oram or Okam and Gloria Abbey, described on the title as gentlewoman and spinster respectively. These ladies sold the land to Tank Weld in 1988. Tank Weld sold to Hojapi in 2003. On part of the property Hojapi built a hotel known as Gran Bahia Principe.

[6] Before the sale to Hojapi, it appears that a number of persons were on on the property. Tank Weld sought to have some or all of them removed. The documents filed by the claimant suggest that there were fifty five persons who were affected by Tank Weld's actions. Tank Weld sought to recover possession and in at least four instances orders for possession were made against persons in the RMC.

[7] The defendants in the four plaints were (a) Mr Edward Lothian, Plaint No 192/89; (b) Mr Don Clarke, Plaint No 194/89; (c) Mr Leonard Reid, Plaint No 197/89 and (d) Miss Marlene Donaldson, Plaint No. 198/89. In all four cases the Resident Magistrate ordered that the defendants quit and deliver up possession to Tank Weld. Two of those persons appealed to the Court of Appeal. These were Mr Don Clarke and Mr Edward Lothian. The appeal was heard and dismissed on July 1, 1991. There is no evidence that either Miss Marlene Donaldson or Mr Leonard Reid appealed the order. All this RMC litigation, including the appeal, took place between 1989 and July 1991. After this round of litigation nothing else happened for the next twelve years.

[8] After twelve years, new counsel, Mr Humphrey McPherson made his appearance. In 2003, Mr Humphrey McPherson sought to persuade the Resident Magistrate to set aside the judgments entered against Mr Don Clarke, Mr Leonard Reid and Miss Marlene Donaldson. It appears from the recital to the order dismissing this application that the grounds were (a) dismissal for want of prosecution; (b) irregularity; and (c) that there be a criminal investigation. The application was heard and dismissed on September 3, 2003. From the evidence, there was no appeal against the orders of September 3, 2003. Here endeth the litigation in the RMC.

The Supreme Court litigation

The 2004 claim

[9] In 2004, there was filed **Leonard Reid, Edward Lothian, Amon Grant and Clifton Cammock v Tank Weld Development Ltd and AG** Claim No 2004HCV2816 (the 2004 claim). Going by the names it appears that Mr Reid and Mr Lothian are the same persons who were the subject of a possession order in the RMC. So too was Mr Grant. There is no evidence to suggest that Mr Cammock were the subject of possession orders in the RMC.

[10] Before going on it is important to say why Mr Grant was a party to the RMC litigation. The particulars of claim filed April 28, 2005 has a stamp on it that reads 'We certify that writ to be a true copy of the original filed herein 15th day of January 2005.' Under this stamp is the signature which reads Humphrey McPherson. Mr Amon Grant was one of the persons who signed the particulars of claim. Paragraph six identified Mr Grant as the defendant in Plaint No 199/99 Tank Weld Development Ltd v Amon Grant. If this is correct then Mr Grant, like Mr Reid and Mr Lothian were part of the RMC litigation which ended with an order for possession made against him.

[11] The claim form was twice amended. The first amended claim form was filed on March 3, 2005. The second amended claim form filed April 28, 2005. This seems to be the extant claim form. It alleges that Tank Weld wrongfully entered the claimants' land and 'fraudulently, criminally and illegally, interfered, aided and abetted by the second defendant under colour of law with the claimants' right to exclusive possession and quiet enjoyment of the land … causing the claimants to be fraudulently, criminally and illegally ejected and dispossessed of the said land under colour of law and the said land fraudulently sold by the first defendant to the Pinero Group in breach of the Limitations of Actions Act, the Prescription Act and the Beach Control Act.'

[12] Paragraph 1 of the particulars of claim alleged that the claimants 'were equitable owners of 15 acres of part of the parcel of land, more or less, known as Pear Tree Bottom … for more than 12 years and are second and third generation fishermen at the beach … and … were fraudulently, criminally and illegally interfered with the first defendant, aided and abetted by the second defendant under color (sic) of law with the claimants' right to exclusive possession and quite enjoyment of the land at Pear Tree Bottom causing the claimant to be fraudulently, criminally and illegally ejected and dispossessed of the said land fraudulently sold by the

first defendant to the Pinero Group in breach of the Limitations of Actions Act, the Prescription Act and the Beach Control Act.'

[13] At paragraph 2 the claimants alleged that Tank Weld was at all material times the registered owner of land at Belle Aire at volume 1155 folio 764 of the Register Book of Title (paragraph 2). The same paragraph alleges that Tank Weld, 'fraudulently, criminally and illegally interfered, aided and abetted by the second defendant under color (sic) of law with the claimants' right to exclusive possession and quite enjoyment of the land at Pear Tree Bottom causing the claimant to be fraudulently, criminally and illegally ejected and dispossessed of the said land fraudulently sold by the first defendant to the Pinero Group in breach of the Limitations of Actions Act, the Prescription Act and the Beach Control Act.'

[14] Paragraph 7 alleges that first defendant 'under the color (sic) of law wrongfully, illegally and criminally entered claimants' land and bulldozer (sic) claimants' homes, our farms, our businesses, dumped up the swamp lands, dredged the sea and destroyed the livelihood of fishermen, expropriated our lands build a new road and cut of the supply of electricity and water to the Pear Tree Bottom community where the claimants have been in possession for more than 12 years …'

[15] The claimants purports to set out particulars of what is called land fraud, judicial fraud and breaches of the various statutes named such as the National Resources Conservation Authority Act and the Beach Control Act.

[16] The particulars name fifty five persons including the claimants. There was no pleading that the claimants were suing in a representative capacity and there is no evidence that anyone at the time or shortly after the claim was issued was appointed to bring any claim on behalf of the all the persons allegedly affected by the actions attributed to Tank Weld.

[17] It is important to pause at this point and analyse the 2004 claim. There is no explicit reference to extinction of title by virtue of taking over the property with the requisite intention. The reference to twelve years seems to be suggesting that that is what the claimants have in mind. The significance of the 12 years seems to be that the title of the registered owner can be extinguished in the manner suggested by McDonald-Bishop JA (Ag) in the case of **Fullwood v Curchar** [2015] JMCA Civ 37.

[18] The **Fullwood** case is critical to the question of abuse of process. Marva McDonald-Bishop JA (Ag) in **Fullwood v Curchar** [2015] JMCA Civ 37 confirmed the following: the fact of having a registered title is not necessarily the end of the matter when it comes to the determination of who is entitled to possession of registered land. Her Ladyship underscored the point that a registered land owner may have his title extinguished if there are persons who occupied the land (a) without permission of anyone; (b) openly; and (c) with an intention to possess. Her Ladyship's analysis and review of the law demonstrated that this is not new law but was in fact the legal position in Jamaica if not for over one hundred years but certainly since the Privy Council delivered its decision in **Wills v Wills** (2003) 64 WIR 176.

[19] Her Ladyship, at paragraphs 38 – 42, stated emphatically that where a claimant brings an action for recovery of possession, he must prove that he is entitled to recover the land as against the person in possession and he recovers on the strength of his own title and not on the weakness of the person against whom the action is brought. The authorities have also established, according to her Ladyship, that where the claimant brings the recovery of possession action and the defendant pleads the statute of limitations, that is to say pleading that the time during which the claimant could recover the land has expired, then the claimant must prove that he has a title that has not been extinguished by the statute. Finally, the

learned Justice of Appeal, stated that when an action for recovery of possession is brought then the claimant must establish that his title is not extinguished.

[20] These are not new principles of law. The court says all of this to say that when the recovery of possession action was brought in the RMC it was open to Mr Edward Lothian, Mr Don Clarke, Mr Leonard Reid and Mr Amon Clarke to challenge Tank Weld using the legal principle of extinction of title. They could have relied on the statute of limitations if they were relying on the principle of extinction of title. It appears that they either failed to raise that defence or raised it and failed. Since the orders were made, this court must assume that the Resident Magistrate applied the correct principles of law and that she was satisfied that Tank Weld established that it had a better right to possession than the defendants in the RMC cases. The upshot of this is that the RMC found that whatever the defence was it was not sufficient to displace Tank Weld's title and consequently, Tank Weld's right to recover possession of the land was not scuttled. This court has to proceed on the basis that Tank Weld established that its title was not extinguished.

[21] This means that it is very difficult to see how Mr Reid, Mr Lothian and Mr Grant can now bring a claim in the Supreme Court on the ground of extinction of title in light of the RMC decisions. If they did not raise the issue of extinction of title in those proceedings then to raise it now in the 2004 claim may well amount to an abuse of process on the ground that they should have brought forward their full case. This is the principle laid down in **Henderson v Henderson** 3 Hare 100. It is from this case we get the expression Henderson abuse. What exactly is Henderson abuse?

[22] The facts are these. Bethel Henderson and Jordan Henderson were brothers and the sons of William Henderson. William was a merchant with interests in Newfoundland, Canada, and Bristol, England. At some point

he took both Bethel and Jordan into his partnership. William eventually left the business and so it continued with Bethel and Jordan. Jordan got married to Elizabeth Henderson and they had a daughter, Joanna. This meant that Elizabeth became Bethel's sister in law and Joanna was Bethel's niece. Eventually, Joanna grew up and got married to one Charles Simms. Jordan also died (intestate), leaving wife Elizabeth and daughter Joanna. His estate, in England, was administered by J Gadsden. William also died.

[23] A dispute arose between the sister in law Elizabeth and her brother in law Bethel. A bill in equity was filed in Newfoundland (the Newfoundland suit). The claimants were Elizabeth, Charles Simms and Joanna. In other words, sister in law, niece and niece's husband sued Bethel. The claimants asked the court for an account of (a) William's estate; (b) the partnership transactions; (c) Bethel's dealings with Jordan's estate since his (Jordan's death) and (d) that part of Jordan's estate that was in Bethel's possession. In response to the Newfoundland suit, Bethel filed an answer alleging that Jordan's estate owed him money both in respect of the partnership and private dealings between them. The claimants' amended the bill and alleged specifically 'that Bethel was largely indebted to the estate of Jordan on the partnership accounts' (page 112).

[24] The Master was to take an account. However the Master's efforts were hampered by the fact that Bethel left Newfoundland and did not produce the documents. The court responded by taking the bill pro confesso, that is, in his absence. The bill was referred to the Master to take an account.

[25] The Master reported that sums of money were due to the claimants. He also reported that no account was taken between Bethel and Jordan's estate. Based on this report, the court ordered that Bethel should pay the sums due to the claimants. Armed with this order, the claimants sought to enforce the judgment in England against Bethel.

[26] In response to this, Bethel brought suit in England against the claimants as well as J Gadsden, the administrator of Jordan's estate, alleging that Jordan's estate owed money to him both in respect of the partnership and private transactions between them (the English suit).

[27] In the Newfoundland suit, Bethel 'made claims by his answer to the original bill corresponding in substance with those which he makes by his bill in current suit.' (page 112).

[28] The claimants demurred on the ground that the matters sought to be raised by Bethel ought properly to have been raised by him in Newfoundland. This he failed to do. The English suit was held to be an abuse of process.

[29] It was in this context that Wigram VC made his famous statement at pages 114 – 115:

> *In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.* ***The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every***

point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time*.* (emphasis added)

[30] Thus Henderson abuse occurs where a party to litigation fails without good reason to bring forward all his case in a previous claim and is now seeking to have litigated in the a second or subsequent claim, a matter which he could have brought forward in the earlier claim. The court is fully aware of the developments in **Johnson v Gore Wood** [2002] 2 AC 1.

[31] There is no evidence that the information being used to challenge Tank Weld's title in any of the Supreme Court claims was not known to Mr Reid, Mr Lothian and Mr Grant. This must mean that so far as these three litigants are concerned as between themselves and Tank Weld, their attempt to subvert Tank Weld's title has already failed. The RMC must be taken to have found that they were not able to show any basis on which Tank Weld's title could be overturned. They did not establish a better right to possession and it appears, implicitly, neither did they establish that Tank Weld's title was extinguished by the passage of time, namely twelve years. This means that so far as these particular persons are or may be part of any subsequent action in the Supreme Court to challenge Tank Weld's title, whether in the 2004, 2006 or 2014 claim or any other claim, they should be stopped because they would be seeking to overturn four binding decisions of the RMC without having been able to do so in the substantive action for recovery of possession. This is the more so when it is recalled that in 2003 Mr McPherson sought to re-open the cases and failed. Also Mr Clarke and Mr Lothian appealed and that appeal was dismissed. What this means is that there were three court proceedings in this matter concerning Tank Weld's title and none has brought success.

[32] In this 2004 claim the allegations against the AG were as follows:

a. the claimants 'were fraudulently, criminally and illegally interfered with by the first defendant, aided and abetted by the second defendant under color (sic) of law ..;

b. the second defendant is made a party because 'at all material times [the second defendant] fraudulently, criminally and illegally aided and abetted the first defendant' to unlawfully acquire parcels of land at Hopewell Bottom, Runaway Bay St Ann and Pear Tree Bottom, Runaway Bay, St Ann.

[33] Unsurprisingly, on October 9, 2008 Marva McIntosh J dismissing the case against the AG. The allegations against the AG were just not particularised so that anyone could know what the alleged misdeeds of the AG were. What were the specific acts done or omitted to be done by the AG that the Association claims were sufficient to make him a joint tortfeasor with Tank Weld? To say that someone aided and abetted is actually a conclusion and not an allegation of fact that would tell the defendant what exactly he did or failed to do. The pleader needs to state the specific acts or omissions that in his view make the AG an aider and abettor. The requirement of particulars is nothing more than the practical manifestation of the natural justice principle that the a person accused of wrong doing needs to know exactly what he or she did or failed to do so that a rational response can be given. Rule 8.9 (1) requires the claimant to 'include in the claim form or the particulars of claim a statement of all the facts on which the claimant relies;' facts not the legal of factual conclusion being sought.

[34] This striking out decision still stands. As far as this court is aware there has been no application to set it aside and no appeal has been heard in respect of the striking out by McIntosh J. The reference to setting aside

was made because of the following. The recital of the order of Marva McIntosh J does not say that the claimants were present or represented when the order was made. Going on the premise that the claimants were absent the Civil Procedure Rules ('CPR') provide the means to address this. There is a clear rule. Rule 11.8 permits the absent party to apply to the court to set aside or vary the order within fourteen days of being served with the order. There is no evidence that there was an application under rule 11.8 of the Civil Procedure Rules ('CPR') to set aside or vary the order or any appeal from that order.

[35] It is important to note that rule 11.8 does not say that the affected party must be served before the application to vary or set aside can be made. All it says is that if the affected party is served then he or she has fourteen days to make the application to set aside or vary the order made in his or her absence.

[36] There is no evidence that the claimants have sought to take advantage of rule 11.8 or to make an application to set aside or vary the order without being served the order striking out the claim against the AG.

[37] In these circumstances, it cannot be appropriate, without more to simply launch another claim against the AG raising the same issues and seek to justify it under the banner of a representative action. To do this is a misuse of the court's processes and it is this misuse that amounts to an abuse of process. Rules are put in place to ensure order in litigation. The right of access to the court does not, has never meant and cannot mean that procedural rules can be ignored. Litigation is not about the survival of the most unruly. It is about pursuing the claim in a timely and orderly manner consistent with fair play as identified in the general law and procedural rules. Where the procedural rules points in the direction of a particular remedy for a particular problem the expectation is that the remedy is utilised unless there is some compelling reason not to do so.

[38] There are a variety of ways a claim can be brought to an end. Summary judgment and striking out are two ways of bringing the claim to an early end without a trial. Where any of these procedures is utilised the expected way of coming out from under either of them is continuing in the same claim by relying on the procedural rules, substantive law and appeals. It is not expected that a litigant can seek to avoid the consequences of an early determination by the simple expedient of filing another claim, (and in some instances anoint it as a representative action) and proceed as if there was not an earlier summary judgment or striking out.

[39] It should be noted that in the 2004 claim, the claimants filed on application on October 21, 2008 asking for an order to consolidate the 2006 claim with the 2004 claim. Do recall that by the time that application was filed the 2004 claim was struck out against the AG. This same application was seeking an order that the Association be substituted as the claimants in the 2004 claim. The sole ground of that application was that in the 2006 claim the Association was appointed in a representative capacity to represent its members. Do note as well that the only order found appointing the Association to sue in a representative capacity was that of Gayle J made in 2011 in the 2006 claim. There is no evidence that Gayle J's order made in the 2006 claim extended to any other claim.

[40] Judgment in default of defence was entered against Tank Weld on a request for judgment made in March 2006 (see **[2015] JMSC Civ 134**). An application has been made to set aside that judgment.

[41] Thus the 2004 claim, subject to the outcome of the setting aside of judgment application, ended with default judgment entered against Tank Weld and the case against the AG struck out. Tank Weld and the AG may well have thought that this 2004 claim would be the only one they would face in the Supreme Court in respect of the disputed land. Those hopes were dashed in when in 2006 another claim as launched.

The 2006 claim

[42] The picture presented by the available documents is confusing. It appears that the claim started life being intituled **Donald Clarke, Amon Grant v The Pinero Group, Hoteles Jamaica Pinero Ltd** Claim No 2006HCV02102. The court says this because there is a document headed 'Amended Notice of Application for Court Orders' dated June 21, 2006. That was an application by Mr Donald Clarke and Mr Amon Grant asking for an order appointing The Pear Tree Bottom Land Owners Association Limited to be appointed to represent claimant. The available documentation does not present a clear picture indicating the path of litigation but at some point **The Pinero Group** and **Hoteles Jamaica Pinero Ltd** ceased to be defendants.

[43] Not only had the original defendants disappeared from the claim but so too had Mr Clarke and Mr Grant, the original claimants. There is no evidence that an order making the Association the claimant was granted. The court noted that In the same claim (bearing the same claim number as **Donald Clarke, Amon Grant v The Pinero Group, Hoteles Jamaica Pinero Ltd**) a claim form was filed February 14, 2007. This claim form was intituled **The Pear Tree Bottom Land Owners Association Limited v Gran Bahia Principe, Hojapi Limited, The National Environmental and Planning Agency and The St Ann's Parish Council**. What this means is that in the same claim filed in 2006 there was (a) a change of claimants without sufficient documentation indicating how this happened; (b) new defendants without any clear indication of how that came about and (c) the removal of the original defendants without any record of how that came to be.

[44] The confusion becomes even more acute because on or before October 24, 2008 the National Environmental and Planning Agency and the St Ann's Parish Council were no longer named as defendants. Gran Bahia Principe and Hojapi are still named as defendants. However, the AG

became the third defendant. There is no clear record delineating how these developments came to be.

[45] Therefore by late 2008, without any clear records on the court's file, a claim completely transformed from one in which Mr Clarke and Mr Grant were suing the Pinero Group and Hoteles Jamaica Pinero Ltd to one in which the Association was now the claimant and a completely new set of defendants now appeared on the documents without clear records showiing when and how this came to pass.

[46] Add to this the fact that the only evidence showing that the Association was ever appointed to act in a representative capacity is an order of Gayle J in February 2011. If this is correct that does not explain how **The Pear Tree Bottom Land Owners Association Limited** came to be named as claimant 2007 since Gayle J's order was not made until 2011 and there is no evidence of any other order appointing the Association to sue in a representative capacity – certainly none on the relevant court file.

[47] The court notes that in the affidavit filed in support of the order to have the Association appointed to sue in a representative capacity one of the grounds of this application was that the Association represented its members. The problem with this is that the latest information available (June 2015 from the Registrar of Companies) makes it clear that the Association has only two members and not fifty five. One of those two members is counsel, Mr Humphrey McPherson. To the best of the court's understanding Mr McPherson is not claiming land at Pear Tree Bottom on any ground. The other member is a Ms Vivia Grant. There is no evidence that Mr Reid, Mr Grant, Mr Lothian, Mr Cammock or Miss Donaldson are or were members of the Association.

[48] This 2006 claim does not differ, in substance, from the 2004 claim and neither does it differ in any material way from the 2014 claim. It is not clear what has become of the 2006 claim. This brings us to the 2014 claim.

The 2014 claim

[49] The recital in the claim form makes no specific allegation against the DPP or AG. However, in the section of the claim form setting out the remedies sought the Association claims the DPP has breached section 94 of the Constitution of Jamaica and has sought a declaration to that effect. The claim form also alleges that the DPP and AG have breached the Constitution and provisions of the Banking Act without stating what the alleged breaches are.

[50] In response to Tank Weld's applications in the 2014 claim Mr McPherson filed an affidavit. The affidavit sought to respond to each of the four orders sought by Tank Weld. The court will set them out in the order that Mr Humphrey has them in his affidavit:

a. in respect of the striking out application he contends that there is already a judgment in the 2004 claim for which damages are to be assessed;

b. regarding the summary judgment application Mr Humphrey states the claimant has a real prospect of success in the claim;

c. on the question of the wasted costs application, Mr Humphrey swore Tank Weld is not entitled to such an order and in any event Tank Weld and the other defendants are guilty of:

    i. 'land fraud, judicial fraud, malicious destruction of property, obstruction and perversion of the course of public justice and other criminality and wrong doing involving Gran Bahia

Principe, as well as illegal tax incentives, illegal tourist licence; illegal building permit; illegal environmental permit';

ii. the alleged misdeeds of the defendants have been referred to the Commission of Police for investigation.

d. the response to the application for costs and the amount summarily stated was this: Tank Weld is not entitled to the costs;

e. the affidavit refers to the fact that a claimant may amend his statement of case at any time before a case management conference without permission.

[51] Paragraph 4 of the particulars of claim states the essence of the cases against Tank Weld. It reads:

> *That the 4th defendant [Tank Weld] was at all material times a construction development company registered with the Companies Office of Jamaica and did maliciously, criminally and illegally bulldozed from part of the 196 acres of land situated at Pear Tree Bottom, Runaway Bay, in the parish of St Ann, the 55 families having an interest in said land on which their buildings, business, livestock, farm and the like said land by the 4th defendant, aided and abetted by the 6th defendant, and said land fraudulently sold and transferred and/or converted by the 4th defendant for US$600,000.00 to the 1st and/or 2nd defendant and the said 4th defendant unlawfully relocated the coastal road to have developed partially*

thereon the Grand (sic) Bahia Principe Hotel on said land aided and abetted by the defendants in breach of the Larceny Act, relevant provisions of the Proceeds of Crime Act and/or Money Laundering Act and has/have in commission of bank fraud, judicial fraud, land fraud, transaction/conveyancing fraud, obstruction of justice and/or other criminality and illegality including illegal tax incentive, illegal tourist license (sic), illegal building permit, illegal environmental permit among other prescribed licenses (sic) granted the 1st and/or 2nd defendant aided and abetted by the 5th and/or 6th and or (sic) 7th defendant. Claimant relies on Claim No. 2004HCV2816 Reid et al v Tank Weld Development Limited in pursuit of claimant's claim.

[52] As has been seen this way of putting the matter hardly differs from the 2004 claim. It is well established that generalised accusations of fraud are not acceptable. The pleader must say what the specific acts of the alleged fraud are and must say what the defendant who is accused of fraud did or failed to do (**Harley Corporation Guarantee Investments Co Ltd v The Estate of Rudolph Daley** [2010] JMCA Civ 46; **Wallingford v The Director of Mutual Society** (1880) 5 App Cas 685). In the present claim the Association has pleaded that Tank Weld breached the Proceeds of Crimes Act, the Money Laundering Act, the Banking Act and committed bank fraud, judicial fraud, transfer/conveyancing fraud, obstruction of justice, illegal tax incentives, illegal tourist licence and on and on. The specific allegations of fact needed to support these broad accusations alleged were not pleaded and so the claimant's case is deficient.

[53] The affidavit also responded to the AG's and the DPP's applications. The affidavit expressly acknowledged the two grounds on which the application was made namely, (a) the statement of case does not disclose any reasonable grounds for bringing the claim and (b) abuse of process. The affidavit goes on to say that the claimant intends to amend its statement of case to allege negligence and damages against both the AG and DPP. Let us look more closely at the pleadings against the AG and the DPP

[54] Paragraph 7 sets out the basis for the AG being sued. It reads:

> *The 6th defendant is the Attorney General of Jamaica and is made a party to this action under and by virtue of the Crown Proceedings Act and is aware of the conduct of the [1st, 2nd, 3rd and 4th defendants] but have taken steps to intentionally and/or negligently, defend the illegal prescribed licences, tax incentives and generally said defendants' criminal conduct. Claimant intends a (sic) to rely on Claim No 2004/HCV2816 Reid et al v Tank Weld Development Limited and/or Claim NO 2005/HCV2491, Erron Thompson and Vivia Grant v The Attorney General of Jamaica to pursue claimant's claim.*

[55] What does it mean to say that the AG 'intentionally and/or negligently' took steps to defend illegal or criminal conduct? To say that the AG took steps to defend the defendants' conduct does not advance the case of the Association. It tells us nothing. It is a conclusion unsupported by specific assertions of fact.

[56] No specific remedy is sought against the AG. Even in the 2004 no remedy was sought against the AG except an interim injunction which was sought 'to restrain the defendants' from entering, trespassing on the disputed land; from issuing permits, granting licences, approving plans and from engaging in acts which may damage the premises or become a nuisance, annoyance or inconvenience to the claimants. King J heard the interim injunction and dismissed it. There was an appeal but as far as this court is aware King J's order was never reversed.

[57] As far as is known, the AG does not issue permits, grant licences or approve plans for development. The court has concluded that in light of the poorly pleaded case against the AG and the absence of any specific allegations then the matter should be struck out. It should be noted that on June 1, 2015 when the matter came before this court the problem with the pleadings were pointed out to counsel and he was given two weeks to remedy that matter. On June 15, 2015 when the matter was heard counsel was absent and no evidence that any further particulars were filed.

[58] Paragraph 8 makes an attempt to catalogue the misdeeds of the DPP. It reads:

> *That the 7th defendant – the Director of Public Prosecutions was at all material times the Chief Prosecutor in the island of Jamaica and has an unfettered mandate pursuant to section 94 of the Jamaica (Constitution) Order in Council 1962 knew, knows or have reason to know through the documentary evidence of the conduct of the 1st and/or 2nd and/or 3rd and/or 4th defendants but intentionally and/or*

negligently in dereliction of its constitutional unfettered constitutional mandate failed to take any steps against said defendants in the malicious destruction of the claimant's members real and/or personal property, the larcenous fraudulent conversion of claimants US$600,000.00 and/or the mortgage banking transaction between the 3rd and/or 1st and/or 2nd defendant whereby the fraudulent, illegal null and void US$140,000.00 mortgage loan given 1st and/or 2nd defendant in (sic) security of claimant's land and seems to be aiding and abetting the 3rd and/or 1at and/or 2nd defendant in the fraudulent illegal null and void banking, mortgage loan of US$140,000.00 laundered in breach of the relevant provisions of the Banking Act, Proceeds of Crime Act and/or the Money Laundering Ac and in the commission of bank fraud, judicial fraud, land fraud, transfer/conveyance fraud, obstruction of justice, and/or other criminality and illegality including illegal tax incentives, illegal tourist licence, illegal building permit, illegal environmental permit among other prescribed licences granted the 1st and/or 2nd defendant aided and abetted by 5th and/or 6th and/or 7th defendant.

[59] The DPP is accused of having knowledge of criminal acts but failing to take action. Presumably, this means that the DPP failed to prosecute the defendants for alleged acts of criminality or having begun a prosecution

has discontinued it without good reason. If this is what is meant then there would need to be much greater detail. Assuming such a cause of action as attempted here is even possible, the Association would need to say what specific knowledge the DPP had and whether that knowledge permitted her to say that crimes were committed and whether her decision to prosecute or not prosecute was motivated by malafides. Courts do no lightly come to the conclusion that the DPP's decision to prosecute or not to prosecute was improperly made. As far as this court is aware the judicial branch of government cannot compel the executive to prosecute anyone. That would infringe the separation of powers doctrine. The DPP is part of the executive branch of government and her decisions are not easily challenged. The particulars of claim have fallen very short of what would be required to challenge the DPP's decision or absence of a decision.

[60] There is no evidence that the Association was part of the financial arrangements between the first, second and third defendants. There is no evidence that any of the parties to the financial arrangements have made any complaints to the police or any other investigative/regulatory body. It is not clear on what basis the Association can complain about the financial arrangements entered into between private citizens. There is no clearly articulated basis on which the Association is seeking to have the DPP act in relation to the financial arrangements. The Banking Act and Proceeds of Crime have many provisions and no specific breach has been identified. At this point in our legal history the Money Laundering Act has been repealed and without specifying when this alleged breached of the now repealed legislation took place there is hardly anything to note. This is simply a statement without context or substance.

[61] The remedies sought against the DPP are a declaration that she is in breach of section 94 of the Constitution and damages. It is not clear

whether the Association is saying the DPP has failed to prosecute persons charged or that she failed to lay charges. Either way there is no immediately obvious causal connection between what is alleged against the DPP and any loss or damage the persons allegedly represented by the Association may have suffered. It certainly has not been stated what duty the DPP owes to the persons who claim that they have suffered loss. In light of all the defects in the case pleaded against the DPP; in light of the doubts about whether the Association is properly appointed in the present claim to pursue this claim, the court concludes that the claim against the DPP should be struck out.

[62] These are additional observations made about Mr McPherson's affidavit. The affidavit refers to the 2004 claim and adds that it is to come up for assessment of damages against Tank Weld at some point.

[63] Mr McPherson says that he is not aware of the dismissal of the claim against the AG in the 2004 claim and in any event there is an application to consolidate the 2006 claim with the 2004 claim.

The (lack of?) appointment of the Association

[64] The question of the Association being appointed to bring the claim in a representative capacity was raised in the 2014 claim. There is no evidence that in the 2014 claim the Association was appointed to bring the claim in a representative capacity.

[65] Even if the Association was properly appointed in a representative capacity, the position is that it purports to be claiming on the part of its members. As noted above, only Mr McPherson and Ms Grant have been identified as members. It is not known who the other members are. Ms Grant has never been named as a litigant in the 2004 or 2006 claims. There is no pleading setting out the basis of her claim to the land and as noted before Mr McPherson is not making any personal claim to the land.

[66] Additionally, assuming the Association was properly appointed to bring the 2006 claim in a representative capacity and assuming that the AG was properly made a party to the 2006 claim then to bring, in substance, the same allegations against the AG in the 2014 claim has to be an abuse of process because it would mean that the Association has brought two claims against the AG alleging the essentially the same facts involving at least some of the same persons who had already litigated the matter in the RMC. More or less the same allegations were made against the AG in the 2004 claim against which was struck out.

[67] So far as Tank Weld is concerned the 2004 and the present claim both seem to be based on the idea of extinction of title which could have been raised or was raised and rejected in the RMC.

[68] To the extent that the 2004 claim is more or less the same as the 2014 claim, if Mr Grant and Mr Cammock are part of the persons purported to be represented by the Association in the present claim, then their claim against the AG has been struck out and they should not be part of the present claim. Also as noted above, the pleadings in the 2004 claim show that Mr Grant was the subject of a possession order in the RMC although there is no order exhibited to that effect. This underscores the need to know who the Association actually represents. It is not a matter of nit picking. If the Association represents Mr Reid, Mr Lothian or Mr Grant in the present claim then the present claim made by them under the umbrella of the Associations is an abuse of process as against the AG because they would be using the cover of the Association to disguise the fact that their claim against the AG has been struck out already. If they are not represented by the Association then rule 11.8 points the way and that remedy is the expected remedy to be used to resolved the striking out issue in the 2004 claim which was struck out against the AG unless there are compelling reasons not to do so. No reason, compelling or otherwise, has been advanced before this court.

[69] The present claim is not very different from the 2004 claim, in substance. The only addition to the present claim is the reference to statutes that were not referred to in the 2004 claim. The statutes referred to in the present claim are the Proceeds of Crimes Act, the Money Laundering Act (now repealed), and the Banking Act. The claim makes unparticularised allegations of fraud against Tank Weld.

[70] Thus for the Association to attempt to bring the current claim which may include these four persons without a clear and definitive order from the court appointing it to act in a representative capacity and a clear identification of the persons on whose behalf it is bringing the claim in the 2014 claim is wrong and should be stopped. At the risk of repetition, the only known members are Mr McPherson and Ms Grant neither of whom has pleaded what is the factual basis in their specific case, if any, for the remedies sought in this case.

Further abuse of process

[71] The other thing that makes this claim an abuse is that it is clearly directed at overturning the decisions of the RMC and the decision of the Court of Appeal in respect of the two persons against whom orders of possession were made. The court says this because of what was said earlier about the **Fullwood** case. The only legitimate basis for claiming to 'own' the land is by extinction of title of the paper owner. When the action for possession was brought against them, they could have resisted the order by relying on the law as stated by McDonald-Bishop JA (Ag). As stated earlier it is not new law. Having failed before the magistrate, having failed in the Court of Appeal and having failed to reverse the order in the 2003 applications some of the parties to those earlier litigation under the guise of a representative action appear to be seeking to go behind those decisions by mounting this claim.

[72] Mr McPherson in his affidavit referred to the principle that a distinction must be drawn between relitigating the same issue and having an adjudication of an issue on which no decision has been rendered. However, this must not prevent the court from looking at the reality. This present claim has sprinkled in it, in quite liberal fashion, words such as fraud, judicial fraud, conveyancing fraud, breach of Proceeds of Crimes Act, breach of Banking Act and such like. As noted earlier, the Association is not suing to vindicate its own rights but the alleged rights of other. Without clear proof of the specific persons who the Association claims to represent and without clear proof that it was in fact appointed to bring this current claim there is every risk that the Association is seeking to relitigate on behalf of the four persons against whom possession orders were made. This means that the claim against Tank Weld is undermined. The claim should be struck out against Tank Weld as an abuse of process.

[73] The case is also struck out against the AG and DPP. The allegations against them are vague and unspecified. They disclose no reasonable grounds for bringing the claim against the AG and the DPP. There is no clear evidence of all the persons the Association claims to represent. The AG and DPP would not know the names of the individuals who it is alleged were wronged so that these defendants can properly respond.

No cause of action

[74] Mr Stimpson further submitted that the Association's statement of case discloses no cause of action. He submitted that there is no cause of action known as malicious destruction of property, fraudulent conversion of land, money laundering or obstruction of justice. It was submitted that the causes of action relating to trespass to and/or damage to chattels are well known and they have not been pleaded. He also said that fraudulent conversion does not apply to land; only to personal property. Finally, he

said money laundering and obstruction of justice are criminal offences and do not give rise to a cause of action; at least not by those names. The court agrees with these submissions and the claim against Tank Weld is struck on the basis that it does not disclose any reasonable grounds to bring the claim.

[75] It follows that if no known cause of action was pleaded against Tank Weld, it follows, that the DPP and AG cannot aid and abet that which is not known to law. On this basis too, the claim against the DPP and AG is struck out.

Wasted costs application

[76] Tank Weld has applied for a wasted costs order against Mr Humphrey in the present claim. It was the submission that the standard laid down in **Ridehalgh v Horsefield** [1994] 3 All ER 848 and **Jevene Thomas v McIntosh Construction Company** [2013] JMSC Civ 114 has been met. The combined effect of these decisions is that the following five questions are asked when determining whether such an order should be made. These are:

Has the attorney-at law acted improperly, unreasonably or negligently?

If yes, did the conduct of the case cause the applicant or any other party unnecessary costs?

If yes, is it in all the circumstances just to make order?

Can the enquiry be done without breaching legal professional privilege?

Are the circumstances such that the facts necessary to establish whether the attorney's conduct has caused unnecessary expense to any part to the proceedings immediately and easily verifiable?

[77] It is the view of this court that the attorney at law in this 2014 claim has acted unreasonably. There is the issue of finding out the persons whom the Association claims it represents. On June 1, 2015, the court raised with Mr McPherson this very issue. Counsel produced Gayle J's order in the 2006 claim. It was pointed out to counsel that Gayle J's order was not at large and did not apply to the 2014 claim for the simple reason that the 2014 claim was not issued when the order was made in 2011. There is no order showing that the Association was appointed to bring this claim in a representative capacity. Until there is evidence to the contrary, this court concludes that no such order exists and therefore the present claim is not properly constituted as a representative action and therefore constitutes unnecessary harassment of Tank Weld, the AG and DPP.

[78] The conduct did cause unnecessary costs to Tank Weld. Tank Weld was forced to defend an improperly constituted claim. The conclusions arrived at so far are from an examination of the court record and do not involve the potential to breach legal professional privilege. Tank Weld has had to undertake the defence of this second claim in circumstances where the Association is not alleging that it is suing in its own right but rather in a representative capacity. It may be that some of the persons who litigated in the RMC are part of this claim. It may also be that some of the persons who litigated the 2004 claim are part of this claim. If so, some of the issues raised in this claim are res judicata as between Tank Weld and some of these persons. This is why the issue of who is really represented by the Association is important. This way of putting the claim may well be seeking to provide cover for persons who should not be bringing this claim since they are already part of the 2004 in which judgment has already been entered against Tank Weld, subject to the outcome of the application to set aside the default judgment.

[79] It should be noted that Mr McPherson has been involved in this case since 2003 when he made the application in the St Ann Resident Magistrate's Court to set aside the recovery of possession orders made a few years earlier. It was he who filed the 2004 claim. He is listed as a member and director of the Association. It can be taken that after a decade of involvement he is fully aware of all the crucial issues and the history of the matter. Mr McPherson is a very experienced attorney at law and quite familiar with the CPR. The court concludes that it is appropriate to make the wasted costs order against counsel. The amount was assessed summarily based on the information presented by Tank Weld.

Absence of counsel

[80] Before leaving this case, something must be said about the history of this matter. It came before this court on June 1, 2015. From what was said on June 1 the court, exercising its case management powers, decided to set the case for an entire day for hearing. The date set was June 15, 2015. The claimant was also to file amended statements of case particularizing the allegations against the AG and DPP on or before June 12, 2015. The claimant was to satisfy the court that it was properly appointed to bring the present claim in a representative capacity. Importantly, the court ordered that all related claims were to be listed before Sykes J so that all pending applications in all related cases could be heard and determined. This last order was made because it became apparent that there were a number of claims before the court with applications have been pending, in some instances since 2009.

[81] On June 15, 2015 counsel for the claimant was absent. The hearing commenced was set to commence at 10:00 but did not start until 10:30 am. Counsel was still absent. This application and other applications in related cases were concluded at 12:04pm without the claimant's counsel being present.

Disposition

[82] The court agrees that the claim should be struck out against Tank Weld, the AG and the DPP. The claim as pleaded does not identify with any specificity the acts or omissions alleged against any of the three defendants. In addition, there is no record of the Association being appointed as the representative of the alleged fifty five persons who wish to sue the defendants. Without this appointment the Association's attempt to represent all these persons is an abuse of process. The Association was given an additional two weeks to amend its pleadings and prove that it was properly appointed. Counsel was absent and no word for his absence was placed before the court. For the reasons already given the claim is struck out against the three defendants who brought their applications for such an order in this claim.

[83] Finally, on the question of costs, counsel for Tank Weld presented a summary of costs on the wasted costs application and asked that the court does a summary assessment. The court agrees with what has been presented and costs are awarded to Tank Weld in sum presented to the court. That sum is $456,424.00. Costs are also awarded to the DPP and AG to be agreed or taxed.

Orders

[84] Claim against Tank Weld, AG and DPP struck out. Costs to Tank Weld summarily assessed at $456,424.00.