



[2019] JMSC Civ. 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 03080

BETWEEN	NICHOLET WARD	CLAIMANT
AND	SECURITY ADMINISTRATORS LTD	1ST DEFENDANT
AND	PORT AUTHORITY OF JAMAICA	2ND DEFENDANT

IN CHAMBERS

Ms. Kristeina Beckford, Attorney-at-Law of Kinghorn and Kinghorn for the Claimant who was present

Ms. Sidia Smith Attorney-at-Law of Livingston Alexander Levy for Ancillary Claimant/Defendant with representative Ms Anna Henry present

Mr. Jeffrey Mordecai Attorney-at-Law for the Ancillary Defendant with representative Ms Kim Lamb present

HEARD: January 29, 2019 and January 31, 2019

CORAM: SHERON BARNES, J (AG.)

[1] On January 29, 2019, the matter came before Judge in Chambers for a pre-trial review. Attorney-at-law for the Ancillary Claimant/Defendant made an application for the Claimant's statement of case to be struck out on the basis that they failed to file their documents on time, as per the Case Management Conference (CMC)

Orders of The Honourable Mrs. Justice Sonia Wint Blair (Ag) of December 16, 2016

[2] Those CMC orders were:

1. Ordinary witnesses are limited to two (2) for the Claimant and three (3) for the Defendant.
2. Trial is set down for three (3) days being April 9 – 11, 2019 in open court before judge alone.
3. Standard disclosure no later than January 12, 2018.
4. Inspection of documents so disclosed no later than January 26, 2018.
5. Witness Statements to be filed and exchanged no later than June 29, 2018.
6. Agreed statements of facts and issues to be filed by the Claimant's Attorney-at-Law no later than July 20, 2018. If no agreement each side to file its own statement of facts and issues no later than July 20, 2018.
7. Pre-Trial Review set for January 29, 2019 at 10:00 a.m for half an hour.
8. Pre-trial memorandum to be filed by both sides no later than December 28, 2018.
9. Listing Questionnaire to be filed no later than December 28, 2018.
10. Skeleton submissions and authorities is reserved for the pre-trial review.
11. Appointment of expert witnesses is reserved for the pre-trial review.

12. Costs to be costs in the claim.

13. Claimant's Attorney-at-Law to prepare, file and serve the orders made herein.

[3] Thereafter, the sequence of events in the matter were as follows:

- (i) On November 14, 2017 the (original) Defendant (now Ancillary Claimant/Defendant) filed an Application for Court Orders to have Ancillary Defendant (Kingston Wharves Ltd) added to the claim.
- (ii) That order was granted on February 19, 2018.
- (iii) On February 23, 2018, an Ancillary Claim Form and Particulars of Claim were filed by the Ancillary Claimant/Defendant.
- (iv) On March 9, 2018 an Acknowledgement of Service to the Ancillary Claim was filed by the Ancillary Defendant.
- (v) A defence was subsequently filed on April 6, 2018.
- (vi) The Ancillary Claimant/Defendant on June 29, 2018 filed an Application to file Witness statements out of time. That Application was set for hearing January 29, 2019 – the same date of this Pre-Trial Review.
- (vii) On August 9, 2018 the Ancillary Defendant filed an Application for Court Orders – seeking to have the claims severed.
- (viii) On January 25, 2019 Master Harris refused the above application and ordered a further CMC at the Pre-Trial Review on January 29, 2019.

- [4] Having perused the file to include aforementioned orders and subsequent actions, the Court recognized that no CMC orders had as yet been made with respect to the Ancillary Defendant since they became a party to the matter in February 2018, thus the order of Master Harris on January 25, 2019. As such, the intention was now to correct that defect without disturbing the already set trial dates of April 9-11, 2019.
- [5] On January 29 when the matter came up for CMC and Pre-Trial Review, Ms Smith made an oral application as mentioned above, relying, she said on Rules 26.8 (Relief from Sanctions) and 29.11 (Consequence of failing to File Witness Statement or Summary) of the Civil Procedure Rules 2002. She also referred to the Court of Appeal decision of Jamaica Public Service Company Limited v Charles Vernon Francis & Columbus Communications Jamaica Limited Civil Appeal No 126/2015 delivered 10th February 2017.
- [6] It was the Ancillary Claimant/Defendant's contention that the Claimant had failed to file anything until January 9, 2019, despite the aforementioned CMC Orders. But said Claimant had made no application under Rule 26.8 and seemed unaware that another party – the Ancillary Defendant – had been added to the matter.
- [7] The Court noted that the CMC orders of December 16, 2016 included no “unless orders”. Additionally, several other activities had occurred in relation to the matter between the date of the CMC Orders in 2016 and January 2019. In fact, the party seeking to strike out the Claimant's case was the same party who had applied to serve witness statements out of time – for which no order had as yet been made.
- [8] In refusing Counsel's application to strike out the Claimant's case, the court considered the over-riding objective of the CPR as stated in Rules 1.1(1) and 1.2 and affirmed by Brooks JA in AG of Jamaica & Western Regional Health Authority v Rashaka Brooks Jnr by Brooks Snr (his father and next friend) [2013] JMCA Civ 16 (as delivered in April 2013), at paragraph 14.

- [9] Additionally, the Court referred to the wide powers conferred by Rule 26.9 of the CPR to rectify matters where there has been a procedural error. In *Dale Austin v The Public Service Commission & AG of Jamaica* [2016] JMCA Civ 46 (Judgment delivered October 2016) the Court of Appeal noted (at paragraph 57) that “...the court’s power to strike out for non-compliance ...does not exist in a vacuum. The court, pursuant to rule 26.9, also has the power to make an order to put matters right.”
- [10] Counsel’s Application was made orally, unsupported by Affidavits or other material for the Court’s consideration, with the authority being relied on not being supplied. The application continued unexpectedly into January 31, 2019 when the court’s ruling and CMC orders were to be made.
- [11] Said case (*JPS v Charles et al*) was consulted, but the Court notes the distinguishing features between that and the matter now before it:
- a) The Application to strike out was accompanied by affidavits and accompanying documents, as against in this case
 - b) There was no third party to the matter who had not yet been made the subject of any CMC orders, as in **this** case
 - c) The Claimant had applied to file its Witness Statements out of time, which has not been done in this case.
- [12] As already stated, the court also notes that no “unless orders” were made in any previously issued orders; plus the very party making the application had applied for an extension of time to file its own witness statements and said application had not yet been heard/granted
- [13] The objective, at this stage, was to ensure there was no prejudice to any of the parties in light of the fact that a trial date was already set.

[14] So, guided by Rule 26.1 (2)(c), the court moved to abridge time and bring the Ancillary Defendant within the ambit of CMC orders.

[15] As such, the following Orders were made on January 31, 2019:

1. Trial Dates of April 9 – 11, 2019 to remain.
2. That Extension of time is granted to the Defendant/Ancillary Claimant to file its Witness Statements on or before December 27, 2018.
3. All Documents filed and served to date by Claimant and Defendant/Ancillary Claimant stand as if filed within time.
4. All documents already filed, are to be served on Ancillary Defendant by February 7, 2019.
5. Ordinary Witnesses of Ancillary Defendant limited to three (3).
6. Standard Disclosure of Ancillary Defendant on or before February 21, 2019.
7. Inspection of documents so disclosed on or before 28th February 2019
8. Witness Statements of Ancillary Defendant to be filed and served by March 15, 2019
9. Pre-Trial Memorandum of Ancillary Defendant to be filed by March 15, 2019
10. Listing Questionnaire of Ancillary Defendant to be filed by 15th March 2019
11. Ancillary Claimant permitted to file further witness statements on or before March 15, 2019.
12. Claimant's Attorney-at-Law to prepare, file and serve Judge's bundle on or before April 1, 2019

13. Claimant's Attorney-at-Law to prepare, file and serve index to Judge's bundle on or before April 1, 2019 on Defendant/Ancillary Claimant's Attorney-at-Law and Ancillary Defendant's Attorney-at-Law
14. Skeleton arguments and list of authorities to be filed and served on or before April 1, 2019
15. Claimant's Attorney-at-Law to file and serve Statements of facts and issues on or before Monday February 4, 2019.
16. Application to strike out Claimant's statement of case refused.
17. Leave to Appeal Order 16 is granted to the Defendant/Ancillary Claimant.
18. Costs to be costs in the claim.
19. Claimant's Attorney-at-Law to prepare file and serve orders herein on or before 4th February 2019.

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SHERON BARNES
JUDGE (AG)