

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**No. 338 of 2012**

**Between**

**EMERSON S BEST**

**CLAIMANT**

**-AND-**

**CORNERSTONE DEVELOPMENT INC.**

**DEFENDANT**

**Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of  
the High Court**

**2013: March 14**

**2014: October 31**

**Francis G. Depeiza of Messrs Carrington & Sealy for the Claimant**

**Peter S. Worrell, Director, in person for the Defendant**

**DECISION**

**Introduction**

- [1] The claimant in this matter was 94 years old at its commencement. He entered into a building contract with the defendant for the construction of a dwelling house at Lot 1A Westmoreland in the parish of Saint James. The arrangement between the parties broke down and the claimant sought in this action commenced on 27<sup>th</sup> February 2012, *inter alia*, an order for specific performance of the building contract and/or damages for breach of contract.
- [2] The defendant in this matter is represented by its Director, Mr. Peter Worrell, who appeared in person. On 17<sup>th</sup> May 2012 the defendant's defence and counterclaim were filed.
- [3] On 22<sup>nd</sup> February 2013, the defendant applied to this court to have the matter dismissed on the basis that claim Form 2 was used by the claimant instead of Claim Form 1 subject to the provisions of the *Supreme Court (Civil*

**Procedure) Rules 2008 (CPR) Part 8.2.** Additionally, the defendant sought orders to the effect that the counterclaim survived as per Part 18.6 of the CPR.

- [4] The sole issue for my consideration is the use of the Fixed Date Claim Form (Form 2) instead of Form 1 is fatal to the proceedings.
- [5] I should point out that the defendant offered no authorities for his application and was unprepared to give the court any arguments as to why the application should succeed. As a self-represented litigant, I have allowed him some latitude in this regard as I consider the point useful for argument.

**History of the Proceedings**

- [6] The history of these proceedings is as follows: the matter commenced by way of Fixed Date Claim Form (Form 2) filed 27<sup>th</sup> February 2012. The defendant acknowledged Service of the Fixed Date Claim and indicated his intention to defend. The Acknowledgment of Service Form 4 was received by the registration Department on 28<sup>th</sup> March 2012.
- [7] On 17<sup>th</sup> May 2012, the defendant entered a defence and counterclaim. The Case Management Conference was heard on 25<sup>th</sup> June 2012 and directions were given as to the deadlines for the filing of documents by the then Master of the High Court, Mr. Keith Roberts. On 29<sup>th</sup> May 2012, the claimant filed a Reply and Defence to the Counterclaim followed by a List of Documents on 19<sup>th</sup> July 2012.
- [8] The claimant then filed a Witness Statement on 20<sup>th</sup> July 2012, a Listing Questionnaire on 3<sup>rd</sup> September 2012 and the Claimant's Statement of Facts and Issues on 14<sup>th</sup> September 2012. On 9<sup>th</sup> November 2012, the defendant filed both his Witness Statement and Listing Questionnaire.
- [9] Pre-trial Review Directions were given on 15<sup>th</sup> November 2012 and the Pretrial Review was adjourned until 8<sup>th</sup> February 2013. The Trial Record was submitted on 6<sup>th</sup> February by the claimant's Attorney and the claimant's Skeleton Arguments were filed on 7<sup>th</sup> February 2013. On 12<sup>th</sup> February 2012, the authorities relied on by the claimant were filed by the claimant's counsel.
- [10] On 22<sup>nd</sup> February 2013, the defendant made the instant application to have the matter dismissed on the basis that the claimant commenced the proceedings by the use of Form 2 rather than Form 1 and for its counterclaim to survive.

### **The Instant Application- Discussion**

- [11] It is accepted that the Form 2 is generally analogous to the old originating summons procedure. **Kodilinye & Kodilinye** in their text *‘Commonwealth Caribbean Civil Procedure’ 2<sup>nd</sup> Ed 2004* stated as follows:
- “Fixed Date Claims (for which Form 2 must be used) are equivalent to the originating summons type of claim under the RSC and to ‘Part 8 claims’ under the English CPR.”
- [12] Prior to the Commencement of the *Supreme Court (Civil Procedure) Rules 2008* matters could be commenced, *inter alia*, by Originating Summons or Writ subject to the provisions of Order 5, 6 and 7 of the then *Rules of the Supreme Court 1982*.
- [13] Order 5.2 set out the provisions by which a matter could be commenced by Writ. Proceedings were to be begun by Writ in proceedings
- (a) “In which a claim is made by the claimant for any relief or remedy for any Tort, other than trespass to land:
  - (b) In which a claim made by the claimant is based on an allegation of Fraud;
  - (c) In which a claim is made by the claimant for damages for breach of duty, whether the duty exists by virtue of a contract or of any provision made by or under and enactment or independently of any contract or any such provision, where the damages claimed consist of or include damages in respect of personal injuries to any person or in respect of damages to any property; and
  - (d) In which a claim is made by the claimant in respect of the infringement of a patent...”
- [14] Order 5.3 made provision for those proceedings which *had to be* begun by Originating Summons. It referred to instances where the application was made to the court under any enactment. Order 5.4, however provided for proceedings to be commenced by either Writ or Originating Summons and Order 5.4 (2) provided as follows:
- “Proceedings

- (a) in which the sole or principal question at issue is a question of law or one of construction of an enactment or of any deed, will, contract or other document, or
- (b) in which there is likely to be any substantial dispute of fact,

are appropriate to be begun by originating summons unless the (claimant) intends in those proceedings to apply for Judgment under Order 14 (Summary Judgment) or Order 81 (Actions for Specific Performance, etc) or for any other reason considers the proceedings more appropriate to be begun by Writ”.

[15] Order 6 made general provisions for Writ of Summons and specified at section 1 that every Writ had to be in the old Form No. 1 whereas Order 7 specified that Originating Summons had to be in the old Form No. 3.

[16] This matters centers around Non- compliance so I must initially examine the old position under the *The Rules of the Supreme Court 1982*. Order 2 dealt with the effect of non-compliance and provided as follows

“1. (1) Where, in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these or any other rules of court, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may on the ground that there has been such failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.

2. (1) An application to set aside for irregularity any proceeding, any step taken in proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity...”

[17] Essentially, then an application begun by originating summons could always (and frequently was) continued as if begun by Writ, although for matters specified as being required to be begun by originating summons, the converse was not true. Under the old Rules therefore it is clear that the instant application would more than likely have been unsuccessful.

[18] Part 8 of the 2008 Rules makes provision for “How to Start Proceedings”. Section 8.1 (1) provides that proceedings are started by filing in the registry “(a) the claim Form...”. Section 8.1 (4) provides that “A claim form must be in Form 1, with or without variation, except in the circumstances set out in sub-rule 5”. Form 1 under the 2008 Rules is in similar terms to Form No. 1 under the 1982 Rules.

[19] Section 8.1 (5) provides as follows

“Form 2 (Fixed Date Claim) must be used

- (a) In proceedings for the possession of land;
- (b) In claims arising out of Hire-Purchase or credit sale agreements;
- (c) Wherever its use is required by a rule or practice direction; and
- (d) Where by any enactment proceedings are required to be commenced by originating summons or motion.”

[20] It seems clear to conclude therefore that Form 2 under the 2008 Rules was meant to deal with those matters which could rightly be commenced using Form No 2 under the 1982 Rules.

[21] Order 2 under the 1982 Rules, however, survives by virtue of Part 26 of the 2008 Rules. Part 26 is entitled “Case Management- The Court’s Powers”. Rules 3.1 and 4 under this Part are of relevance in this matter. They provide as follows:

“26.3 (1)

In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case where it appears to the court that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.

...

“26.4

(1) This rule applies in relation to a matter in respect of which an order has not been sought, or if sought, has not been made under Rule 26.3 striking out a statement of case or part of a statement of case.

(2) An error of procedure or failure to comply with a rule, practice direction or court direction or order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to rectify the error or failure.

(4) The court may make such an order on or without an application by a party.”

[22] The essence of the old Order 2 under the 1982 Rules, in my view has been captured by the provisions of Part 26 of the 2008 Rules. The definition of an irregularity under the old rules falls squarely within the provisions of rules 26.3(1) and (26.3(4)). An error of procedure can simply be described as an error in the application of the procedure established by the rules (refer *Bamber v Eaton* [2004] EWHC 2437, Ch).

[23] It stands to reason therefore that a court can either strike out all or part of a Statement of Case where a party has not complied with a Rule or it can make orders to rectify the error of procedure or failure to comply with that Rule.

More precisely however what is the true difference between Claim Form 1 and Claim Form 2? The real difference is that the procedure attendant on Form 2, means that the case is ‘front-loaded’ to some extent. Thus the entire case is prepared quite early on with consequent costs to the litigant. It is unsuitable, therefore, for matters, like the present case, where there is substantial dispute as to the facts, and witness statements and cross-examination are vital.

[24] There is no real magic about the use of the Forms in commencing proceedings, it is a practical requirement so that the litigant may use the procedure which best suits the issues to be determined. Thus where matters are land proceedings, hire purchase claims or otherwise specified, especially former originating process matters, it is mandatory to use Form 2, the Fixed Date Claim Form, as the rules contemplate that the nature of these matters is more amenable to the procedure which might be said to be simpler and rely less on oral evidence and cross-examination.

[25] **Kodilinye** further supports this point at page 252 (*supra*):

“Amongst the commonest types of fixed date claim are cases where trustees or executors seek the court’s ruling on the construction of a clause in a trust deed or will, and in such cases there should be no dispute as to the facts. There are also other types of claim, not involving a substantial dispute of fact, where the claimant may have the option of proceeding under the usual Form 1 or under Form 2 and, in making the choice of procedure, one of the considerations for the client may be expense. Under the fixed date procedure, the client will need to be prepared and spend more money ‘upfront’ than in the usual Form 1 procedure, mainly because any evidence needed in support of the claim must be filed and served with the claim form, and the gathering, drafting, preparing and serving of evidence is time-consuming and costly. Another disadvantage of the Form 2 procedure is that Judgment in Default is not available and the claimant must wait for the hearing date given when he issues his claim form. However, there are tactical advantages to using the Form 2 procedure, in that *‘the flush of the evidence will put [the] opponent on the back foot’* and this procedure *‘is an ideal way of putting pressure from the start and of giving your client the best chance of obtaining quick closure’*.”

- [26] Courts have also occasionally made the point that the use of Fixed Date Claim Forms in matters which involve contested factual issues and trials in open court is undesirable. In *Cosmo Brooks v Hugh Astley Hendricks* [2013] JMSC Civil 77, Batts J noted that affidavit evidence is unsuited for that purpose and that ordinary claims with statements of case, discovery orders and witness statements make for better identification of issues and a smoother trial process. It is interesting to note that despite his criticism of the fact, that case was commenced was commenced by a Fixed Date Claim Form supported by affidavit he proceeded to do the matter in the interest of avoiding delay.
- [27] In all circumstances a court must take into account the overriding objective of the *Supreme Court (Civil Procedure) Rules 2008* to deal with cases justly. The claimant wishes to have to have this matter dismissed and for his counterclaim to survive based on the wrong method of commencement. It is difficult to reconcile this application in light of the provisions of the overriding objective and the stage of proceedings which the matter has reached.
- [28] In my view, the claimant's filing of this matter via Form 2 is not fatal to its determination and is a failure to comply with a rule subject to the provisions of CPR r. 26.4(3) that can be rectified if I exercise my discretion accordingly.
- [29] Despite the fact that the defendant appears in person as a Director of the defendant, I must note that his application comes some 12 months after the matter commenced and was in the final stages of being prepared for trial.

### **DISPOSAL**

- [30] Accordingly, I find and so hold that the claimant's commencement of this matter via Form 2 was a failure to comply with the Rules under Part 8 but that such failure was not fatal to the continuation of the matter. The defendant's application to dismiss the matter is refused.
- [31] In view of my findings, in accordance with the overriding objective and my discretion to rectify failures to comply with the Rules, I hereby order that this matter continue as if commenced via Form 1.

[32] Costs to be costs in the cause.

**Jacqueline A.R. Cornelius**  
**Judge of the High Court**