

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 865 of 2009

BETWEEN:

**COREY RICARDO HAMILTON MARSHALL
(Acting herein by his duly constituted attorneys
on record Errol Hamilton Marshall and Phyllis
Marshall)**

CLAIMANT

AND

**BARBADOS MILLS LIMITED
ERIC HASSELL & SON LIMITED
POLSTEAM SHIPPING COMPANY LTD
BARBADOS PORT INC.**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 25 September 2019

Ms. Doria Moore for the Claimant

**Mr. Leslie Haynes Q.C. in association with Ms. Wendy Maraj for the First
Defendant.**

**Sir Richard Cheltenham Q.C. in association with Ms. Shelly-Ann Seecheran
for the Second Defendant.**

**Mr. P K H Cheltenham Q.C. in association with Ms. Chanika Carrington for
the Fourth Defendant.**

DECISION

THE APPLICATION

[1] On an application filed on 12 November 2018, the first defendant (Barbados Mills) seeks an order that a notice of discontinuance filed by the claimant (Mr. Marshall) on 4 October 2018 be set aside. Alternatively, Barbados Mills asks for leave to issue an Ancillary Claim Form against the third defendant (Polsteam), the party in respect of which the claimant filed the notice of discontinuance. This decision is concerned only with the application to set aside that notice.

BACKGROUND

[2] Background is important. On 14 March 2007, the claimant was injured when he was struck by a mooring line while a cargo vessel was berthing at a dock at the premises of Barbados Mills. On 15 May 2009, he commenced an action against that entity seeking damages for personal injuries and consequential loss. In his statement of claim, he averred that he was an employee of Barbados Mills; and that he was acting on the instructions of the company's head miller Mr. Andrew Hinds when the incident occurred. He claimed that the accident was caused by Barbados Mills "and/or its employees, servants and/or agents".

- [3] Barbados Mills filed a defence on 25 September 2009. It denied any responsibility for the accident. It asserted that at the material time, Mr. Marshall “was performing work at the request and under the direction of the shipping agent” and that Barbados Mills had no control over the work in which he was engaged. It also averred that the accident was caused, wholly or in part, by the negligence of the shipping agent, or the captain or crew of the cargo vessel.
- [4] On 1 February 2010, Barbados Mills filed an application seeking leave to issue third party notices on Polsteam and the second defendant (Eric Hassell & Son). It asserted that Polsteam was the owner of the vessel. It is not disputed that Eric Hassell & Son is the shipping agent. That application was granted by Roberts M on 17 February 2010. He also granted leave for Polsteam to be served out of the jurisdiction. The claimant asserts that Polsteam is based in Limassol, Cyprus.
- [5] Barbados Mills issued ancillary claim forms against Eric Hassell & Son and Polsteam on 19 February 2010. On 22 September 2010, Clarke J (Ag.) granted Mr. Marshall an order joining Eric Hassell & Son, Polsteam, and the fourth defendant (Barbados Port Inc.) as the second, third and fourth defendant, respectively. The applicant’s evidence is that, at the date of that

order, the ancillary claim form had not been served on Polsteam. There is no evidence that it was ever served.

[6] On 22 September 2010, Clarke J (Ag.) also ordered that the claim form and amended statement of claim be served on the defendants within 28 days. Additionally, she granted leave to Mr. Marshall to serve the claim form and amended statement of claim on Polsteam out of the jurisdiction. He filed an amended statement of claim and a claim form on 26 October 2010 showing the added defendants and claiming damages against them. Subsequently, by an application filed on 13 January 2012, he sought an order extending the period for serving the “Amended Claim Form filed herein on 26th October 2010” on Polsteam. A decision on that application is pending.

[7] Mr. Marshall now avers that the accident was caused or contributed to by the negligence of Barbados Mills, Eric Hassell & Son, Polsteam, and or Barbados Port Inc. Additionally, he asserts a breach of statutory duty on the part of Barbados Port Inc. Barbados Mills, Eric Hassell & Son and Barbados Port Inc. have filed defences to the amended claim.

THE RULES

[8] Such is the context in which the claimant filed his notice of discontinuance. I will now set out the procedural rules that are relevant to the application to set aside that notice. They are contained in *Part 37* of the *Supreme Court (Civil*

Procedure) Rules, 2008 (the *CPR*) which deals with the discontinuance of all or part of a claim. Of relevance are *CPR 37.2* and *CPR 37.4*.

[9] *CPR 37.2* reads:

37.2 (1) A claimant may discontinue all or part of his claim without the permission of the court.

(2) Notwithstanding sub-rule (1),

(a) a claimant needs permission from the court if he wishes to discontinue all or part of a claim in relation to which

(i) the court has granted an interim injunction; or

(ii) any party has given an undertaking to the court;

(b) where a claimant has received an interim payment in relation to a claim, whether made voluntarily or pursuant to an order under Part 17 (Interim Remedies), the claimant may discontinue only if

(i) the defendant who made the payment consents in writing; or

(ii) the court gives permission; and

(c) where there is more than one claimant, a claimant may not discontinue unless

(i) every other claimant consents in writing; or

(ii) the court gives permission.

(3) Where there is more than one defendant, a claimant may discontinue all or part of the claimant's claim against all or any of the defendants.

[10] *CPR 37.4* provides:

37.4 (1) Where the claimant discontinues without the consent of a co-claimant or of the defendant or the permission of the court, any co-claimant or defendant who has not consented may apply to have the notice of discontinuance set aside.

(2) An application under this rule should be made within 28 days after the date when the notice of discontinuance was served on the applicant.

SUBMISSIONS & DISCUSSION

[11] Mr. Leslie Haynes Q.C. in association with Ms. Wendy Maraj appeared for Barbados Mills. Citing *CPR 37.2(b)*, he submitted that where the claimant has received an interim payment, a notice of discontinuance may only be filed with the written consent of the defendants who made the payment, or with the leave of the Court. It is common ground that Barbados Mills, Eric Hassell & Son and Barbados Port Inc. have made voluntary interim payments.

[12] Counsel urged further that neither of the conditions were met in this case and, therefore, that the notice should be set side. He also contended that the addition of Polsteam as a defendant had averted the need for any further action against it by Barbados Mills and that which is now prejudiced by the discontinuance.

[13] Ms. Doria Moore who appeared for Mr. Marshall submitted that the notice was properly filed. She underscored the fact that he has received an interim payment from some but not all of the defendants, and that Polsteam has not

been served. She stated that it “is not an active defendant”. Counsel contended that, in such circumstances, Mr. Marshall may discontinue against a non-paying defendant without the consent of the paying parties or the permission of the Court.

[14] Ms. Moore submitted that *CPR 37.2(2)(b)* may be interpreted in a manner that is consistent with her submissions. Initially, she proffered that the rule was unclear and contended that it “does not speak to a situation where there are multiple defendants”. Later, she appeared to reverse that position. She submitted that the consent of paying defendants would be required to discontinue against a paying defendant but that no such consent was necessary to discontinue against a “non-paying and non-participating defendant”.

[15] Counsel acknowledged that the purpose of *CPR 37.2(2)(b)* may be to avoid prejudice to defendants who have made an interim payment. She submitted though, that subject to any statutory periods of limitation, paying defendants may negate any prejudice to themselves by filing an ancillary claim to re-join the defendant against whom a claim is discontinued.

[16] The Court also had the benefit of submissions from Ms. Shelly-Ann Seecharan who appeared for Eric Hassell & Son in association with Sir Richard Cheltenham Q.C.; and Ms. Chanika Carrington who appeared for Barbados Port Inc. in association with Mr. P K H Cheltenham Q.C. Both

endorsed the submissions made by Mr. Haynes Q.C. For her part, Ms. Seecheran submitted that the interpretation prayed for by Ms. Moore is a strained one and that it could cause prejudice to the other defendants.

[17] Ms. Carrington reminded the Court that *CPR 1.2* mandates that it seeks to give effect to the overriding objective when interpreting the *CPR* or exercising any powers under them. That objective is expressed in *CPR 1.1* to be to enable the court to deal with cases justly. *CPR 1.1(2)* lists a number of subsidiary objectives that are expressed to be included in the concept of the overriding objective. Ms. Carrington adroitly took the Court through that list as she sought to demonstrate that the interpretation asked for by Ms. Moore would defeat the ends of justice.

[18] Additionally, Ms. Carrington referred the Court to *Coffee Industry Board v O’Meilly and Others Claim No HCV/1657/2004 (High Court of Jamaica, date of decision 16 October 2004)*. In that case, Sinclair-Haynes J (Ag), as she then was, considered *Rules 37.2(1)* and *37.4(1)* of the *Civil Procedure Rules 2002* of Jamaica, which correspond to *CPR 37.2(1)* and *37.4(1)*. She determined that the notice in that case was an abuse of process and set it aside for that reason.

[19] In *Coffee Industry Board*, the court cited statements from the judgement of May LJ in *Gilham v Browning [1998] 1 WLR 682, 688 and 690* that such a

notice may be struck out if its purpose is an abuse of the court's process. It is of note that *Gilham* was concerned with the court's jurisdiction to strike out a notice of discontinuance where the applicable procedural rules contained no requirements for leave or consent. The court followed *Castanho v Brown & Root (UK) Ltd [1981] AC 557* in which it was held that the notice could not be struck out unless it was possible to treat it as an abuse of process.

[20] The position is different under *the CPR*. *CPR 37.2* prescribes circumstances in which a claimant may discontinue as of right and others in which she may only do so with consent or leave. *CPR 37.4* gives a non-consenting defendant a right to apply to the Court to have a notice of discontinuance set aside where a claimant discontinues in circumstances where consent or permission was required. I will not consider whether there remains an inherent jurisdiction to set aside a notice which was filed as of right if it amounts to an abuse of process. However, given the scheme of *CPR 37*, there is nothing to suggest that the power to set aside a notice is restricted to cases in which there is an abuse of process.

[21] I disagree with Ms. Moore. There is nothing ambiguous about *CPR 37.2(2)(b)*. Once a claimant has received an interim payment, the written consent of “**the defendant who made the payment**”, or the permission of the Court is a necessary prerequisite to a discontinuance. Implicit in the phrase

underscored is the contemplation that there may be other defendants who have made no payment.

[22] Neither expressly or by necessary implication does **CPR 37.2(2)(b)** limit the need for consent, or permission, to cases where the discontinuance is against a defendant who made an interim payment. To achieve the outcome Ms. Moore seeks requires me to read words into the sub-rule. There is no justification for doing such. The purpose of the provision must be to protect the interests of defendants who make an interim payment. The Court cannot whittle down that protection without reason.

[23] It follows that the notice of discontinuance was filed in contravention of **CPR 37.2(2)(b)**. It is clear that the defendants oppose the filing of the notice. Their common concern seems to be that of prejudice to the parties who have paid money by way of an interim payment. I accept that any discontinuance against Polsteam may prejudice the interest of the Barbados Mills. It has made voluntary interim payments in excess of \$1,000,000.00. Were it to be found at trial that Polsteam was in some degree liable for the accident, it could be called upon to reimburse Barbados Mills some or all of the money it advanced as an interim payment. It is that risk that constitutes a prejudice to Barbados Mills.

[24] I am mindful that if ultimately this Court refuses Mr. Marshall's application for the extension of time within which to serve his claim form on Polsteam, his ability to pursue the claim against that defendant will be thwarted. However, while that decision remains outstanding, it can hardly be appropriate for Mr. Marshall to file a notice of discontinuance against Polsteam to the possible prejudice of another defendant.

DISPOSAL

[25] I see no good reason why the notice of discontinuance should not be set aside. It was filed without the procedural pre-conditions being met and, potentially, it prejudices Barbados Mills and the other defendants that made interim payments. Accordingly, this Court orders that the notice of discontinuance filed by the claimant on 4 October 2018 is set aside.

[26] I will hear the parties on the question of costs.

**OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT**