

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2018/0024

BETWEEN:

[1] PETER TOUSSAINT
[2] TERENCE TOUSSAINT-CARROLL
[3] THE HEIRS OF THELMA TOUSSAINT

Appellants

and

MARTINE JOHNSON
(Representative of the estate of Peter Michael Barnard)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Gertel Thom
The Hon. Mde. Margaret Price-Findlay

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

The Appellants in person
Mr. Dexter Theodore Q.C. and Ms. Sueanna Frederick for the Respondent

2020: July 10;
September 16.

Civil appeal — Principles of case management — Discretion of a judge in making case management orders on his/her own initiative — Striking out of a statement of claim — Discontinuance of a claim where interim injunction granted — Costs to be awarded on a discontinuance of a claim

On 8th April 2015, Mr. Peter Barnard (now deceased) (“Mr. Barnard”) applied to the High Court for an injunction prohibiting Mr. Peter Toussaint and his agents and/or servants from, among other things, entering upon or trespassing upon a parcel of land registered as Block and Parcel Number 104 8B 434. The application was numbered SLUHCV2015/0293.

The next day, 9th April 2015, Mr. Barnard filed a fixed date claim form and a statement of claim in relation to the same issues and the same parcel of land. These documents were erroneously given the claim number SLUHCV2015/0295, a different claim number from the one which contained the injunction.

The injunctive relief applied for in claim number SLUHCV2015/0293 was granted on 24th April 2015. The appellants attempted to set it aside and filed an application to that effect on 8th May 2015. That application was refused on 6th November 2015 and the court ruled that the injunction was to remain in force until trial of the claim.

Concurrently, in SLUHCV2015/0295, and in response to the fixed date claim filed by the respondents, the appellants filed a document titled "Statement of Claim" on 26th May 2015, and then filed a defence and counterclaim on 18th July 2015. Importantly, at the time of filing the "Statement of Claim" document, the appellants were not yet parties to those proceedings. On 18th December 2015, the respondent filed a reply and defence to counterclaim. All of these pleadings bore the number SLUHCV2015/0295.

The proceedings both existed separately and concurrently under different claim numbers until case management was conducted in claim number SLUHCV2015/0295 on 18th May 2018 before Phulgence J. The respondent made an application for leave to discontinue claim number SLUHCV2015/0295 and submitted that there should never have been two different claim numbers. The court made the following case management order ("the Order"):

1. The Statement of Claim filed on 26th May 2015 in Claim number SLUHCV 2015/0295 is struck out.
2. The documents filed on Claim number SLUHCV2015/0295 are to be filed as part of Claim number SLUHCV2015/0293. Claim number SLUHCV 2015/0295 shall be closed in the Court's record.
3. The Claimant is given leave to file a notice of discontinuance in relation to the claim in SLUHCV2015/0295 on or before 8th June 2018.
4. The defendants are granted leave to file and serve an amended defence and counterclaim on or before 11th June 2018.
5. ...
6. ...
7. Counsel for the claimant is to file and serve a medical report on or before 20th September 2018, indicating what the current medical status of the claimant is and his ability to stand trial in the matter.
8. ...
9. ...

10. Costs on the discontinuance to the defendants to be paid by the claimant in the sum of \$3,375.00 being 55% of the prescribed costs.

11. ...”

The appellants, dissatisfied with the Order, appealed on several bases. They are outlined as follows:

- a. The Learned Judge erred when she on the Court’s own initiative struck out the claimant’s Statement of Claim rather than consolidate the actions.
- b. The Learned Judge when she failed to recognize the need to expedite the Claimant’s testimony made necessary by his advanced age and stated failing health.
- c. The Learned Judge erred in law when she limited the defendants to prescribed costs and to only 55% of the prescribed costs immediately upon granting the Claimant leave to discontinue.
- d. The Learned Judge abused her discretion when she allowed the Claimant leave to file a notice of discontinuance after an injunction had been granted and had been in place for over two years.
- e. The Learned Judge abused her discretion and erred in law when she ordered a filing of a Notice of Discontinuance to predate the filing of an Amended Statement of Claim in SLUHCV2015/0442.
- f. The Learned Judge abused her discretion and erred in law and in fact when she determined that the Claimant was not the proper party to maintain the claim and that he was not the owner of the property.
- g. The Learned Judge abused her discretion when she quantified costs as prescribed instead of assessed and in failing to consider all the circumstances.

Held: dismissing the appeal; and summarily awarding costs to the respondent in the sum of two thousand dollars, that:

1. Part 25 of the Civil Procedure Rules 2000 requires the Court to actively manage cases. In so doing, a judge must identify the issues between the parties and ensure that: (a) those matters which could be settled are settled on terms that are fair to all parties; (b) those issues which could be resolved summarily are summarily disposed; (c) those issues which require a trial to resolve them are brought to trial expeditiously. In summary, at case management a judge is required to make orders to enable the parties to have a fair and expeditious resolution of their dispute.

2. A case management decision being the exercise of the judge's discretion, appellate courts are very slow to interfere with such decisions and an appellant must cross a high threshold in order for the court to do so. If appellate courts were to readily interfere with case management decisions and exercise a discretion of their own, this would ultimately defeat the purpose of case management and create inordinate delays in the trial process. This is not to say that judges are not to exercise their discretion judiciously, or that an appellate court will not intervene when it is appropriate to do so. The limited circumstances when an appellate court would overturn a case management decision are when the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters or come to a decision that is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.

Re TG (A Child) [2013] EWCA Civ 5 applied; **Re AV (A Child) (Expert Report)** [2020] EWCA Civ 346 applied.

3. The conjoined effect of rules 26.2 (2) and (3) of the Civil Procedure Rules 2000 is that where a judge proposes to make an order of his or her own initiative, the judge is required to give the party to be affected a reasonable opportunity to prepare to deal with the matter where necessary. The length of period would depend on the circumstances of the case and the overriding objective of enabling the court to deal with cases justly; the more complex the issue, the more time would be needed. The trial judge's decision to strike out the document the appellant filed titled "Statement of Claim" in claim number SLUHCV2015/0295 was a straightforward decision which the appellants had reasonable opportunity to be heard on. The appellants were not parties to the claim at the time of filing the document, had subsequent to filing that document, filed a defence and counterclaim in the same matter and were given permission to amend their defence and counterclaim following the striking out. The decision therefore did not fall outside the generous ambit of discretion awarded to the trial judge.

Re AV (A Child) [2020] EWCA Civ 346 applied; Rule 26.2 of the **Civil Procedure Rules 2000** applied.

4. The learned trial judge identified and addressed the issue of the health of Mr. Barnard at paragraph seven of the Order. There was therefore no basis for the appellants' contention that the judgement of the trial judge did not consider the issue of Mr. Barnard's health.
5. There were no reasons advanced by the appellants which would support a departure from the general rule concerning costs to be awarded on a discontinuance and the method of quantification of such costs. Further, there has actually been no real discontinuance but a transfer of the substantive matters from one claim number to the next. The appellants were in effect

awarded three thousand three hundred and seventy-five dollars (\$3,375.00) costs on the learned judge closing a case number in the court system due to an administrative error on the part of the court office.

Rules 1.2 and 37.7 (1) of the **Civil Procedure Rules 2000** applied.

6. Where an interim injunction was granted and the claim is subsequently discontinued prior to trial with the permission of the court, the party enjoined does not have an automatic right to damages. The judge has a discretion whether to order an inquiry as to damages. An order for an inquiry as to damages would only be made where it is determined that the injunction was wrongly granted. There was no need for the respondent to obtain permission to withdraw claim number SLUHCV2015/0295 neither was there any need for the learned judge to perform an inquiry into the damages arising out of the discharge of an injunction since the interim injunction was not discharged. The injunction and the claim still subsist in SLUHCV2015/0293.

Rule 37.2 of the **Civil Procedure Rules 2000** applied. **Cheltenham and Gloucester Building Society v Ricketts** [1993] 4 All ER 276 considered; **Ansett Transport Industries (Operations) Pty Ltd v Halton, Interstate Parcel Express Co (Aust) Pty Ltd and Air Express Ltd** (1979) 25 ALR 639 considered; **Ushers Brewery Ltd. v. P. S. King & Co. (Finance) Ltd.** [1969] **U. No. 1525** [1972] Ch. 148 considered.

7. The learned judge made no order in relation to claim number SLUHCV2015/0442 and the stay of the proceedings in that matter has not been discharged and that matter remains unaffected.
8. The learned trial judge made no findings as to the ownership of Block and Parcel Number 1048B 434 but was merely restating the oral application and the basis on which the application was made by counsel for the respondent.

JUDGMENT

[1] **THOM JA:** This appeal arises from a case management order made by the learned judge on the 30th day of May 2018 (“the Order”).

[2] The background to this appeal is that on 8th April 2015, Mr. Peter Barnard (now deceased) (“Mr. Barnard”) applied to the High Court for an injunction prohibiting Mr. Peter Toussaint and his agents and/or servants from, among other things, entering upon or trespassing upon a parcel of land registered as Block and Parcel Number 104 8B 434. This application was numbered SLUHCV2015/0293 by the court office.

- [3] On 9th April 2015, the respondent filed a fixed date claim and statement of claim which related to the same parcel of land and the same issues. However, these documents were both erroneously numbered SLUHCV2015/0295 by the court office.
- [4] On 24th April 2015, the application for an injunction bearing claim number SLUHCV2015/0293 was heard without notice by Belle J who granted the injunction in the following terms:
- “(i) An interim injunction be granted restraining the Defendant his agents or servants from entering upon the property registered as Parcel 1048B 434 or trespassing thereon committing any acts of encroachment thereon including the clearing of lands, felling of trees, taking away of felled trees or lumber or committing any act thereon until further order of the court.
 - (ii) Costs reserved.
 - (iii) The applicant undertakes to abide by any order as to damages caused by the granting of this order.
 - (iv) The respondent may apply to vary or set aside this order in 14 days.
 - (v) Penal notice to be attached.”
- [5] On 8th May 2015, Mr. Peter Toussaint applied to set aside the injunction. Affidavits in support were filed on 3rd June 2015. These documents were all numbered SLUHCV2015/0293.
- [6] On 26th May 2015, a document titled “Statement of Claim” and numbered SLUHCV2015/0295 was filed by the appellants as “petitioners”. Importantly, the appellants were not yet parties to that matter as they had not yet obtained permission of the court to be so added when they filed this document. They sought the following orders:
- (i) That the Claimant is not the true owner of the property.

- (ii) That the Registrar of Lands rectifies the register to reflect ownership by the heirs of Thelma Toussaint.
- (iii) The land be deemed prescribed by the heirs of Thelma Toussaint as absolute owners.
- (iv) Compensation for trespass.
- (v) Costs and all other relief as the court sees fit.

[7] On 18th June 2015, the appellants filed a defence and counterclaim. This document was also numbered SLUHCV2015/0295.

[8] The application to set aside the injunction filed in claim number SLUHCV2015/0293 was heard by Belle J on 6th November 2015. The learned judge dismissed the application and ordered that the injunction remain in force until trial of the claim.

[9] On 18th December 2015, the respondent filed a reply and defence to counterclaim. This document was also numbered SLUHCV2015/0295.

[10] On 27th September 2016, the respondent applied to the court to substitute the claimant in SLUHCV2015/0295 for Tanburn Estates. Belle J granted the application and gave Tanburn Estates leave to amend the Claim Form and Statement of Claim in that matter. The appellants appealed the decision and this Court allowed the appeal, set aside the order of Belle J, and remitted the matter to the High Court.

[11] On 30th May 2018, a case management conference was held by Phulgence J. At that hearing, Mr. Theodore, QC made an oral application on behalf of the respondent to discontinue the claim in SLUHCV2015/0295. After much discussion, as evidenced by the transcript of the proceeding, the learned judge made the Order as follows:

“IT IS HEREBY ORDERED THAT:

1. The Statement of Claim filed on 26th May 2015 in Claim number SLUHCV 2015/0295 is struck out.
2. The documents filed on Claim number SLUHCV2015/0295 are to be filed as part of Claim number SLUHCV2015/0293. Claim number SLUHCV 2015/0295 shall be closed in the Court's record.
3. The Claimant is given leave to file a notice of discontinuance in relation to the claim in SLUHCV2015/0295 on or before 8th June 2018.
4. The defendants are granted leave to file and serve an amended defence and counterclaim on or before 11th June 2018.
5. The claimant is granted leave to file a defence to the Counterclaim within 28 days of service of the amended defence and counterclaim on him.
6. The defendants are to file and serve a reply to the amended defence to the counterclaim within 14 days of service of the amended defence to counterclaim on them.
7. Counsel for the claimant is to file and serve a medical report on or before 20th September 2018, indicating what the current medical status of the claimant is and his ability to stand trial in the matter.
8. The matter is adjourned to 8th October 2018, for first hearing and for case management.
9. Costs of the claimant to be paid by the defendants in the sum of \$500.00.
10. Costs on the discontinuance to the defendants to be paid by the claimant in the sum of \$3,375.00 being 55% of the prescribed costs.
11. The claimant to have carriage of the order."

The Appeal

[12] The appellants, being dissatisfied with the Order, filed a notice of appeal in which they outlined seven grounds. They read as follows:

- (a) The Learned Judge erred as a matter of law when she on the Court's own initiative struck out the claimant's Statement of Claim rather than consolidate the actions.
- (b) The Learned Judge erred as a matter of law when she failed to recognize the need to expedite the Claimant's testimony made necessary by his advanced age and stated failing health.

- (c) The Learned Judge erred in law when she limited the defendants to prescribed costs and to only 55% of the prescribed costs immediately upon granting the Claimant leave to discontinue.
- (d) The Learned Judge abused her discretion when she allowed the Claimant to leave to file a notice of discontinuance after an injunction had been granted and had been in place for over two years.
- (e) The Learned Judge abused her discretion and erred in law when she ordered a filing of a Notice of Discontinuance to predate the filing of an Amended Statement of Claim in SLUHCV2015/0442.
- (f) The Learned Judge abused her discretion and erred in law and in fact when she determined that the Claimant was not the proper party to maintain the claim and that he was not the owner of the property.
- (g) The Learned Judge abused her discretion when she quantified costs as prescribed instead of assessed and in failing to consider all the circumstances.

[13] This being an appeal against an order made at case management, it is appropriate at this time to briefly outline the principles which guide an appellate court when reviewing an order made at case management. As stated in Part 25 of the **Civil Procedure Rules 2000** (“the CPR”) it is the Court’s duty to actively manage cases, which essentially requires a judge to identify the issues between the parties and to ensure that: (a) those matters which could be settled are settled on terms that are fair to all parties; (b) those issues which could be resolved summarily are summarily disposed; and (c) those issues which require a trial to resolve them are brought to trial expeditiously. In other words, a case management judge is required to make orders so that the parties can have a fair trial expeditiously. As Sir Mark Headley

puts it at paragraph 84 of **Re TG (A Child)**:¹ “Although judges must comply with the rules case management remains an art. The judge should have the ‘feel’ of the case...” In other words, the judge, being familiar with the entire case, must be able to determine what is required for the case to be resolved fairly and expeditiously. To achieve this, Part 26 of the CPR gives the judge a plenitude of powers and a very wide discretion when exercising those powers.

[14] Appellate courts, recognising that a case management decision is an exercise of the judge’s discretion, are very slow to interfere with such decisions. This is because the judge, being familiar with the entire case, is often better positioned to deal with case management issues. If appellate courts were to readily interfere with case management decisions and exercise a discretion of their own, this would ultimately defeat the purpose of case management and create inordinate delays in the trial process. This however is not to say that judges are not to exercise their discretion judiciously, or that an appellate court will not intervene when it is appropriate to do so.

[15] Appellate courts have consistently stated that the circumstances in which they will interfere with case management decisions of a judge are very limited. These limited circumstances have been stated by this Court on numerous occasions to be when the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters or come to a decision that is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge. This approach was recently reiterated in **Re AV (A Child) (Expert Report)**² where the court stated at paragraph 21:

“The judge’s decision was made in the course of exercising her case management powers. It is right to emphasize again that this court does not lightly interfere with case management decisions. A party applying for permission to appeal to overturn a case management decision made within the judge’s discretion must cross a high threshold.”

¹ [2013] EWCA Civ 5.

² [2020] EWCA Civ 346.

Ground A - Striking out of the “statement of claim”

- [16] The appellants contend that the learned judge erred when, on her own initiative, she struck out the document they filed titled “Statement of Claim” and numbered SLUHCV2015/0295. They argue that the learned judge should have consolidated claim number SLUHCV2015/0295 and claim number SLUHCV2015/0442 which is a claim instituted by the appellants in relation to the same property which was the subject of the injunction. They submit further that they may be prejudiced if the document titled “Statement of Claim” is struck out since it was filed prior to Tanburn Estates being registered as owner of the said property.
- [17] In response, the respondent submits that since the claim numbered SLUHCV2015/0295 was being discontinued, it would have served no useful purpose for the two claims to be consolidated.
- [18] Rule 26.3 (1) of the CPR gives the court the power to strike out a statement of case or part of it in certain circumstances. It is not disputed that no application was made to the learned judge to strike out the “Statement of Claim”. Indeed, the transcript of the proceedings does not show any such application being made. Rather, the learned judge struck out the document titled “Statement of Claim” on her own initiative.
- [19] Rules 26.2 (2) – (4) of the CPR outline the procedure to be followed where a judge proposes to exercise his/her case management powers on his/her own initiative. They read as follows:
- “ ...
- (2) If the court proposes to make an order of its own initiative, it must give any party likely to be affected a reasonable opportunity to make representations.
- (3) The opportunity may be to make representations orally, in writing telephonically or by any other means as the court considers reasonable.
- (4) If the court proposes to:
- (a) make an order of its own initiative; and

(b) hold a hearing to decide whether to do so; the court office must give each party likely to be affected by the order at least 7 days' notice of the date, time and place of the hearing."

[20] The applicable paragraphs are paragraphs (2) and (3). Paragraph (4) is not applicable in this case since no hearing was proposed by the learned judge. The conjoined effect paragraphs (2) and (3) is that where a judge proposes to make an order on his/her own initiative, the judge is required to give the party to be affected a reasonable opportunity to be heard on the matter. This would include a reasonable opportunity to prepare to deal with the matter where necessary. The length of period would depend on the circumstances of the case and the overriding objective of enabling the court to deal with cases justly. The more complex the issue, the more time would be needed by the parties to prepare to deal with the matter. Where the issue is straightforward, the matter could be heard the same day.

[21] The transcript shows that there was discussion between the learned judge and the parties in relation to the document titled "Statement of Claim". The learned judge expressed the view, correctly in my opinion, that the claimant having filed his fixed date claim and statement of claim in claim number SLUHCV2015/0295, the defendants could not respond with a "Statement of Claim". Also, the second and third appellants who were described as "Petitioners", in the document titled "Statement of Claim" were not yet granted permission by the court to be added as defendants to claim number SLUHCV2015/0295. The second appellant, Mrs. Toussaint-Carroll, who is an attorney-at-law, explained to the learned judge that the "Statement of Claim" ought to have been filed in another matter bearing claim number SLUHCV2015/0442, but due to an administrative error by the court office, it was filed in SLUHCV2015/0295. However, the learned judge pointed out to Mrs. Toussaint-Carroll that the case number was typed in by her or her office and was therefore not an administrative error by the court office. The learned judge also expressed the view that the reliefs sought in the "Statement of Claim" were the same reliefs sought in the defence and counterclaim filed in claim number SLUHCV2015/0295.

[22] In my view, the issue before the learned judge was quite straightforward. Furthermore, in keeping with rule 26.2 (2) of the CPR, the appellants were given an opportunity to make oral representations in the matter, albeit that opportunity was given during the hearing where the Order was made. Having regard to the nature of the issue and the circumstances of this case as outlined above, robust case management was required. While striking out of a statement of case is a measure of last resort, in the circumstances of this case it was appropriate to do so and did not require extensive representations being made by the parties. Persons who are not a party to a litigation cannot file documents in the litigation without the court's permission. Furthermore, a defense and counterclaim was already filed in the proceedings and the learned judge granted the appellants leave to amend the defence and counterclaim which would have given the appellants an opportunity to include in their defence and counterclaim any argument which was contained in the "Statement of Claim". There is therefore no basis for this Court to interfere with the judge's exercise of her discretion to strike out the document titled Statement of Claim filed on 26th May 2015 in SLUHCv2015/0295 as it cannot be said that the discretion exercised fell outside the generous ambit within which reasonable disagreement is possible, and was clearly or blatantly wrong.

Ground B – Health of the claimant

[23] This ground of appeal has no merit. During the case management hearing, the appellants expressed concern about Mr. Peter Michael Barnard's (the then listed claimant) declining health and the need for him to give his evidence soonest. They submit that the learned judge failed to consider their concern. However, the record of appeal shows the contrary. The learned judge addressed the matter in paragraph seven of the Order by requiring Mr. Theodore, QC, counsel for Mr. Barnard, to file and serve a medical report on or before the 20th September 2018, on the status of Mr. Barnard's health and his ability to testify at trial. This information was needed to enable the learned judge to make an appropriate order for the trial of the matter.

Grounds C and G – Quantification of costs on the discontinuance of the claim

- [24] I will deal with grounds C and G together since they both deal with the way the costs were quantified by the learned judge after she granted permission to the claimant to discontinue claim number SLUHCV2015/0295.
- [25] The learned judge having granted the respondent leave to discontinue claim number SLUHCV2015/0295 proceeded to award the appellants costs on the discontinuance in the sum of three thousand, three hundred and seventy-five dollars (\$3,375.00).
- [26] The appellants contend that the learned judge erred in so doing. They argue that costs should have been assessed because several interlocutory applications were made since the grant of the interim injunction. Also, they submit that they were successful in their appeal of the order for substitution but were not awarded any costs.
- [27] The award of costs is governed by the CPR which provides several methods of quantification of costs and sets out the circumstances in which a specific quantification method is to be used. The specific rule which deals with the quantification of costs on discontinuance of a claim is Part 37 of the CPR. Rule 37.7 reads as follows:
- “37.7 (1) The general rule is that, unless an order has been made for budgeted costs under rule 65.8, the costs are to be determined in accordance with the scale of prescribed costs contained in Part 65, Appendices B and C.
- (2) If the claimant discontinues part of the case only, the amount of costs must be assessed by the court when the remainder of the claim is resolved.
- (3) In determining the appropriate amount of costs to be paid where an order has been made under rule 65.8 (budgeted costs), the court may take into account any written information provided by either party when the costs budget was made.”

[28] There was no order for budgeted costs, nor an order for discontinuance of part of the case. The applicable paragraph was therefore paragraph 1 which provides for the prescribed costs method to be used. The leave for discontinuance having been granted after the defence had been filed and at case management, the learned judge granted 55% of the prescribed costs in keeping with Appendix C of Part 65. Where the CPR outlines a general rule for the method to be used in quantifying costs, the court would only be compelled to depart from that general rule if departing from the general rule would be in keeping with the court's overriding objective to deal with the matter justly.

[29] A close examination of the Order shows (as will be seen when discussing ground D) that in fact, the proceedings were not in fact discontinued. Both the injunction and the claim still exist, albeit now the substantive claim is also numbered SLUHCV2015/0293. The appellants were in effect awarded three thousand three hundred and seventy-five dollars (\$3,375.00) costs on the learned judge closing a case number in the court system due to an administrative error on the part of the court office.

[30] The parties are still to litigate the substantive claim in claim number SLUHCV2015/2093 which now contains all the pleadings which were in SLUHCV/2015/0295. When these proceedings are completed, the court below will make an order for costs in that matter. The application of the general rule in 37.7 (1) was therefore in my view in keeping with the overriding objective and there was no wrongful exercise of the judge's discretion in applying it.

Ground D – Discontinuance where interim injunction granted

[31] The appellants contend that the learned judge erred in granting the respondent permission to discontinue claim number SLUHCV2015/0295. They submit that in exercising her discretion the learned judge was required to consider the circumstances in which the notice of discontinuance was issued and what the respondent was trying to achieve in seeking to discontinue the claim. The

respondent had indicated that they sought the discontinuance because the named claimant was not the owner of the property and he could not maintain the claim; as such the claim would be refiled in the name of another entity. The appellants contend that, the respondent in discontinuing the claim was therefore seeking to get an advantage since the facts are detrimental to his case. The appellants therefore argue that in those circumstances, the learned judge should have dismissed the claim with prejudice rather than simply permit the respondent to discontinue the claim. Alternatively, they argue that the learned judge should have consolidated claim number SLUHCV2015/0295 with claim number SLUHCV2015/0442.

[32] The appellants further submit that in granting permission to discontinue, the learned judge failed to take into account that an injunction was granted, and the respondent had given an undertaking as to damages. In such circumstances, they argue that the learned judge was required to conduct an inquiry as to damages.

[33] The relevant rules are 37.2 (1) and (2) of the CPR which read as follows:

“(1) The general rule is that a claimant may discontinue all or part of a claim without the permission of the court.

(2) However –

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

- (i) any party has given an undertaking to the court; or
- (ii) the court has granted an interim injunction;

...”

[34] The respondent was both the beneficiary of an injunction and he gave an undertaking to abide by any order for damages resulting from the injunction in SLUHCV2015/0293. He was therefore required to seek the permission of the court to discontinue that claim.

[35] Rule 37.2 (2) of the CPR gives the court a discretion whether to grant permission to discontinue. The rule does not state the factors to be considered by a judge in exercising the discretion, however, a judge is required to give effect to the overriding

objective when exercising its discretion under the rules as stipulated in rule 1.2 of the CPR.

[36] Invariably, when an interim injunction is granted prior to trial, there is a risk that the party enjoined by the injunction may suffer loss by reason of compliance with the injunction. The loss suffered may not be recoverable by the relief granted in the substantive claim. It is therefore usual for a court in granting an interim injunction to require the applicant to give an undertaking in damages. This undertaking is given to the court and not to the party enjoined, therefore it does not form the basis for a cause of action. The party enjoined does not have an automatic right to damages where a matter is discontinued, and the injunction discharged. The judge has a discretion whether to order an inquiry as to damages. An order for an inquiry as to damages would only be made where it is determined that the injunction was wrongly granted – see **Cheltenham and Gloucester Building Society v Ricketts**,³ **Ansett Transport Industries (Operations) Pty Ltd v Halton, Interstate Parcel Express Co (Aust) Pty Ltd and Air Express Ltd**,⁴ and **Ushers Brewery Ltd. v. P. S. King & Co. (Finance) Ltd. [1969 U. No. 1525]**.⁵

[37] The above cases provide useful guidance on the steps to be taken when a judge exercises the discretion under rule 37.2 and gives permission to discontinue a claim and discharges an injunction. The judge is also required to consider whether directions should be given to enable the court to determine whether the injunction was wrongly granted. Such directions would not be necessary where the judge can determine the issue without further enquiry (those instances are likely to be rare). If the injunction was rightly granted that brings the matter to an end. However, if it was not, then the judge must decide whether the undertaking should be enforced. Where the judge determines that the undertaking should be enforced, the judge must order an enquiry as to damages. Damages are assessed on the same principles applicable to cases of breach of contract. Thus, only loss caused by the

³ [1993] 4 All ER 276.

⁴ (1979) 25 ALR 639.

⁵ [1972] Ch. 148.

grant of an injunction are recoverable and not loss resulting from the litigation of the substantive matter.

[38] However, this case is not the normal discontinuance of proceedings. In fact, no proceedings were discontinued by the learned judge. It is appropriate at this juncture to restate the paragraphs of the Order that are the subject of this ground of appeal. They are paragraphs 2 and 3 and they read as follows:

“2. The documents filed on Claim Number SLUHCV 2015/0295 are to be filed as part of the Claim Number SLUHCV 2015/293. Claim Number SLUHCV 2015/0295 shall be closed in the Court’s record.

3. The Claimant is given leave to file a notice of discontinuance in relation (sic) the claim in SLUHCV 2015/0295 on or before 11th June 2018.”

[39] The conjoint effect of the above paragraphs in the Order is that the injunction is still in effect and the claim in relation to the injunction is also in effect. All the pleadings pertaining to the injunction and the claim are now numbered claim number SLUHCV2015/0293. Claim number SLUHCV2015/0295 thereafter contained no pleadings. The appellants have misconstrued the effect of the impugned paragraphs to be that the substantive claim was discontinued, the injunction was discharged, and they were left without a remedy for any loss suffered because of the injunction. Also, since the claim was discontinued without prejudice, the respondent was at liberty to refile the same proceedings albeit by a different entity.

[40] In my view, it was not necessary for the judge to give permission to discontinue claim number SLUHCV2015/0295 as that claim did not contain either the injunction or the undertaking as to damages. Paragraph 2 of the Order which states that claim number SLUHCV2015/0295 shall be closed in the court’s record was sufficient. Therefore, it was not necessary to conduct any enquiry into damages as a result of the discharge of an injunction as the injunction still remains.

Ground E – Statement of claim in SLUHCV2015/0442

[41] The appellants contend that the learned judge erred in requiring the notice of discontinuance to be filed before the filing of an amended statement of claim in SLUHCV2015/0442. This ground of appeal is also without merit. The proceedings in SLUHCV2015/0442 were instituted by the appellants against the respondent in relation to the same property. It was common ground before the learned judge that on 6th November 2015, Belle J granted a stay of proceedings in SLUHCV2015/0422. While the transcript shows that there was mention of SLUHCV2015/0442 at the case management conference, the case management conference was not in relation to that claim. The learned judge therefore made no order in relation to claim SLUHCV2015/0442. The stay of the proceedings has not been discharged.

Ground F – Proper party

[42] The appellants also contend that the learned judge erred when, in their view she purported to make a finding that the respondent was not the proper party to the proceedings since he was not the owner of the property.

[43] This submission is misconceived. The appellants based their submission on the fourth recital of the Order where the learned judge stated:

“AND UPON COUNSEL for the claimant applying to discontinue the claim pursuant to rule 37.2 of the Civil Procedure Rules as it cannot be maintained in the name of the claimant as he is not the owner of the land which is the subject of the claims;”

[44] In so stating, the learned judge was merely reciting the oral application and the basis on which the application was made by counsel for the respondent. A perusal of the terms of the Order, which are outlined at paragraph 11 of this judgment shows that the learned judge did not make any finding in the terms of the Order as alleged by the appellants. This ground of appeal also fails.

Conclusion

[45] For the reasons stated above, there is no basis for this Court to interfere with the judge’s exercise of her case management powers. The appellants have failed to show that the trial judge erred in principle, took into account irrelevant matters, failed

to take into account relevant matters or come to decisions that were so plainly wrong that they must be regarded as outside the generous ambit of the discretion entrusted to her.

[46] The appeal is accordingly dismissed. The appellants shall pay the respondent costs summarily assessed in the sum of \$2,000.00.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Margaret Prince-Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar