

ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. AXAHCV 12 OF 2005

BETWEEN

ROBERT FRIEDMAN

Applicant/2nd Defendant

and

**APEX CONSTRUCTION CO. LTD
APEX CONSTRUCTION CO. INC**

Respondent/Claimants

and

BRENKSTONE LIMITED

1st Defendant/Ancillary Claimant

and

JOSEPH HODGE

Ancillary Defendant

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

On written submissions

Lake & Kentish for the Applicant/2nd Defendant

Keithley Lake & Associates for the Respondents/Claimants

2006: February 6;
February 24.

JUDGMENT

[1] **BARROW, J.A.:** Notwithstanding, the impressive submissions on the law made on behalf of the applicant, it seems clear to me that there is no prospect of the intended appeal succeeding and I refuse the application for leave to appeal.

- [2] The applicant wishes to appeal the decision of Master Mathurin refusing to dismiss the applicant as a defendant. The short ground of that application was that the building contract that is the core of the litigation was made between the respondents (together referred to as Apex) and the 1st defendant (Brenkstone), that the applicant acted at all times as a director of Brenkstone and that the applicant could therefore not be personally liable for anything that he did in this regard. The solicitors for the applicant presented cogent submissions on the separate legal personality of a company, privity of contract, and piercing the corporate veil. The statements of the law contained in the submissions seem accurate. The difficulty in the way of the applicant is not the law, however, but the facts.
- [3] In its Second Amended Statement of Claim Apex alleged¹ that a conversation took place between the applicant and Apex's representative in which the applicant stated that he was going to add an additional US\$200,000.00 to the contract price; that he knew that the job was difficult but that he would see to it that Apex would not lose any money on the project.
- [4] In its particulars of breach of contract, bad faith and/or misrepresentation Apex alleged specifically against the applicant that he misled Apex into believing that he would pay them additional moneys thereby inducing them to continue works. Apex alleged that they relied on the applicant's assurances that he would not allow them to lose money on the project and proceeded to do extra-contract work on the basis that Brenkstone and/or the applicant would pay them for the additional work performed. Apex alleged, as well, that the applicant misrepresented to them that he would pay them for such works thereby inducing them to continue working. Further, Apex alleged that the applicant acted in bad faith by misleading them and giving them false assurances in order to persuade them to continue to perform

¹ At paragraph 31.

works to their ultimate detriment. From this, Apex alleged that the applicant (who it is alleged occupies the house that Apex built) has taken the benefit of Apex's construction as occupier of the residence without fully compensating them for it. In their claim for relief Apex seeks, among other things, payment on a quantum meruit and on the principle of unjust enrichment.

- [5] The submissions for the applicant contend that, assuming they were made, the alleged statements made by the applicant were intended to further bind Brenkstone and were not indicative of an intention to create a legal relationship between the applicant and Apex on which Apex would then be able to rely against the applicant in his personal capacity. It seems to me that is very much a question of fact.
- [6] The solicitors for the applicant argued that on the application before the master she was required to determine firstly, whether or not the statement of case disclosed an issue to be tried between Apex and the applicant and, secondly, whether there was a real prospect of success in the issue. It seems inescapable that the claim made by Apex raised a real issue to be tried between them and the applicant, namely, when he allegedly made the reported statements did he do so in his capacity of director of Brenkstone or did he do so in his personal capacity? That is a pure question of fact and can only be determined after evidence is considered. It is an issue that needs to be tried.
- [7] The applicant's second proposition was that he should be dismissed from the case because there was no real prospect of Apex succeeding against him. I treat this application to dismiss a defendant as equivalent to an application to strike out a case because it discloses no reasonable cause of action. There is high persuasive authority in the speeches in the House of Lords in **Three Rivers District Council v Governor and Company of the Bank of England**² that a pleaded case should only be struck out if it is bound to fail. A distinction was drawn in the opinions of

² [2001] UKHL 16; [2001] 2 All ER 513.

two members of the majority³ between striking out because when the pleaded allegations are considered the claim is bound to fail, and striking out because when the court looks at what will happen at the trial it is clear that there is no real prospect of success. In relation to the pleaded case the position is that even if a case is weak and not likely to succeed it should not be struck out so long as the statement of claim discloses some cause of action or raises some question fit to be tried.⁴ Because Apex's claim depends entirely on the evidence that it will bring in support of its contention that the applicant was acting in his personal capacity when he allegedly made the reported statements there is no way of determining, at this stage, whether the claim will fail or not. Apex has produced correspondence on the matter of the statements that they say proves their contention. Assuming that the correspondence is interpreted as they argue, and assuming that the oral evidence of their representative who spoke with the applicant will support their case, both of which assumptions the master was required to make in the absence of any reason to do otherwise, the master was obliged to conclude that Apex have a real prospect of success. There is nothing in the applicant's submissions that points to the prospect of a different conclusion being reached on appeal.

[8] It follows from the views that I have expressed that no point would be served by giving leave to appeal to the applicant because he has no real prospect of success on the intended appeal. Accordingly, the application is dismissed with costs of EC\$2,500.00 to Apex.

Denys Barrow, SC
Justice of Appeal

³ Lord Hope of Craighead at paragraph 90 and Lord Hutton at paragraph 120.

⁴ Per Lord Hope at paragraph 117.