

**THE EASTERN CARRIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2017/0072

BETWEEN:

[1] Adam Bilzerian
[2] Lemon Grove Company Limited
[3] Caribbean Building Systems (St. Kitts) Ltd
Respondents/Claimants

and

[1] Terence V. Byron
[2] Byron & Byron
[3] Kevin Horstwood
1st Defendant/Applicant
2nd Defendant
3rd Defendant/Applicant

Appearances:

Mr. Paul Bilzerian, representative of the Second and Third Claimants
First Defendant in person (states that Second Defendant not served)
Third Defendant in person
No appearance by First Claimant

2023: March 23;
May 5.

JUDGMENT

[1] **GILL, J.:** This is the court's ruling on two applications, one each by the first and third defendants to strike out the claim. The orders sought in both applications are identical. The applicants ask the court to strike out the claim as disclosing no reasonable cause of action and as an abuse of the process of the court.

Background

- [2] On March 20, 2017, the claimants filed a claim form and statement of claim against the defendants alleging breach of fiduciary duty, intentional interference with contractual relations, fraudulent misrepresentation, negligent misrepresentation, and also seeking injunctive relief.
- [3] On March 24, 2017, the claimants filed an application for an interim injunction seeking to restrain the defendants, whether by themselves or their agents, or assigns, from in any way interfering in the running of the affairs of either the second claimant Lemon Grove Company Limited (“Lemon Grove”) or the third claimant Caribbean Building Systems (St. Kitts) Limited (“CBS), including but not limited to representing themselves as a shareholder, director, officer, employee, manager or legal representative of either Lemon Grove or CBS.
- [4] Lanns J. (Ag.) granted the interim injunction on May 11, 2017, with a return date of June 12, 2017. That return date never materialised. An application filed by the third defendant on October 19, 2017, to discharge the injunction was never determined, and the interim injunction remains in effect to date.
- [5] No defence has been filed in this matter. Instead, on May 25, 2017, the first defendant, Terence Byron (“Mr. Byron”) filed his application to strike out the claim. The third defendant, Kevin Horstwood (“Mr. Horstwood”) followed suit on May 26, 2017.

Intervening preliminary issue

- [6] The hearing of these applications took place on March 23, 2023. The following day, March 24, 2023, Lemon Grove, without an application for leave, filed an amended claim form and amended statement of claim. CPR 20.1 provides that a statement of case may be amended once without the court’s permission at any time before the date fixed by the court for the first case management conference.
- [7] At the start of the hearing on March 23, 2023, Mr. Paul Bilzerian, the representative of Lemon Grove and CBS, sought an adjournment of the matter to file an amended

claim. Mr. Byron and Mr. Horstwood strenuously objected and urged the court to proceed with the hearing of their strike out applications, given the length of time this matter has been before the court, and to avoid further delay. In the circumstances, I proceeded to hear the applications and reserved my decision for May 5, 2023.

- [8] The day after the hearing, March 24, 2023, an amended claim was filed.
- [9] The amended claim modifies the parties. Lemon Grove is the sole claimant and Mr. Horstwood is eliminated as a defendant. It also dispenses totally with the allegations of unlawful interference with contractual relations, fraudulent misrepresentation and negligent misrepresentation. What remains is the case of breach of fiduciary duty against Mr. Byron and Byron & Byron and the claim for a permanent injunction against those two remaining defendants. The claimants have, in essence, “struck out” major parts of the claim.
- [10] The question arises as to what effect, if any, the amended claim, filed without an application for leave to amend, has on the strikeout applications before the court. On the authority of **The Attorney General of Saint Lucia v Darrel Montrope**,¹ it appears that there is none. Being persuaded by the decisions in **Index Communication Network Limited v Capital Solutions Limited and Others**² and **Maria Agard v Mia Mottley and Anor**,³ Pereira CJ followed the principle that “even if no date had been fixed for the case management conference, once an application to strike out has been filed, there can be no amendment to the pleadings without the court’s leave”.⁴
- [11] Therefore, Mr. Byron and Mr. Horstwood, having filed applications to strike out the claim of March 20, 2017, the claimants were required to seek leave of the court to amend the claim. The claimants’ failure to do so renders the amended claim nugatory.

¹ SLUHCVP2019/0021, delivered July 9, 2020

² [2012] JMSC Civ. No. 50 (Jamaica)

³ Barbados High Court Claim No. 1753 of 2015

⁴ *Montrope* supra at note 1, at paragraph 30, and see paragraphs 34 and 41

Issue

- [12] The court must determine whether to strike out the claim or parts thereof.

Law and analysis

- [13] Part 26.3 of the Civil Procedure Rules 2000 as amended (CPR 2000) empowers the court to strike out a statement of case in certain circumstances. The defendants' applications are made pursuant to CPR 26.3(1)(b) and (c), by which the court is empowered to strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim, or the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings.
- [14] Mitchell JA (Ag.), in **Tawney Assets Limited v East Pine Management Limited and Others**,⁵ stated;
- “The striking out of a party’s statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach to be taken in striking out a case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in **Ian Peters v Robert George Spencer**, where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence. In that case, she set aside the master’s order striking out the claimant’s claim as containing no allegations of fact which supported the claim.”
- [15] In a strike out application, the court considers the pleaded facts. George-Creque JA, as she then was, in the **Ian Peters** case⁶ Mitchell JA [Ag.] referred to in **Tawney**

⁵ HCVAP 2012/007, delivered September 17, 2012, at paragraph 22

⁶ HCVAP 2009/016, delivered December 22, 2009, at paragraph 18

Assets, reproduced paragraph 13 of the judgment of Edwards JA with which she concurred in **Citco Global Custody NV v Y2K Finance Inc**⁷ as follows:

“On hearing an application made pursuant to CPR 26.3(1)(b) the trial judge should assume that the facts alleged in the statement of case are true. “Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conditions or inferences may require to be subjected to closer scrutiny”. ”⁸

Breach of fiduciary duty: Lemon Grove v Terence Byron and Byron & Byron

[16] The claim alleges breach of fiduciary duty owed to Lemon Grove by Mr. Byron and his law firm, Byron & Byron, the second defendant. Paragraphs 18 to 21 of the statement of claim are applicable. They read as follows:

- “18. On March 13, 2017, Terence Byron, of Byron & Byron, filed a Notice of Change of Solicitor which stated that Terence Byron replaced Merchant & Associates as Counsel for Lemon Grove in appeal no. SKBHCVAP2016/0013, Horstwood vs. Lemon Grove. Terence Byron had no authority to file the Notice of Change of Solicitor nor did he have any authority to represent Lemon Grove.
19. On March 14, 2017, Terence Byron, of Byron & Byron, appeared before the Court of Appeals and stated that he was appearing for Appellants, Horstwood and Exclusive Hotels, and he was also appearing for Respondent Lemon Grove. Again, Mr. Byron had no authority whatsoever to represent Lemon Grove. Mr. Byron then withdrew Lemon Grove’s application to strike the appeal.
20. Representing both the Appellants and the Respondent in appeal no. SKBHCVAP2016/0013, Horstwood vs. Lemon Grove is a conflict of interest by Terence Byron and Byron & Byron. Mr. Byron’s withdrawal of Lemon Grove’s application to strike the appeal was unauthorized, unethical and was in breach of fiduciary duty to Lemon Grove, the company Mr. Byron was purporting to represent.
21. Mr. Byron’s and Byron & Byron’s conflict of interest and breach of fiduciary duty caused Lemon Grove damages in an amount to be proved at trial.”

⁷ HCVAP 2008/022, delivered October 19, 2009

⁸ See *Bank of Credit and Commerce International (Overseas) Ltd (in liq.) & Ors v Price Waterhouse and Another* [1988] BCC 617 at 620

[17] Mr. Byron contends that since, according to paragraph 18 of the statement of claim, he had no authority to represent Lemon Grove, it is axiomatic that he could owe a duty to Lemon Grove, and hence, it is absurd to simultaneously allege the breach of any duty to Lemon Grove. He further points out that as a matter of record, he did not withdraw Lemon Grove's application, but that was done by an order of the Court of Appeal, pursuant to his application. Accordingly, he argues that the pleading in paragraph 20 of the statement of claim that his withdrawal of Lemon Grove's application and the attendant claim for breach of fiduciary duty are misconceived and should be struck out.

[18] Further, Mr. Byron submits that what he said while appearing before the Court of Appeal is privileged, and is, therefore, immune from action. He directs the court's attention to Halsbury's Laws of England,⁹ under the caption "Privilege for defamatory statements", in the section headed "Privileges". Paragraph 40 reads:

"The expressions of Counsel uttered in his professional capacity with reference to and in the course of a judicial inquiry are absolutely privileged, and no action shall lie in respect of them...."

"The rule of law is that what is said in the course of the administration of the law is privileged; and the reason of the rule covers counsel, judge, parties, and witnesses, who in this respect are equally protected."

[19] Mr. Byron cites the leading case of **Munster v Lamb**¹⁰ where Brett MR stated:

"That rule is founded on public policy. With regard to counsel, the questions of malice; bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law."

[20] Mr. Byron submits that these principles go beyond privilege for defamatory statements and cover any statements in the course of the administration of law. The

⁹ Volume 3, Third Edition

¹⁰ (1883) 11 QBD 588 at 605

claimants acknowledged in the statement of claim that Mr. Byron was acting as counsel before the Court of Appeal, and the claim is brought against him for representations he made, and which were accepted by the Court of Appeal. He posits that the most egregious aspect of the claim is its barely concealed collateral attack on the Court of Appeal. He sees the claim as a protest against the Court of Appeal sanctioning the withdrawal of the application of Lemon Grove to strike out the appeal. He avers that this attack is not mounted in the ordinary manner by way of appeal, making it all the more distasteful and contemptuous.

[21] In written submissions filed on March 6, 2020, the claimants directed the court to the dicta of Potter LJ in **Montrod Ltd v Grundkötter Fleischvertriebs GmbH**¹¹ as to the meaning of fiduciary duty. The declaration is that “where someone puts himself in the position of a self-appointed agent in relation to the affairs and interests of another, he is liable to be regarded as a fiduciary in respect of the exercise of his powers in the name of that other”.

[22] While the claimants allege that Mr. Byron was not authorised to act on behalf of Lemon Grove, they submit that in filing the Notice of Change of Solicitor and on announcing his appearance in court, he was a self-appointed agent, as he had not been appointed by Lemon Grove to act for it. They argue that Mr. Byron had ostensible authority given his position as an attorney-at-law, and the Court of Appeal was entitled to presume that he had such authority. The claimants maintain that despite his lack of authority, as a self-appointed agent, Mr. Byron was liable as a fiduciary to act in the best interests of Lemon Grove.

[23] On Mr. Byron’s submissions on privilege, the question is whether the principles in relation to privileged statements in judicial proceedings in a defamation claim are applicable in this case. In my respectful view, the representations Mr. Byron made on behalf of Lemon Grove to the Court of Appeal as pleaded cannot be equated with defamatory statements. The issue is not what Mr. Byron said to the Court of Appeal. The issue is the fact of Mr. Byron’s representation of Lemon Grove allegedly

¹¹ 1 WLR 1975 at 1998, G-H

without Lemon Grove's authorisation. Mr. Byron's alleged "statement" to the Court of Appeal that he was appearing for Lemon Grove is not one to which privilege attaches as to an alleged defamatory statement made in a judicial proceeding. That privilege would come into play if, for example, counsel had made a remark about Lemon Grove being a rogue company or engaging in corrupt practices, which would no doubt attract a defamation claim. An allegation of counsel stating that he represents a party is not akin to the kind of statement envisaged in the authorities where privilege attaches to statements made in the course of the administration of law.

[24] If the facts pleaded in the statement of claim on the allegation of breach of fiduciary duty are true, Mr. Byron represented to the Court of Appeal that he acted as counsel for Lemon Grove without Lemon Grove's authority. By the filing of the Notice of Change of Solicitor, he placed himself on record as counsel for Lemon Grove. As such, he had a duty to act on the instructions and/or in the interests of Lemon Grove. Even if, "on closer scrutiny", it is factually incorrect to state that Mr. Byron withdrew the application to strike the appeal, instead of "the appeal was withdrawn by an order of the Court of Appeal on Mr. Byron's application", in my view, this does not defeat the claimants' allegation that Mr. Byron represented Lemon Grove before the Court of Appeal without Lemon Grove's authorisation to file the Notice of Change of Solicitor. As a result of the withdrawal of Lemon Grove's application through Mr. Byron's representations, the claimants plead that damage was caused to Lemon Grove. The elements of the tort of breach of fiduciary duty are made out in the claim.

[25] In the circumstances, I conclude that the claim raises the cause of action of breach of fiduciary duty against Mr. Byron and that it is not an abuse of the process of the court. If Mr. Byron contends that he was properly acting for Lemon Grove through Mr. Horstwood's authority as a Director of Lemon Grove or otherwise, that would be a matter for his defence. On the face of the claim, Mr. Byron acted for Lemon Grove without its authority. For the purposes of this application, the court has to take that allegation as true. It is for Mr. Byron to plead otherwise.

- [26] Therefore, I decline to exercise the court's nuclear option to strike out the parts of the claim regarding breach of fiduciary duty.

Intentional interference with contractual relations: Lemon Grove v Terence Byron, Byron & Byron and Kevin Horstwood

- [27] At paragraphs 22 and 23 of the statement of claim, the claimants plead as follows:

"22. *The Notice of Change of Solicitor filed by Terence Byron, of Byron & Byron, and authorized by Horstwood, which purported to have Terence Byron replace Merchant & Associates as counsel for Lemon Grove in appeal no. SKBHCVAP2016/0013, prevented Dr. Dennis Merchant from representing Lemon Grove at the hearing before the Court of Appeal on March 14, 2017.*

23. *Terence Byron, of Byron & Byron, and Horstwood willfully and intentionally interfered in the contractual relationship between Lemon Grove and Merchant & Associates which caused damages to Lemon Grove in an amount to be proved at trial."*

- [28] Lord Nicholls in the House of Lords case of **OBG Limited v Allan and Others**¹², in his dissenting judgment, rejected the existence of the tort of interference with contractual relations when His Lordship stated:

"I feel bound to say therefore that the ambit of the *Lumley v Gye* tort should be properly confined to inducing a breach of contract. The unlawful interference tort requires intentional harm effected by unlawful means, and there is no in-between hybrid tort of "interfering with contractual relations"."
(*Emphasis added*)

There was no dispute among the Law Lords with this part of Lord Nicholls' judgment and Mr. Byron submits that the rejection of the tort of interference with contractual relations was unanimous.

- [29] On this authority, I am of the view that the statement of claim in relation to the allegations of interference with contractual relations discloses no reasonable cause of action and accordingly, those parts of the claim must be struck out.

¹² [2007] UKHL 21 at paragraph 189

Fraudulent and negligent misrepresentation: Lemon Grove v Terence Byron

[30] Paragraphs 24 and 25 of the statement of claim allege fraudulent misrepresentation on Mr. Byron's part. They read:

"24. *Mr. Byron's representation to the Court of Appeals that he was authorized to replace Merchant & Associates as counsel for Lemon Grove in appeal no. SKBHCVAP2016/0013 was false and he knew it was false at the time he made it. Mr. Byron's representation that Mr. Horstwood was a Director of Lemon Grove was false and Mr. Byron knew it was false at the time he made it. Mr. Byron intended that the Court of Appeal would rely on his false representations and therefore would allow him to appear for Lemon Grove for the purpose of withdrawing Lemon Grove's application to strike the appeal.*

25. *Mr. Byron's knowing and intentional representations were made with the intention to defraud Lemon Grove and were a fraud on the Court of Appeals. Mr. Byron's fraudulent misrepresentations caused damages to Lemon Grove in an amount to be proved at trial."*

[31] Negligent misrepresentation is also pleaded against Mr. Byron at paragraphs 26 to 29 of the statement of claim, alleging that Mr. Byron either knew or should have known that his representations to the Court of Appeal were false.

[32] The claimants did not address these misrepresentation claims in their written submissions. As Mr. Byron contends, the parties to an alleged misrepresentation are the person making the representation and the person to whom it was made. The statement of claim reveals that the alleged misrepresentation was made to the Court of Appeal. Therefore, the claimants have no *locus standi* to make the claims for fraudulent or negligent misrepresentation in this case. Accordingly, I rule that no reasonable cause of action arises in respect of these claims, and those parts of the claim must be struck out.

Injunction

[33] The claimants seek an injunction against all defendants prohibiting them from interfering in any way in the affairs of CBS or Lemon Grove. The basis for this claim appears in paragraphs 30 to 34 of the statement of claim, which read:

- “30. On March 15, 2017, Lemon Grove served Terence Byron and Byron & Byron with a letter instructing them to “immediately cease and desist from any further unlawful and unauthorized representation of the Company or we will file a claim and seek injunctive relief as well as damages.” A true and correct copy of the letter is attached as Exhibit 8.
31. On March 15, 2017, Mr. Byron and Byron & Byron, responded to Exhibit 8 with a letter that referred to the Court of Appeals decision in appeal no. SKBHCVAP2016/0003, and then stated: “In my opinion, the setting aside of that [March 2, 2012] Order has had the immediate effect of putting an end to the exclusion of Mr. Horstwood from his previous positions in Caribbean Building Systems (St. Kitts) Limited and Lemon Grove Company Limited. In my further opinion, the Order of the Court of Appeal has also had the effect putting an end to the ownership by Adam Bilzerian of all the issued and outstanding shares of Caribbean Building Systems (St. Kitts Limited”. A true and correct copy of the letter is attached as Exhibit 9.
32. On March 16, 2017, Lemon Grove served Terrence Byron and Byron & Byron with a letter explaining in detail why their purported “understanding” of the effect of the Court of Appeals decision in appeal no. SKBHCVAP2016/0003 was totally incorrect. In the letter, Lemon Grove instructed Mr. Byron and Byron & Byron to “immediately cease and desist from any further representation of Lemon Grove Company Limited, and that you will promptly file the necessary papers to remove yourself as counsel for Lemon Grove in appeal SKBHCV2016/0013, Kevin A. Horstwood v Lemon Grove, and make an undertaking to reimburse Lemon Grove for the damages you have caused, or we will have no other alternative but to bring a claim against you on March 17, 2017”. A true and correct copy of the letter is attached as Exhibit 10.
33. Neither Mr. Byron nor Byron & Byron responded to the letter in Exhibit 10. Clearly the Defendants intend to continue to falsely claim Horstwood is the shareholder of CBS and Lemon Grove and to continue to falsely claim that Horstwood is a Director of CBS and Lemon Grove.

34. *It is also clear that the Defendants intend to continue to interfere with the affairs of CBS and Lemon Grove, which is likely to result in irreparable harm to all Claimants."*

[34] Mr. Byron submits that the statement of claim does not specify, among other things, (i) what alleged wrongful act or steps the claimants apprehend will or may be repeated by him or Mr. Horstwood (ii) whether any such act or step will or may be difficult to reverse, (iii) what damage to any of the claimants is apprehended, and why damages would not be an adequate remedy.

[35] Further, Mr. Byron points out that it is a matter of record that the Court of Appeal on March 15, 2017, instructed him to take steps to cease representation of Lemon Grove and he undertook to do so.

[36] Paragraphs 33 and 34 of the statement of claim convey that the conduct the claimants are attempting to restrain is the continued allegedly false claims of all defendants that Mr. Horstwood is a shareholder and director of CBS and Lemon Grove, and the defendants' continued alleged interference with the affairs of CBS and Lemon Grove.

[37] On March 13, 2017, the Court of Appeal in appeal no SKBHCVAP2016/0003 set aside the order of the court below. The learned judge ordered:

- "1. *That the Claimant Adam Bilzerian is the owner of all the issued and outstanding shares of Caribbean Building Systems (St. Kitts) Ltd.*
2. *That the Defendant Kevin Horstwood is not a shareholder, nor does he hold any position in Caribbean Building Systems (St. Kitts) Ltd.*
3. *That the Defendant Kevin Horstwood is not a shareholder, nor does he hold any position in Lemon Grove Co. Ltd.*
4. *That the Defendant Kevin Horstwood is restrained whether by himself, his agent, or from in any way interfering in the running of the affairs of either Caribbean Building Systems (St. Kitts) Ltd or Lemon Grove Co. Ltd."*

[38] The setting aside by the Court of Appeal of this order quashed the injunction against Mr. Horstwood. Therefore, I conclude that the claim before the court for the

injunctive relief sought against Mr. Horstwood is an abuse of the process of the court.

[39] The entire claim against Mr. Horstwood must be struck out. Accordingly, the interim injunction in respect of Mr. Horstwood falls away.

[40] Paragraph 31 of the statement of claim conveys that in answer to Lemon Grove's cease and desist letter to Mr. Byron, and Byron & Byron, Mr. Byron did not accept that Mr. Horstwood was excluded from his previous positions in CBS and Lemon Grove. The letter spoke to the further alleged unlawful and unauthorized representation of Lemon Grove. The claim seeks to restrain interference with the affairs of CBS and Lemon Grove. Unauthorized legal representation of Lemon Grove will suffice as interference with the affairs of Lemon Grove. Mr. Byron's undertaking to the Court of Appeal was made over six years ago. Mr. Byron says he does not recall if he took steps to come off the record as legal practitioner for Lemon Grove, and no evidence to this effect was provided to the court. Further, it appears that Mr. Byron's response letter to Lemon Grove was sent after his undertaking to the Court of Appeal. Therefore, although lacking specificity and clarity, the claim seeks to restrain Mr. Byron and Byron & Byron from providing legal representation to Lemon Grove. This is more than a scintilla of a case,¹³ and I cannot conclude that no reasonable cause of action lies on this aspect of the claim. The claim for an injunction prohibiting Mr. Byron and Byron & Byron from interfering in any way in the affairs of Lemon Grove stands.

Order

[41] Based on the foregoing, it is hereby ordered as follows:

- 1) The claim filed on March 20, 2017, is struck out, save for the parts in relation to the claim for breach of fiduciary duty and injunctive relief against Mr.

¹³ See *Baldwin Spencer v The Attorney-General of Antigua and Barbuda and Others* ANUHCVP1997/0020A (delivered April 8, 1998) at page 5; see also *Cedar Valley Springs Homeowners Association Incorporated v Kenneth Meade and Anor* ANUHCVP2016/0010 (delivered January 18, 2017) at paragraph 6

Byron and Byron & Byron. For the removal of doubt, the following parts of the statement of claim are struck out:

- i. All claims against Mr. Horstwood; and
 - ii. Paragraphs 22 to 29, and the relief sought in respect of those paragraphs.
- 2) The claimants are granted leave to file and serve an amended claim within 7 days of today's date.
 - 3) Thereafter, the amended claim shall take its normal course in accordance with the rules.
 - 4) Costs of Mr. Horstwood's application to be assessed, and damages in respect of the interim injunction in relation to Mr. Horstwood to be inquired into, if not agreed within twenty-one days of today's date.
 - 5) In relation to Mr. Byron's application, the claimants and Mr. Byron shall bear their own costs.

Tamara Gill
High Court Judge

By the Court

Registrar