

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

Civil Division

SAINT LUCIA

Claim No. SLUHCV2021/0347

BETWEEN

AL BEAUSOLEIL

Claimant

-and-

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances:

Leslie Prospere and Megan Duboulay – Lee for the Claimant; and
George K. Charlemagne and Seryozha Cenac for the Defendant.

2022: May 05;
July 08.

DECISION

Defendant's application to strike out

[1] **PARIAGSINGH, M:** - Before the Court is the Defendant's application filed on April 21, 2022 seeking an order that this claim be struck out.

[2] The grounds of the application can be summarised as one main ground, the claim is an abuse of process. The crux of the Defendant's application is that the Claimant in a previous claim¹ commenced a constitutional motion seeking redress in relation to the same facts advanced in this claim. Further that, the first claim was struck out by the Cenac – Phulgence J on March 31, 2021 and a subsequent appeal of that decision was withdrawn.

[3] The Defendant contends that the Claimant has re-engineered his claim to fix a material defect, to plead bad faith, in an attempt to circumvent the prescription hurdle he faces. The Defendant

¹SLUHCV2020/0344

further contends that the claim seeks to litigate the same claim which the learned judge has already determined.

DISPOSITION:

[4] For the reasons set out below, the Defendant's application is dismissed.

ANALYSIS:

[5] The Defendant submitted that the facts in this case are the same as the facts advanced in the first claim. I can make no finding as the first claim was not put before me. In the absence of such evidence, I can do no more than to record the Defendant's submission. The Defendant who took out this application had the evidential burden to put before the Court the evidence required to make a comparison between the two claims. That was not done.

[6] Whilst I have no doubt that the facts reproduced by Cenac- Phulgence J in her written judgment dated March 31, 2021 are accurate, statements in the judgment in the first claim are not a substitute for the Defendant putting proper evidence in support of its application, in this case, the complete papers filed in the first claim.

[7] Counsel for the Defendant relied on the decision of the Court of Appeal in **Clarvis Joseph et al –v- Antigua Power Company Limited**² in support of his submission on abuse of process. In this case, a claim was commenced in 2007 which went the full gambit of the Court system including an appeal to the Board of the Judicial Committee. The 2007 claim was remitted to the High Court to assess compensation by the Board. At that stage, a second claim was commenced, the 2013 claim. The learned Chief Justice in refusing leave to appeal the trial judge's refusal to stay the 2013 claim stated that at paragraph 12:

"12. It cannot be doubted that where an application is advanced on this basis, considerable material must of necessity be placed before the judge so that a careful analysis of the claims and all the facts of the case are taken into account. That is surely not the case here as the

² ANUHCVP2014/0016

only material exhibited before the judge appears to be the Privy Council decision in the 2007 claim, apart from the very generalised statements made in the application and the affidavit evidence in support. The learned judge, in our view, would have been hard-put to carry out the kind of careful analysis required based on the paucity of material before him. This lack of a fulsome and detailed factual foundation reinforces our view that the application was not put before the judge in reliance on the Henderson principle. If it was, then the applicants would have been alive to the need to provide and put all the facts of the case and issues before the judge for his consideration as it related to the claims and the parties concerned. The necessary factual foundation which would have enabled the judge to address his mind to all the facts and issues relating to the claims and the parties was woefully lacking. The passage from the judgment of Lord Bingham of Cornhill in the case of *Johnson v Gore Wood & Co (A Firm)* is quite apt:

“It may very well be, as has been convincingly argued (Watt, “The Danger and Deceit of the Rule in *Henderson v. Henderson: A new approach to successive civil actions arising from the same factual matter*” (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v. Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.” (Emphasis added)

- [8] Like **Joseph**, the first claim was not put before me. Nothing besides the written decision of Cenac- Phulgence J was placed before much like what happened in **Joseph**. **Joseph** in my

view is clearly distinguishable from the instance case for two main reasons. Firstly, the first claim was a claim for relief pursuant to the Constitution. Constitutional relief goes to the heart of the vindication of a right. Whilst damages may be awarded for the breach of a right, the first claim was not a claim in damages per se. Secondly, unlike **Joseph**, there was no determination on the merits of the first claim. Res judicata simply does not arise for my consideration on the evidence. If the Defendant wished to advance the issue estoppel limb of **Henderson v Henderson**, as tenuous as that argument sounds in my respectful view, material would have been put before this Court to show that the issues in the constitutional claim are the same in this common law action. The facts being the same does not mean that the issues are the same. The first type of claim deals with protection and vindication of an enshrined right. The second claim deals with a common law action in delict. Both are two different species of claims altogether.

[9] Similarly I find the Defendant's reliance on the decision of Stephenson J in **Levi Maximea –v- The Chief of Police**³ to be misplaced. In **Maximea** the facts were different to what obtains in the case at bar. The Claimant in that case filed a claim in 2019 after having filed two(2) common law actions and one (1) judicial review action, all of which were determined on the merits. As stated above, there was no determination of any disputed facts or issues in the first claim.

[10] The Defendant further submitted that the withdrawal of the appeal of the decision in the first claim and filing this claim was abusive. I also find no merit in this argument as the nature of the first claim was different from this claim. Further, as stated above, there was no judicial determination of any disputed fact or issue in the first claim.

[11] Counsel for the Claimant in his submissions made the distinction between instances where the Court has jurisdiction but declines to exercise it and instances where the Court cannot decline jurisdiction. Counsel submitted that the first claim was brought pursuant to **Section 16 of the Constitution of Saint Lucia**⁴ which gives the Court the discretion to decline to exercise jurisdiction. Section 16 states:

³ DOMHCV2019/0248

⁴ Chapter 1.01 of the Laws of Saint Lucia

'16. ENFORCEMENT OF PROTECTIVE PROVISIONS

- (1) If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.
- (2) The High Court shall have original jurisdiction—
- (3) to hear and determine any application made by any person in pursuance of subsection (1); and
- (4) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.' (Emphasis mine)

[12] Counsel made specific reference to paragraph 52 of the judgment in the first claim where the learned judge stated:

'I decline to exercise the constitutional jurisdiction of the Court in the circumstances of this case.'

[13] I agree with Counsel for the Claimant that the first claim, was struck out because the Court declined to exercise its constitutional jurisdiction. There was no determination of any issue in the first claim.

[14] It was further submitted on behalf of the Claimant that there is nothing abusive about remedying a defect in pleadings and refiling a claim. Reliance was placed on paragraph 28 of the decision of the Court of Appeal in **Dr. Martin Didier et al –v- Royal Caribbean Cruises Limited**⁵ which states:

'[28] Therefore, for the strike out procedure, the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. **This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation**

⁵ Civil Appeal No. SLUHCVP2014/0024

to the same dispute. They are perfectly entitled to do so. The situation is different, however, with the summary judgment procedure since this procedure gives a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court.'

[15] The Claimant submitted that there is nothing abusive about bringing this common law action as the Court has declined to exercise jurisdiction in the first claim. It was common ground that one of the options available to the judge in the first matter was to convert the constitutional claim to a common law claim. In her written decision at paragraph 45 the judge referred to this option and stated that:

"Now that his constitutional claim cannot be maintained, he now faces the hurdle that he is outside the time prescribed for bringing the false imprisonment claim. To allow a claimant to continue his claim as an ordinary claim to seek the parallel relief is one thing. But to allow such to be done outside of the prescription period I think would be encouraging the abuse of the court's process. I am also of the view that the claimant's pleadings would have to be substantially amended not just in terms of the relief which now has to be sought but also substantively as it would be necessary to plead and particularize bad faith. There is no bad faith alleged on the claimant's pleadings. I would therefore decline to give leave to treat the claim as filed as an ordinary claim for false imprisonment. It would have been different if the claim was a mixed claim and the false imprisonment claim having been filed within time could have been saved by simply striking the constitutional claim"

[16] This option was not however deployed by the learned judge as by the time the preliminary point was heard in the first claim, time was prescribed. In order to avoid the effect of prescription, the Claimant would have had to have alleged bad faith and that was not done in the first claim. In the second claim however, bad faith is pleaded. Bad faith is a triable issue that can only be resolved by making a finding on evidence.

[17] The Defendant submitted that bad faith ought to have featured in the first claim if there was such an allegation. Bad faith in a constitutional claim at its highest will go to the award of damages. In a common law claim however, it may very well go to jurisdiction of the Court. If there is no finding of bad faith and time is prescribed, the Court has no jurisdiction.

[18] The Claimant relied on the decision of the Court of Appeal in **Fast Kaz Auto Supplies et al –v- The Attorney General**⁶ in which Blenman JA stated at paragraph 68:

[68] It must be highlighted that the appellants have taken a broad-brush approach to the contention that the customs officers acted in bad faith. Their particularisation and pleadings of bad faith raised no specific infractions but rather, were grounded in very general terms. To my mind, placing these assertions so broadly would not have placed the Crown in a position to adequately respond. In my view, the general allegations of bad faith in the pleadings and particulars were insufficient to justify a finding in the appellants' favour. It is not enough to simply allege bad faith. However, there must be particulars of bad faith which must be substantiated by the evidence that is lead. In this connection, I observe the pithily encapsulated principle in the case of *Three Rivers District Council v Governor and Company of the Bank of England*, a House of Lords decision wherein Lord Hope stated at paragraph 51 that:

“On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.”

There is no doubt that the appellants have failed to properly plead bad faith and to adduce cogent evidence to substantiate their broad unparticularised allegations of bad faith on the part of the customs officers'

[19] For this reason, I accept the submission of Counsel for the Claimant that it only became necessary to specifically plead bad faith in this claim and not the first claim. This is with the caveat however that there are no “pleadings” in the traditional sense in constitutional claims. The grounds of relief are set out and the evidence in support of the grounds of are contained in a supporting affidavit.

[20] For these reasons I hold that the institution of this claim is not abusive. Although this claim arises out of the same facts relied on in the first claim, there was not any judicial determination of any disputed fact or issue of law in the first claim. The Court declined to exercise its constitutional jurisdiction in the first claim. Further, the Court did not exercise the option of converting the claim as bad faith was not pleaded in the first claim. Bad faith having been pleaded in this claim, raises a live triable issue. *Res Judicata* does not arise and issue estoppel was not argued.

⁶ Civil Appeal No SLUHCVP2018/0040

[21] On the issue of costs, whilst the general rule is that costs follow the event, the Defendant's application was far from unmeritorious or frivolous. The work done on both sides seems to be proportional. In this regard, I am of the view that the appropriate costs order should be each party to bear their own costs of this application.

ORDER:

[22] In the circumstances, it is hereby ordered that:

- (a) The Defendant's application filed on April 21, 2022 is dismissed; and
- (b) Each party to bear their own costs of this application.

**Alvin Shiva Pariagsingh
High Court Master**

By the Court,

Registrar