

THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: SKBHCV2015/0283

BETWEEN:

MOHAMMED SADEK ATASSI
(by his attorney Malek Atassi)

1st Claimant/Applicant

and

CHIRIN ATTASI
(by her attorney Malek Atassi)

2nd Claimant/Applicant

and

RAGHED MURTADA

1st Defendant

and

LIVE NEVIS DEVELOPMENT LIMITED

2nd Defendant

Appearances:

Mrs. Angela Cozier for the Claimants/Applicants

Mr. O'Grenville Browne for the Defendants

Mrs. Cindy Herbert for the Bank of Nevis Limited

2020: December 15

2021: March 18

RULING

[1] **GILL, M.** This is an application by the claimants ("the applicants") for permission to add the Bank of Nevis Limited ("the Bank") as a party to the proceedings and for further amendment of the claim

and statement of claim. The Bank strenuously opposes the application. The defendants did not participate in this application.

Background facts

[2] On 14th December 2015, the applicants, Mohammad Sadek Atassi and Chirin Atasi of Dubai, United Arab Emirates (by their attorney Malek Atassi) filed a claim against the defendants Raghed Murtada and Live Nevis Development Limited. According to the claim, the 1st defendant is the director and sole beneficiary of the 2nd defendant. The applicants are seeking the following relief:

- a. rescission of the retainer agreement between the applicants and the 1st defendant's organisation, North American Services Center (NASC) dated 2nd February 2013;
- b. rescission of the purchase and sale agreements between the applicants and the 2nd defendant dated 16th September 2013;
- c. rescission of the escrow agreement between the 2nd defendant and the applicants dated 10th September 2014;
- d. return of the sum of USD\$909,250.00 paid by the applicants to the 1st defendant for the purpose of obtaining economic citizenship by investment in the Federation of St. Christopher and Nevis through the real estate option in the Citizenship by Investment programme of the Federation as well as interest thereon from the date of the filing of the claim herein;
- e. damages for fraudulent misrepresentations made by the 1st defendant to the applicants, individually and through and for the benefit of the 2nd defendant, in various correspondences between May and October of 2003 and upon which misrepresentations the applicants acted to their detriment, thereby suffering loss and damage, as well as interest thereon, at such rate and for such period as the court shall deem fit;
- f. aggravated damages for fraudulent misrepresentations made by the defendants to the applicants as well as interest thereon, at such rate and for such period as the court shall deem fit;
- g. special damages;
- h. costs; and
- i. any other relief that the court deems just.

- [3] On 17th June 2016, Carter J. granted an order compelling the Bank to disclose statements related to the bank account in the name of the 2nd defendant for the purpose of tracing the applicants' money.
- [4] The documents disclosed by the Bank under the first order for disclosure constituted statements of account and did not disclose the identities of the persons to whom the defendants had wired money out of the account, and so could not be used to trace the applicants' money.
- [5] By an application made without notice filed on 28th July 2016, supported by evidence on affidavit, the applicants applied to the court for the Bank to be added as a party to the proceedings pursuant to Rules 19.2 and 19.3 of the Civil Procedure Rules 2000 as amended (CPR 2000). The application also sought an order for further disclosure.
- [6] By judgment dated 13th December 2016, Ward J. granted an order for further disclosure against the Bank but dismissed the application to add the Bank as a party to the proceedings. This judgment of Ward J. was not appealed by the applicants.
- [7] Nevertheless, on 1st February 2017, the applicants filed an amended claim and statement of claim adding the Bank to the proceedings.
- [8] On 11th January 2018, Actie M., as she then was, struck out the amended claim adding the Bank to the proceedings.
- [9] On appeal, the decision of the learned master was upheld. However, the Court of Appeal gave the applicants liberty to apply.
- [10] The applicants made the necessary application and on 30th January 2020, this court gave the applicants leave to amend the claim and statement of claim, there being no objection by the defendants.
- [11] On 11th February 2020, the applicants filed the amended claim and statement of claim.
- [12] On 13th February 2020, the applicants filed the present application for the Bank to be added as a party to the proceedings and to further amend their claim and statement of claim. The application is

supported by the affidavit of Dwight C. Cozier exhibiting a draft further amended claim and statement of claim, containing detailed particulars with regard to the Bank.

[13] On 12th March 2020, the Bank filed an affidavit opposing the application.

[14] The applicants filed an affidavit in reply on 25th March 2020.

The Law

[15] CPR 19.2 and 19.3 address the addition or substitution of a party to proceedings. In relation to the addition of a party, Rule 19.2 reads:

19.2(1) A claimant may add a new defendant to proceedings without permission at any time before the case management conference.

(2) The claimant does so by filing at the court office an amended claim form and statement of claim, and Parts 5 (service of claim within jurisdiction), 7 (service of court process out of jurisdiction), 9 (acknowledgment of service and notice of intention to defend), 10 (defence) and 12 (default judgments) apply to the amended claim form as they do to a claim form.

(3) The court may add a new party to the proceedings without an application if –

- (a) it is desirable to add a new party so that the court can resolve all the matters in dispute in the proceedings; or*
- (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.*

(6) The court may add, remove or substitute a party at the case management conference.

(7) The court may not add a party (except by substitution) after the case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.

[16] Rule 19.3 lays out the procedure for adding or substituting a party as follows:

19.3 (1) The court may add, substitute or remove a party on or without an application.

(2) An application for permission to add, substitute or remove a party may be made by –

- (a) an existing party; or*
- (b) a person who wishes to become a party.*

[17] In **Mr. Fok Hei Yu and Mr. John Howard Batchelor v Basab Inc. et al**,¹ the Court of Appeal stated the following in relation to joinder of a party to proceedings:

“While rule 19.3 states that the court may add, substitute or remove a party and sets out, among other things, the procedure for so doing, and while it is also true that the discretion given to the court is in the widest terms, it is also true and trite law that a discretion must be exercised judicially. In other words there must be a basis warranting the exercise of the discretion. That basis, in our view, is captured in the general principles set out in rule 19.2(3)...”

The applicants' case

[18] The application, supported by the affidavit of Dwight Cozier, states that based on the facts and circumstances in the documents disclosed under the order of Ward J., it came to light that the 1st defendant had converted the applicants' money to his own use with the dishonest assistance of the Bank and in breach of trust. The application states the following as to what was disclosed after the disclosure order of Ward J. and it references the incorporation of this information in the amended statement of claim, which is exhibited to Mr. Cozier's affidavit.

- i. On 14th October 2013, subsequent to the execution by the applicants of the purchase and sale agreements with the 1st and 2nd defendants, which the applicants say that they were fraudulently induced to enter into by the 1st defendant, the 1st applicant wired the amount of €590,000.00, or US\$804,000.00 into account number 296150 held at the Bank of Nevis Limited in the name of the 2nd defendant in settlement of an invoice prepared by the 1st defendant for the benefit of the 2nd defendant, which invoice stated that the money was for the purchase of 66% of the shares in a villa (Nelson 1) in the 2nd defendant's project at Clifton Estate, Nevis. The said invoice was referenced in an Operation Advice describing the Bank of Nevis as the beneficiary bank of the funds transferred by the applicants. **(See paragraph 65 of the amended statement of claim)**
- ii. Prior to the wire transfer by the 1st applicant, the 2nd defendant's account in the Bank of Nevis Limited reflected a balance of US\$70.75, which proved that the majority of the money deposited into the 2nd defendant's account belonged to the applicants. **(See paragraph 66 of the amended statement of claim)**

¹ BVIHCMAP2014/0010, at paragraph 11

- iii. Between 13th November 2013 and 30th June 2014, the 1st defendant transferred monies out of the account in the name of the 2nd defendant held at the Bank of Nevis Limited with the dishonest assistance of the Bank of Nevis Limited, because the Bank of Nevis Limited was fully aware that the money deposited by the applicants in the bank account of the 2nd defendant on 14th October 2013 was for the purchase of a villa in Nevis by the applicants, and none of the monies transferred related to the purchase of the villa in Nevis. **(See paragraphs 67, 68, 69, 70, 71 and 72 of the amended statement of claim)**
- iv. Between the 4th and 13th January 2016, despite several notices and ongoing correspondence to the Bank of Nevis Limited from the applicants through their attorneys since 15th July 2015, all to the effect that there were ongoing proceedings in the High Court by the applicants against the defendants for misuse of the applicants' money, **(See paragraphs 76 and 79 of the amended statement of claim)**, the Bank of Nevis Limited wired the applicants' money out of the account it held at its bank in the name of the 2nd defendant, and out of the jurisdiction, and into an account in the sole name of the 1st defendant, when the Bank of Nevis knew from all the circumstances that the applicants had paid money into the account of the 2nd defendant for the purpose and construction of a villa in Nevis. **(See paragraph 65 of the amended statement of claim)**

[19] Mr. Cozier swore that the amended claim and statement of claim included particulars of constructive trust and conversion by the 1st defendant and particulars of dishonest assistance provided by the Bank to the 1st defendant in the defendants' breach of trust. **(See paragraphs 67, 68, 70, 77, 78, 79, 82 and 83 of the amended statement of claim)**

[20] The application states that the addition of the Bank is therefore necessary in order to deal with the case justly so as to ensure that the real issues in controversy between the parties are determined without the need for instituting further proceedings, and so as to prevent duplicitous and possibly parallel claims.

[21] Moreover, it adds, if the Bank is not added to the proceedings, the applicants will suffer severe prejudice, as it was through the active assistance rendered by the Bank to the 1st defendant that he was able to convert the applicants' money to his own use, thereby causing a resultant breach of trust. They aver that this fact was completely unknown to them at the time that the original claim

and statement of claim were filed on 14th December 2015, and which only became apparent subsequent to the order for further disclosure made by Ward J. on 13th December 2016.

- [22] The applicants are of the view that in all the circumstances, the justice of the matter weighs in favour of granting the application sought herein to add the Bank as a defendant to these proceedings so as to enable the real issues to be determined between the parties.
- [23] In addition, they aver that no defendant will be prejudiced if the further amendments sought are allowed, as the amended claim was filed on 11th February 2020 and is still in very early stages and so no trial date will be affected.

The Bank's submissions

- [24] The Bank contends that the applicants have not shown any new change in circumstances that became known after the case management conference, which took place on 2nd February 2017.
- [25] Learned counsel for the Bank, Ms. Herbert, posits that the relevant and uncontroverted facts are that the applicants previously applied to the court on 28th July 2016 for the Bank to be added to these proceedings, and the application was adjudicated on and rejected by Ward J.
- [26] Counsel submits that the applicants have not presented any new information or evidence in their present application, which departs from what was presented to Justice Ward in their first application. The current application, counsel argues, therefore constitutes a re-litigation of the issues, which were judicially decided upon by the learned judge.
- [27] In particular, Ms. Herbert posits that the applicants' allegations contained in the affidavit in support of the application that new information came to light as a result of the disclosure order of Justice Ward dated 13th December 2016 is unmerited and without factual support.
- [28] Counsel urges upon the court that this contention is supported by the evidence in the affidavit in opposition to the application that on 11th July 2016 and 4th August 2016 respectively, the applicants received statements of accounts in relation to the account. These disclosures also included particulars about the recipient of the funds wired on or about 31st January 2016.
- [29] Ms. Herbert points out that these disclosures emanated from the first disclosure order of Carter J. and were handed over to the applicants approximately 5 months before the second disclosure

order by Justice Ward. She directed the court to an exhibit to the affidavit of Dwight Cozier filed on 2nd September 2016, which includes the same statement of accounts. Counsel submits that this confirms that since 11th July and 4th August 2016 respectively, the applicants had the same information that they are citing as new information in the affidavit in support of the application filed on 13th February 2020.

- [30] Counsel draws support for her argument from part of the judgment of Justice Ward, which she says also confirmed that the applicants had discovered that the funds were wired in January 2016 to the 1st defendant's bank account in Dubai.²
- [31] The Bank further submits that the applicants' draft pleadings do not depart in substance from the application and affidavit in their first application before Ward J. to add the Bank to the proceedings.
- [32] Therefore, Ms. Herbert is of the view that the applicants have not shown any new change in circumstances that became known after the case management conference, which occurred on 2nd February 2017, and the application ought to be rejected on that basis alone.
- [33] Assuming but not admitting that new information came to light after the order of Justice Ward and/or the case management conference, the Bank submits that the proper action for the applicants was to apply to set aside or vary the judge's order. Instead, the applicants are now coming before this court approximately 4 years later with the same old information to add the Bank to these proceedings.
- [34] The Bank further submits that the court ought not to exercise its discretion on the basis that the applicants have not demonstrated that (a) it is desirable to add the Bank so that the court can resolve all matters in dispute in the proceedings; or (b) there is an issue involving the Bank which is connected to the matters in dispute in the proceedings and it is desirable to add the Bank so that the court can resolve that issue.
- [35] Using the judgment of Ward J. to illustrate its arguments, the Bank alleges that the applicants' contention that monies were placed in an escrow account or that the funds were held in trust at the Bank is unsupported. Also unsupported by affidavit evidence, the Bank contends, is the applicants'

² Mohammad Sadek Atassi and Chirin Atassi v Raghed Murtada and Live Nevis Development Limited and The Bank of Nevis Limited SKBHCV2015/0283, delivered 13th December 2016, at paragraph 40

allegation that the funds were removed from the account on or about 31st January 2016 with the dishonest assistance of the Bank. On the evidence before the court, the Bank submits (as found by Justice Ward) that the applicants have not established a prima facie case of breach of trust or dishonest assistance by the Bank.

The applicants' reply

- [36] The applicants say that the difference between their application filed on 28th July 2016 and heard by Justice Ward and the present application filed on 13th February 2020 is that, with leave of the court, the claim and statement of claim in this matter were amended on 11th February 2020.
- [37] Learned counsel for the applicants, Mrs. Cozier, points out that what was under consideration by Ward J. when he gave his judgment dated 13th December 2016 was the original claim and statement of claim filed on 14th December 2015. Since then, Counsel states, the claim was amended on 11th February 2020 and so the judgment of Ward J. could not conceivably have been referring to the amended claim and statement of claim.
- [38] Citing numerous paragraphs of the amended claim, the applicants contend that it demonstrates a clear involvement by the Bank during the course of the transactions which form the basis of these proceedings, and which provide the basis for the addition of the Bank to the claim and the further amendment of the claim and statement of claim to reflect this.
- [39] Referring further to numerous paragraphs of the draft further amended statement of claim, the applicants posit that an examination of the draft clearly demonstrates that it is desirable to add the Bank to the proceedings so that the court can resolve all matters in dispute and that there is an issue involving the Bank which is connected to the matters in dispute. They submit that a prima facie case has been made out against the Bank that is neither frivolous nor vexatious.
- [40] According to the applicants, the Court of Appeal reinstated the original claim but held that leave was necessary to amend the claim after case management. They state that the Court of Appeal also gave them liberty to apply and the matter was remitted back to the lower court for case management, where the application to amend the claim was made and granted by the court, and now the application to add a party and for further amendment, has been made.

[41] Therefore, the applicants proffer that the proceedings are still in case management and so the submissions of the Bank, in relation to CPR 19.2(7) to add a party after some change in circumstances became known after the case management conference, are without merit.

Discussion and conclusion

[42] The present application is premised on the amended claim of 11th February 2020 filed with the leave of this court on 30th January 2020. Therefore, I agree with learned counsel for the applicants that what is for consideration before this court is the amended claim with allegations not present in the original claim before Ward J. and addressed by His Lordship. The amended claim makes several changes and/or additions in relation to allegations against the Bank which were absent from the original claim.

[43] Paragraphs 76,77,78,79, 82 and 83 plead particulars of dishonest assistance of the Bank in the actions of the defendants. In this regard, I adopt the submissions of learned counsel for the applicants on the law relating to dishonest assistance.

[44] Dishonest assistance or knowing assistance is a form of third party liability under English trust law. It is usually seen as one of the two liabilities established in the renowned case of **Barnes v Addy**.³ In that case, Lord Selbourne stated:

“But...strangers are not to be made constructive trustees merely because they act as the agents of the trustees in transactions within their legal powers...unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

[45] Liability for dishonest assistance is secondary. As a result, the liability of the assistant (in this case, allegedly the Bank) is premised on that of the defaulting trustee (in this case, allegedly the defendants), and the assistant and the trustees will be jointly and severally liable.

[46] There are 3 elements that must be pleaded in a claim for dishonest assistance, specifically:

- a. breach of trust;
- b. assistance by the defendant; and
- c. dishonesty

³ (1874) LR 9 Ch 244, 251-252

- [47] The applicants have pleaded particulars of resulting or constructive trust in paragraphs 62-75 of the amended statement of claim. As referenced earlier, they have pleaded particulars of dishonest assistance by the Bank in paragraphs 76-79 and 82-83 of the amended statement of claim.
- [48] Under the heading of dishonesty, delivering the judgment of the Judicial Committee of the Privy Council in **Royal Brunei Airlines v Philip Tan Kok Ming Co**,⁴ Lord Nicholls of Birkenhead opined:
- “Unless there is very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.”
- [49] The applicants have pleaded particulars of dishonesty on the part of the Bank.
- [50] Therefore, all the elements that must be pleaded to ground a claim in dishonest assistance are set out in the amended statement of claim. The facts pleaded are to be determined at trial. The Bank will be entitled to put in a defence to include some of the facts on which it relies in its opposition to this application (eg. the discharging of the freezing order). If the allegations in the amended statement of claim are proved, then the Bank can be found liable.
- [51] At this stage the court is not concerned with the application to amend the original claim, which has already been granted. The Bank was not a participant in the proceedings to amend the claim and there was no objection to amend by the only other parties at the time, the defendants. Consequently, with the amendments, the Bank is clearly an alleged significant party in the resolving of all the matters in dispute in these proceedings. The submissions of the Bank, in relation to the applicants not showing any new change in circumstances which became known after the case management conference, have been overtaken by the amended claim and statement of claim, now properly filed.
- [52] I am of the view that the applicants have shown a basis for adding the Bank as a defendant to these proceedings as there are clear issues involving the Bank connected to the matters in dispute. It is therefore desirable that the Bank be so added.

⁴ [1995] UKPC 22; Privy Council Appeal No. 52 of 1994, at page 10

[53] It follows, then, that the claim must be further amended accordingly. Whereas the further amendment of the claim is consequent on the granting of leave to the applicants to add the Bank as a party to the proceedings, the parties addressed the provisions of CPR 20.1 on amending a statement of case.

[54] CPR 20.1(2) authorises the court to give permission to amend a statement of case at a case management conference or at any time on an application to the court. CPR 20.1(3) sets out the factors to which the court must have regard when considering an application to amend a statement of case. These factors are: (a) how promptly the applicant has applied to the court after becoming aware that the change was one which he or she wished to make; (b) the prejudice to the applicant if the application is refused; (c) the prejudice to the other parties if the change were permitted; (d) whether any prejudice to any other party can be compensated by the payment of costs and or interest; (e) whether the trial date or any likely trial date can still be met if the application is granted; and (f) the administration of justice.

[55] Based on the brief submissions of the parties in this regard, in relation to promptness, the present application was made 2 days after the filing of amended claim and statement of claim with leave of the court. The amendments sought were the subject of the amended claim filed in February 2017, which was struck out. The striking out of the claim was appealed. The appeal was dismissed but the applicants were given liberty to apply. This was done. With the process of the court, the matter has taken this long so far, and is still at the case management stage. On the issue of prejudice to the parties, if the application is not granted, the applicants will be denied to opportunity to pursue relief in relation to their allegations against the Bank in these proceedings, bearing in mind that the court is of the view that there are issues in dispute involving the Bank. The proceedings are still in case management and the Bank will have the opportunity to file all the necessary documents in pleading its case. In my view, the administration of justice demands that the further amendments be made.

Order

[56] In light of the foregoing, it is ordered as follows:

1. The application to add the Bank of Nevis Limited as a party to these proceedings and to further amend the claim and statement of claim is granted.

2. The applicants shall file and serve the further amended claim form and statement of claim within 7 days of today's date.
3. The matter is to be listed by the court office for further case management.
4. There is no order as to costs.

Tamara Gill
Master

By the Court

Registrar