

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE**

SVGHCV2019/0211

BETWEEN:

STANDARD GROCERY LIMITED	FIRST APPLICANT/CLAIMANT
STANGRO ENTERPRISES LIMITED	SECOND APPLICANT/CLAIMANT
NEW MONTROSE APARTMENT HOTEL LTD	THIRD APPLICANT/CLAIMANT

AND

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED	FIRST RESPONDENT/DEFENDANT
PHILLIPS & WILLIAMS LAW FIRM (L.A. DOUGLAS WILLIAMS & ZOE WILLIAMS)	SECOND RESPONDENT/DEFENDANT
BRIAN GLASGOW (RECEIVER OF THE CHARGED PROPERTY OF STANDARD GROCERY LIMITED)	THIRD RESPONDENT/DEFENDANT

Appearances:

Mr. Michael Wyllie for the Claimants
Ms. Beverly Reddock representative for the Claimants
Ms. Annique Cummings and Mr. Jadric Cummings for the First Defendant
Mrs. Zhing Horne-Edwards for the Second Defendant
Mr. Grahame Bollers for the Third Defendant
Mr. Curtis Small representative for the First Defendant
Mr. Phillip Williams and Ms. Zoe Williams representatives for the Second Defendant
Mr. Taj Lee representative for the Third Defendant

2020: 12th November
9th December

ORAL DECISION

Byer, J.:

- [1] On the 12th June 2020, the claimants filed an amended claim form and thereby added the third defendant herein as a party to the proceedings.

- [2] The claim as filed by the claimants seeks several prayers against the first defendant for damages for breach of the fiduciary relationship, mistake, negligence, undue influence and ultimately an order to set aside the mortgage debenture entered into by the claimants with the first defendant. As against the second defendant, a law firm, the claimants claim damages for professional negligence. There was in fact no prayer sought as against the third defendant save and except injunctive relief to prohibit him from acting as the Receiver appointed by the first defendant pursuant to the mortgage debenture and from therefore offering the properties the subject matter of the claim for sale to satisfy sums owed to the first defendant and for an account for monies collected on behalf of the first defendant.

- [3] It is against this amended claim that the third defendant filed a notice of application on the 14th October 2020 seeking to have the claim against the third defendant struck out and that the claimant pay costs on the said application.

Third Defendant's Submissions

- [4] The third defendant by the notice of application relies on Part 26.3 (1) (b) of the CPR 2000 which empowers the court to strike out a statement of claim or a part of it, if the same does not disclose any reasonable ground for bringing or defending the action.

- [5] The third defendant although readily recognizing that the use of the court's power to strike out was only to be utilized in exceptional circumstances, it was the submission of the third defendant that the amended claim form as filed clearly does not disclose a cause of action against him.

- [6] In coming to that conclusion the third defendant identified and itemized the references that had been made in the amended statement of claim of the claimants and of those identified, where the third defendant was mentioned there was never any relief sought against him nor were any allegations made against him but simply a recital of the actions taken by him pursuant to the powers conferred on him by the first defendant.

- [7] The third defendant therefore submitted that there having been no allegations of wrongdoing pleaded as against him, the amended statement of claim could not stand as against him and the same should stand struck out as against him.

The Claimant's Submissions

- [8] The nub of the claimant's submission is that at the hearing of the application for injunctive relief to prohibit the third defendant from placing the claimant's properties up for sale pursuant to the mortgage debenture with the first defendant, it was counsel on the record for the third defendant who insisted that the third defendant should be made a party to the proceedings. This was done, therefore the claimants submit that the third defendant cannot now seek to be removed from the proceedings and ask the claimant to bear the cost when they acquiesced to the request for joinder.
- [9] In any event, the claimants submit that the third defendant has purportedly taken actions which are *ultra vires* any authority given to him by the mortgage debenture and more importantly there is an extant issue as to whether there was any contractual relationship which would allow for the third named defendant to be so appointed and then purport to dispose of properties allegedly part of the securities pledged by the claimants.
- [10] The claimants therefore submit that it is imperative for the third named defendant to remain as a party to the proceedings to ensure all matters raised on the claim are dealt with as between the proper parties and that therefore this application should be dismissed.

Court's Analysis and Conclusions

- [11] By Part 26.3 (1) (b) CPR 2000, the court is empowered to strike out a statement of case or a part of a statement of case if it appears to the court that: "*... the statement of case or the part of to be struck out does not disclose any reasonable ground for bringing or defending a claim.*"
- [12] It is therefore clear that all that the court needs to consider on an application of this nature, are the pleadings and what they divulge. Therefore, it follows that on an application under this Part, it must be decided by the court "solely on the parties' pleaded cases before it...and that all facts pleaded in the statement of case [are] assumed to be true for this purpose."¹
- [13] What does this particular pleaded case reveal by the amended statement of case as against the third defendant²:
- i. Paragraph 5 – the third defendant is described as the Receiver who was appointed by the First defendant pursuant to the Mortgage debenture registered number 4529/2006.
 - ii. Paragraph 9 – the third defendant is not referred to in his capacity as a party to the proceedings but is mentioned by name as the person who offered for sale as Receiver of

¹**Didier and ors v Royal Caribbean Ltd** 89 WIR 277 at 289

² The number references will refer to the paragraph in the Amended Statement of Claim as filed

M & G Enterprise Ltd the property ultimately purchased by the claimants for which they entered the mortgage debenture with the first defendant.

- iii. Paragraph 22 – the third defendant is mentioned as having written to the claimants indicating his appointment as Receiver over properties held by the first defendant under the mortgage debenture, he was again not mentioned as a party to the proceedings but rather by name.
- iv. Paragraph 25 – the third defendant is also mentioned therein as having participated in a meeting with the claimants with reference to his appointment. He was again not referred to as a party to the proceedings but it was pleaded that the claimant questioned the basis for his appointment under the mortgage debenture.
- v. Paragraph 26 – the third defendant was mentioned in his capacity as a party to the proceedings and the only averment contained in this paragraph was that he had assumed control of the claimants' companies and properties. There was no averment that this was wrongfully done or that he had acted outside of any authority vested in him. The first time that that may have been an issue is in the submissions of the claimants on this application.
- vi. Paragraph 35 – that the third defendant, in his capacity as Receiver had been contacted with a view to purchase the said properties over which the third defendant had control. Once again there was no allegation made as to any misconduct of the third defendant in this pleading.
- vii. Paragraph 36 – that the third defendant was once again referred to in his capacity as Receiver and it is pleaded that in responding to the offer of the claimant, that the Receiver had purportedly admitted that some of the properties sought to be purchased by the claimants were not part of the mortgage debenture. There was however no allegation in the pleadings that the third defendant had facilitated any kind of wrongdoing or that his alleged admission created a cause of action against him.
- viii. Paragraph 37 – the third defendant was referred to in his capacity as Receiver and is said to have issued a notice of disposition of the properties under the said mortgage debenture pursuant to the Bankruptcy and Insolvency Act. There was no averment that the third defendant in doing so had contravened any provision of the Act or had wrongfully done so.
- ix. Paragraph 40 – the third defendant is written to by the claimants' counsel debating that the properties he seeks to dispose of are part and parcel of the mortgage debenture.
- x. Paragraph 41 – the third defendant responds asserting that the properties are in fact part of the charged properties by the terms of the mortgage debenture.

- xi. Paragraph 42 – the third defendant informs the claimants’ representative of the extent of the indebtedness to the first defendant and renders an account of monies collected for March 2020. There was no averment that this account was incorrect or that the third defendant had not produced accounts since that account in March 2020 although the amended claim was filed in June 2020.
- xii. Prayers claimed – (xiii) that there be an injunction to stop the third defendant offering the properties for sale and (xiv) that the third defendant account for all monies received for and on behalf of the first defendant.
- [14] From the pleaded case it is therefore clear that there is no case made out as against the third defendant and certainly no case to which he could respond by way of filing a defence.
- [15] Indeed, from a close perusal of these proceedings in their present form, there is not one pleading that exists that claims any cause of action against the third defendant.
- [16] Certainly when this court examines the factual matrix that gave rise to this claim in the first place, this court is satisfied that the third defendant could not in fact be a proper party against whom a cause of action could arise given that the sole function and power of the third defendant is derived from the appointment of him by the first defendant. Indeed, the issue for the court is to determine whether the mortgage debenture should stand or be declared null and void. It is upon that determination that the actions of the third defendant will stand or fall. He has no legal rights save and except through the powers conferred on him by virtue of a mortgage debenture to which he himself is not a party.
- [17] In the case of **Tawney Assets Limited v East Pine Management Limited**³ the Court of Appeal per Mitchell JA agreed with the finding of the trial judge who had struck out portions of the statement of claim that raised no cause of action as against the first respondent “*because no amount of oral evidence could save the error in pleading found ... in that it could “clearly be seen on the face of it that the claim [was] obviously unsustainable, cannot succeed or in some way is an abuse of the process of the court.”*”⁴
- [18] In the case at bar, this court has examined the basis upon which the third defendant has carried out his duties, he is merely the agent of the first defendant and obtains all of his powers to act from the contractual agreement as between the claimants and the first defendant. There is therefore no cause of action to which the third defendant can be subject unless there is an allegation that he has acted outside of the terms of the agreement as conferred on him by the first defendant by

³ HCVAP2012/0007 (Territory of the Virgin Islands)

⁴ **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al** Antigua and Barbuda HCVAP20A/1997 per Sir Dennis Byron at paragraph 5

virtue of the mortgage debenture. There has been no such allegation. No amount of oral evidence, further disclosure or even a request for information will change that fact. This is an insurmountable hurdle.

- [19] What is also clear is that when one considers the powers conferred under Part 19.3 CPR 2000, where a party can be added or substituted, it has been held⁵ that the power to add a party is not and cannot be limited to the adding of a party only as a claimant or a defendant and therefore if the third defendant wished or was needed to be heard on the legal aspects of this case, he could have been added as an interested party, not a defendant.
- [20] This discretion to add, substitute or remove a party is a wide discretion reposed in the court, but the claimants never engaged this discretion. At the time that this statement of claim was amended, the court had not yet undertaken case management and upon the representations being made that the claimant would amend their case, all that the court did at that point was to set a time limit to file the amended claim but was never required to address its mind to the exercise of the discretion to add a party.
- [21] Thus it must be remembered that Part 19.2 (3) CPR 2000, makes it clear that a new party is added only if a) it is desirable to add the new party to 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. However like the indication given by the Court of Appeal in the case of **Mr FokHei Yu and anr v Basab Inc and ors**⁶ that neither of those circumstances had been engaged in the application that was for consideration before that court, this court also finds that in the case at bar, those requirements have also not been engaged.
- [22] The addition of the third defendant, in this court's mind, cannot assist the litigation or the resolution of issues that must be determined by this court at trial.
- [23] I am therefore constrained to accede to the application of the third defendant and utilize this exceptional power and order that the portions of the statement of case that refer to the third defendant are to be struck out. In relation to the issue of costs, this was an interlocutory application filed just subsequent to case management where even the deadlines for the case management directions have not yet passed. I therefore find that in all the circumstances the third defendant is entitled to his costs on the application in the sum of \$500.00.

⁵**Javin Johnson v The Attorney General of Saint Vincent and the Grenadines** SVGHCV2019/0110 consolidated with **Sean MacLeish v The Attorney General of Saint Vincent and the Grenadines** SVGHCV2019/0111 per Henry J at paragraph 21

⁶ BVIHCMAP2014/0010

[24] The claimants are of course at liberty to file an application to have the third defendant added as an interested party however the same would have to be fully ventilated as between the parties.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar