

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2010/0301

BETWEEN:

MILLHAWKE HOLDINGS (BEQUIA) LTD

STOWE CONSTRUCTION (BEQUIA) LTD

HENRY JOHN MARRIOTT (A.K.A. HARRY MARRIOTT)

HON. DINAH LILIAN MARRIOTT

CLAIMANTS

AND

(1) JORG “STANLEY” DORNIEDEN

(2) TIMOTHY GABRIEL

(3) CARIB CONSTRUCTION

(4) CARIB INTERNATIONAL

(5) LEOMORE MACDONALD

(6) STANLEY’S FOOD AND BEVERAGES LTD

DEFENDANTS

Before:

The Hon. Mde. Justice Esco L. Henry

High Court Judge

Appearances: Mrs. Kay Bacchus-Baptiste for the claimants.

Mr. Stanley K. John Q.C. with him Mr. Akin John for the first, second and sixth defendants.

2020: Sept. 23

Oct. 13

DECISION

BACKGROUND

- [1] **Henry, J.:** This case involves a claim¹ by Millhawke Holdings (Bequia) Ltd., Stowe Construction, Mr. Henry Marriott and Hon. Dinah Marriott² against Mr. Jorg Dornieden, Mr. Timothy Gabriel and Stanley's Food and Beverages (Stanley's Food')³ for damages arising from allegations of breach of a joint venture agreement ('JVA'), fraud, conversion and breach of fiduciary duty. Mr. Dornieden and Stanley's Food filed a defence and counterclaim⁴ alleging wrongful repudiation of the JVA.
- [2] In 2014⁵, the claimants obtained an order for security for costs in the sum of \$80,000.00, which was upheld on appeal. The defendants were directed to pay that sum within 28 days of the order. The claimants allege that the defendants have paid none of it. The claimants contended that Civil Procedure Rules 2000 ('CPR') 24.5(b) mandates the court to include in an order for security for costs, a stipulation that if it is not paid within the timelines in the order, that the counterclaim will be struck out. They submitted that the defendant's counterclaim should be struck out for failure to comply with the referenced order. They have applied⁶ for an order striking it out and for costs.
- [3] Mr. Gabriel did not object to the application.⁷ The defendants' legal practitioners indicated that Mr. Dornieden and Stanley's Food have not been in contact with them for an extended period and further that their attempts to contact them have been futile. The legal practitioners filed no legal submissions on in respect of the substantive application to strike out the counterclaim. They however filed⁸ speaking notes in which they noted that the referenced security for costs order did not contain a stipulation that the counterclaim would be struck out if not paid by the specified date.

¹ Filed on 29th September 2010.

² Collectively referred to as 'the claimants'.

³ Collectively referred to as 'the defendants'.

⁴ On 15th June 2011.

⁵ October 14.

⁶ By Notice of Application filed on 1st June 2018.

⁷ See para. 3.7 of 'Submissions of the first and sixth defendants' filed on 22nd September 2020.

⁸ On 5th May 2020.

They reasoned that the order was irregular in this regard and that as a result the present application should be dismissed. For the reasons outlined below the claimants' application is dismissed.

ISSUE

- [4] The issue is whether the defendants' counterclaim should be struck out by reason that they failed to comply with the order to pay security for costs.

ANALYSIS

Issue - Should the defendants' counterclaim be struck out by reason that they failed to comply with the order to pay security for costs?

- [5] The security for costs order arose from an application by the claimants pursuant to CPR 24.3(g). The claimants asserted that the defendants live in the United Kingdom; had limited assets within Saint Vincent and the Grenadines and further that it would be difficult to recover any costs order against them. Those are matters which the learned Master considered in making the order and which were re-visited by the Court of Appeal when they upheld the learned Master's order.
- [6] The learned Master's order is set out paragraph 57 of her decision and states:

'[57] Summary of award

- (a) The Claimants are awarded security for costs of the Ancillary Claim in the sum of \$80,000.00 to be paid by First and Sixth Named Defendants within 28 days hereof, into an account under the management of the Registrar of the High Court, or by way of bank guarantee for an equivalent amount from a bank doing business in St. Vincent and the Grenadines.
 - (b) Costs to the Claimants on their application in the sum of \$3000.00 payable within 21 days hereof.
 - (c) The First and Sixth Defendants' application for security for costs is dismissed with costs in the sum of \$1500.00 to the claimants payable within 21 days hereof;
 - (d) No costs are awarded on the application for budgeted costs which continues.
- 25.

- (e) With the exception of the obligation to pay costs the ancillary claim is stayed pending the payment by the Defendants of the security.' (Underlining provided)

- [7] The claimants outlined 6 grounds on which the instant application is hinged. In the first 4 of those grounds they summarized the chronology of proceedings which culminated with the referenced order. In the 5th ground, they asserted that CPR 24.5(b) stipulates that a security for costs order must also direct that the related claim or counterclaim will be struck out if security is not provided in accordance with the terms of the order. Ground 6 stated simply that the security was not provided within the stipulated 28 days and consequently the application is being made for the counterclaim to be struck out.
- [8] The affidavit in support of the order was sworn to by Ms. Beverly Frederick, senior legal clerk in the law chambers of Williams and Williams - the former attorneys on record for the claimants. Ms. Frederick averred that the claimants were awarded security for costs which was upheld on appeal. She added that the appellate court held that the security for costs order was properly awarded. She stated that the security has not been paid by the defendants and requested an order striking out their counterclaim.
- [9] The claimants filed skeleton arguments⁹ and very brief written submissions¹⁰. They acknowledged that the CPR provides at rule 24.5(a) and (b) that the court must include in a security for costs order, a direction staying the related claim or counterclaim until the security is provided as ordered; and also an order that the claim will be struck out if the order is not complied with. They submitted that the objective of a security for costs order is to ensure that in the event of an adverse result 'the respondent would be able to recover the costs incurred in defending the claim. They submitted further that while the learned Master did not include a term in her order mandating that the claim will be struck out if the defendants do not provide security; the mischief is still present and in the interest of justice the counterclaim ought to be struck out.

⁹ On 13th June 2018.

¹⁰ On 21st July 2020.

[10] The claimants argued that the order is an unless order which prevents the defendants from proceeding with their ancillary claim unless the security is paid. The remainder of their brief submissions¹¹ were made in bullet form as follows:

‘Contempt of court see:

Hadkinson Order

The Defendants should

(1) Not even be permitted to file the extant submissions.

(2) **Gavin Scott Hapgood vs COP et al**’

[11] The claimants did not elaborate on those further points. It is not clear whether those bullet points are related. It is difficult to extract a coherent stream of argument from those bullets. For what it is worth, the court reviewed the **Gavin Scott**¹² decision, from the copy of the order made in the and the reasons for decision supplied by the claimants. In that case, the Court of Appeal refused an application for a **Hadkinson order**; made an order for other issues to be scheduled for hearing by the Full Court and issued case management directions for filing of written submissions and affidavit evidence.

[12] The Court of Appeal also noted the conditions necessary for a Hadkinson order, as articulated in the case of **De Gafforj v De Gafforj**¹³; namely:

‘1. The respondent is in contempt;

2. The contempt is deliberate and continuing;

3. As a result there is an impediment to the course of justice;

4. There is no realistic and effective remedy;

5. The order is proportionate to the problem and goes no further than necessary to remedy it.’

[13] The case of **De Gafforj v De Gafforj** was decided by the UK Court of Appeal. Lord Justice Peter

¹¹ See paragraph 2 of the Brief Submissions.

¹² AXAHCVP2020/0003 an oral decision rendered by video conference on May 7th 2020.

¹³ [2018] EWCA Civ 2070.

Jackson explained what a Hadkinson order is and outlined some principles for activating it. He stated:

- '9. The nature of the *Hadkinson* order was described in this way by Sir Ernest Ryder in *Assoun v Assoun* [No 1] [2017] EWCA Civ 21 at [3]:
"Such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be a commonplace. As developed in case law, **it is a case management order of last resort in substantive proceedings** (for example for a financial remedy order) where a litigant is in wilful contempt rather than a species of penalty or remedy in committal proceedings for contempt." ...
10. An order of this kind can be made at any stage of proceedings, both at first instance and on appeal. Its history and modern development is set out in the judgment of Eleanor King J in *C v C* (*Appeal: Hadkinson Order*) [2011] 1 FLR 434 at [27]-[41].
11. For present purposes, it is enough to note the exceptional nature of the order ...'
(Bold added)

[14] He added:

- '14. The fourth condition underscores the obvious point that a *Hadkinson* order will not be made if the court has other powers that can be effectively deployed.
15. Lastly, a *Hadkinson* order is a flexible one with a range of possible sanctions. In *Hadkinson* itself, the Court of Appeal refused to hear a mother's appeal until she had returned a child to England. The form of order will be tailored to the needs of the case. What is important is that the sanction is no stronger than it need be to remove the impediment to justice.'

[15] The claimants failed to explain why they cited the case of **Gavin Scott** in support of their application. There is no application before this court for the making of a Hadkinson order. In those circumstances, it does not appear that the principles just outlined are applicable to the

case at bar, in respect of the present application. The claimants did not highlight any learning from the case that they consider to be applicable to the present application. They just listed it as an authority.

[16] I think it is useful to remind counsel that it is for them to communicate their submissions in a manner which would enable the court to understand their case; and not for the court to distill from a decided case the portions on which a party hinges his contentions, except in the most obvious of cases; where for e.g. a legal authority is notoriously known. I find that the **Gavin Scott case** is not helpful in that regard and disregard it for present purposes. The claimants advanced no other decided cases in support of their application.

[17] On 22nd July 2020, the court ordered parties to file written submissions on the principles which guide the court in considering an application or other process where a party has remained out of contact with his legal practitioner on record and the court for an extended period. They did. I have already referred to the brief notes filed by learned Queens Counsel in which he made observations and mentioned legal authorities in respect of the present application. He stressed that they were not provided as formal submissions in opposition to the claimants' application; or on instructions from Mr. Dornieden or Stanley's Food.

[18] On the issue relating to a non-communicative litigant, learned Queens Counsel submitted that the question which arises is 'What is the general character of litigation counsel's authority to represent the interests of the client?' He continued:

'The venerable principle that counsel is clothed with apparent authority to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause, was eloquently pronounced in *Strauss v Francis*¹⁴ by Blackburn J in the contest of counsel compromising a cause, as follows:-

"The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to shew that the client absolutely withdrew all authority, nor is there anything to shew that counsel

¹⁴ LR 1 QB 379.

had done so unprofessional a thing as to undertake the conduct of a cause giving up all discretion as to how he should conduct it; still less is there anything to shew that there was the slightest knowledge on the part of the other side that the apparent general authority of counsel had been in fact limited. Mr. Kenealy has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill, and discretion. Few counsel, I hope, would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel, therefore, being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do everything which, in the exercise of his discretion, he may think best for the interests of his client in the conduct of the cause:..”

[19] Learned Queens Counsel observed further:

‘Accordingly, the key issue for the court’s consideration in respect of the issue raised is that on the assumption of Legal Practitioners on Record/Counsel continuing their assumption of the brief, whether or not their inability to make contact with the client in all the circumstances must of necessity be treated as an implied withdrawal or limitation of their retainer, that is to say has their apparent authority to represent the 1st and 6th Defendants in relation to the subject application or any other aspect of this matter been withdrawn such that their action in the conduct of same ought not to bind their clients?’

[20] Learned Queens Counsel added:

‘it is respectfully submitted that legal practitioners on record for the 1st & 2nd Claimant have the apparent authority to act on behalf of the clients in pursuing the applications. However, the distinct potential impact on the clients’ interest and consequences that flow from each of the applications, inform what Legal Practitioners on Record/Counsel consider as the reasonable action that can be taken without the client’s express instructions but is in the clients’ best interest.

‘... the avoidance of any exposure to costs is a critical consideration in responding to the application, given that no instructions have been received from the clients. Hence it is hoped that by counsel drawing the Court’s attention to the applicable law and authorities in the interests of justice, this will not prejudice the Defendants as regards costs.

Legal Practitioners remain on the record and appear as counsel. It would be failing in our duty to the court, if at the minimum these observations were not made in an effort to assist the Court in its disposition of the Application.

In light of the foregoing considerations and with specific reference to Blackburn J’s observations on the character of his representation, although counsel has the apparent authority to act, one considers that the Speaking Notes are the safest compromise that can be made as it relates to this application without reference to the clients.’ (Underlining added)

- [21] The speaking notes were not supplemented by oral representations. In them, learned Queens Counsel indicated that the court would need to decide whether the learned Master’s order is an ‘unless order’; and if it is not, whether the court has power to amend it, by making it an unless order and thereby strike out the counterclaim. He noted that while the claimants accepted that the security for costs order did not include the CPR 24.5(b) sanction, they maintained that the counterclaim should be struck out in the interest of the administration of justice, but supplied no legal authority to support that contention.
- [22] Learned Queens Counsel noted further that although CPR 24.5(b) mandates the making of an unless order, no such order was incorporated in the security for costs order. He posited that this goes to the substance of the judgment. He observed that it is a settled principle of law that this court being a court of concurrent jurisdiction with the Master’s, cannot attempt to perfect a perceived imperfection in the learned Master’s order.
- [23] He opined that this court has no authority to amend the security for costs order by way of the slip rule pursuant to CPR 42.10. He reasoned that to do so would be to go beyond correcting a clerical error or ‘accidental slip or omission’. He remarked that rule 42.10 is limited to the correction of typographical errors. He stated that even if the court considered that there was an omission, accidental slip or omission in the security for costs order, it has no power to correct it, since it was

appealed. He cited in support the case of **Saint Christopher Club Ltd v Saint Christopher Club Condominiums and Ors**¹⁵. Learned Queens Counsel concluded that the instant application is an abuse of the court's process and should be dismissed. On this latter point, he referenced the decision in **Lauron Baptiste and Benjamin Exeter v Attorney General et al**¹⁶.

[24] It has been accepted by the parties that the security for costs order does not contain a stipulation that the ancillary claim will be struck out if the security is not provided. This is self-evident. It is also clear that this constitutes a departure from the mandatory language of CPR 24.5(b).¹⁷ As explained by Madame Justice Janice Pereira JA in **Robin Darby v LIAT**:

‘CPR 24.5 says in effect that on making an order for security for costs the court must also order that, ‘if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out.’¹⁷ (Underlining added)

[25] The judgment of the Privy Council in **Attorney General v Keron Matthews**¹⁸ is also instructive. There, the court considered what had been described as an ‘implied sanction’ for the tardy filing of a defence. In that case, a lower court had ruled that even though the CPR contained no express sanction preventing a defendant from filing his defence after the stated time limit had expired, an implied sanction arose in such circumstances. That court ruled that such a defendant was precluded from filing a defence unless and until he had applied for and obtained an extension of time to do so and relief from the implied sanction.

[26] Lord Dyson opined:

‘It is straining language to say that a sanction is imposed by the rules in such circumstances. At most, it can be said that, if the Defendant fails to file a defence within the prescribed period and does not apply for an extension of time, he is at risk of a request by the Claimant that judgment in default should be entered in his favour. That is not a

¹⁵ SKHCVAP2007/004

¹⁶ SVGHCV2015/202 and SVGHCV2015/202 (Judgment delivered on February 27 2018).

¹⁷ Robin Mark Darby v LIAT (1974) Ltd. ANUHCVP2011/002, at para. 12. The underlined portions are an exact quote of rule 24.5(b) of the CPR.

¹⁸ [2011] UKPC 38.

sanction imposed by the rules. Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose.’¹⁹

[27] He reasoned:

‘There is no rule which states that, if the Defendant fails to file a defence within the period specified by the CPR, no defence may be filed unless the court permits.’¹⁶

Lord Dyson concluded:

‘...if the language of the rules admits of only one interpretation, it must be given effect.’²⁰

[28] Rule 24.5(b) of the CPR must be interpreted in accordance with those guidelines. It is pellucid that the provision does not state that a defendant who fails to provide security for costs will have his ancillary claim struck out. The onus is placed on the judicial officer making the order to include that sanction as part of the order, so that the sanction flows from the order and not from the rule. CPR 24.5(b) allows no other interpretation. This interpretative approach is also congruent with natural law and administrative law principles of fairness. It follows that in the absence of the expressly stated sanction from the order, it may not be invoked by the claimants.

[29] The decision in the **Robin Darby v LIAT** case also demonstrates that even where a security for costs order contains the rule 24.5(b) sanction, it does not automatically lead to a striking out of the related claim, if a timeous and justifiable application is made for extension of time to comply. In this regard, the learned Justice of Appeal remarked:

‘Notwithstanding that relief is sought after the sanction is said to have taken effect it is still open to the court, as it should be, in recognition of and giving full effect to the broad and fundamental principles of access to justice, to grant relief where the justice of the case requires.’²¹

[30] For completeness, I will touch briefly on the other observations made by learned Queens

¹⁹ At paragraph 16 of the Keron Matthews judgment.

²⁰ At paragraph 20 of the Keron Matthews judgment.

²¹ Paragraph 13 of the Robin Darby v LIAT case, per Pereira JA.

Counsel Mr. John in relation to the slip rule. Suffice it to say that the claimants have made no application for amendment of the order pursuant to the slip rule. I agree with learned Queens Counsel that omission of the sanction cannot be characterized as an accidental omission or slip which can be corrected in that way. I accept too that once a matter has proceeded to appeal, an order may not be amended in that fashion.

[31] For the foregoing reasons, I am satisfied that the sanction of striking out the defendants' counterclaim is not an option which arises from the security for costs order. I hasten to add that the order must be given its full effect. In this regard, it directs that the ancillary claim be stayed pending payment of the security by the defendants. In the circumstances, the defendants are still bound by that prohibition. The claimants are not so affected.

COSTS

[32] CPR Part 65 provides rules which govern the award of costs. The general rule is that the victorious party is entitled to recover costs. The defendants were successful in this skirmish. However, they filed no submissions on the issue and did not take an active full-throated role in the proceedings. I therefore make no order as to costs.

[33] It is ordered:-

1. The claimants' application to strike out the defendants' counterclaim is dismissed.
2. No order as to costs.

[34] I am grateful to learned counsel for the submissions and speaking notes.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar