

THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2018/0009

BETWEEN:

[1] KINSCORP LIMITED

Claimant

and

[1] REMY LAWRENCE

Defendant/Ancillary
Claimant/Respondent

and

[1] IBANK CORPORATION

[2] KINSCORP LIMITED

Ancillary Defendants/Applicants

Before: The Hon. Justice M E Birnie Stephenson

Appearances:

Mrs. Heather Felix-Evans for the Applicants
Mr. Lennox Lawrence for the Respondents

2018: September 11

RULING ON APPLICATION TO STRIKE OUT ANCILLARY CLAIM ON WRITTEN SUBMISSIONS

[1] STEPHENSON, J.: This is the court's ruling on an application to strike out an Ancillary Claim filed on the 10th April 2018 by the Ancillary Defendants. (The applicants)

The Substantive Claim

[2] On the 15th January 2018, the Claimant Kinscorp Limited ("Kinscorp") brought an action by way of Fixed Date Claim against the defendant Remy Lawrence ("Lawrence") essentially to recover the sum of \$39,547.00 belonging to Kinscorp and withdrawn by the defendant from Kinscorp's bank account. Kinscorp also seeks a declaration from this court that Lawrence who was at the material times a Director of Kinscorp is liable to account to Kinscorp for the said funds and that he Lawrence as a director is in breach of his fiduciary duty towards it and has acted Breach of Trust.

[3] Kinscorp's Fixed Date Claim was accompanied by an affidavit in support of claim which was sworn to by Mr. Jhonny Gregorio Griman, a director of Kinscorp who was duly authorised to make the affidavit. His affidavit lays out the detail of the claim and transactions relating to the claim.

[4] The claim was served on the defendant on the 5th February 2018.¹

[5] Lawrence filed an affidavit in reply on the 26th February 2018 stating his defence to the claim brought against him. On the 8th March 2018 the matter came up for first hearing of the Fixed Date Claim and Learned Counsel Mr. Lennox Lawrence acting for and on behalf of the respondents informed the court of his intention to file an Ancillary Claim. An order was then made that this claim should be filed by the 15th March 2018 and the first hearing was adjourned to the 18th April 2018.

¹See Affidavit of service filed on the 7th March 2018

- [6] On 8th May 2018 Lawrence filed his ancillary claim and named Ibank Corporation (“Ibank”) and Kinscorp Limited as the ancillary defendants² (together “the applicants”). In his ancillary claim Lawrence is essentially seeking the following declarations that:
- (1) Kinscorp is the alter ego of Ibank;
 - (2) Ibank is the principal of Kinscorp for the purpose of settling Ibank’s financial responsibilities;
 - (3) Ibank is beneficially entitled to the monies on the bank account held in the name of Kinscorp; and
 - (4) Ibank is beneficially entitled to monies paid by Lawrence on behalf of both Kinscorp and Ibank.
- [7] Lawrence is also seeking an order in his ancillary claim that the monies claimed and held by Kinscorp were properly utilised for the settlement of Ibank’s financial obligations which included the legal retainer owed by Ibank.
- [8] Lawrence is also seeking a declaration from the court that the claim “brought herein is frivolous and vexatious and an abuse of process” and “further ...that the claim does not disclose a reasonable basis for filing and action and should be struck out”³

The Application to Strike Out by the Applicants (the Ancillary Defendants):

- [9] An affidavit and submissions in support of the application was filed on ???????. Mr. Lawrence filed his submissions in opposition to the application to strike out on the 19th April 2018. On 11th May 2018 submissions in reply to the Lawrence’s submissions was filed by the Kinscorp & Ibank .
- [10] In their application to strike out the ancillary claim the applicants submit the following:
- (1) That the facts pleaded in the ancillary claim even if they are true, do not disclose a legally recognizable claim or cause of action against them;

² An Amended Ancillary Claim was filed on the 14th March 2018. This Amended only the Rubric of the claim.

³ See paragraph 5 & 6 and 14 & 15 of the Ancillary Claim

- (2) The facts as pleaded constitute a defence (whether or not viable) to the claim brought by Kinscorp against Lawrence, and as such should properly be contained in a defence and not in a claim;
- (3) That based on the facts pleaded and the relief sought Lawrence has no standing or interest in the ancillary claim;
- (4) That the ancillary claim and the amended ancillary claim constitute an abuse of the process of the court.

[11] The affidavit filed in support of the application to strike merely confirms the grounds as stated in the application and lends nothing more to the application at bar.

[12] The applicants' submissions seek to fully put before the Court their case for consideration, as do the respondents in their submissions.

Whether There is a Cause of Action or Legally Recognizable Claim that has been Pleaded Against the Applicants?

[13] It is the applicants' case that Lawrence has not pleaded "any factual situation the existence of which entitled him to a remedy against the applicants"⁴. Further, that Lawrence has not claimed or alleged any wrong committed by the applicants against him. It is contended that the remedies which Lawrence is seeking in the ancillary claim are not remedies to assuage any wrong meted out to him and in the circumstances Lawrence has failed to state a case against the applicants that is known or recognizable in the law.

[14] Learned Counsel Mrs. Felix-Evans has submitted that an examination of the ancillary claim filed discloses a defence and what amounts to a "proxy claim" on behalf of Mr. Lennox Lawrence, who is in fact Counsel having conduct of the matter on behalf of Lawrence. It is further contended that Lawrence in his defence to the claim brought

⁴ Paragraph 11 of the Applicants Submissions filed on the 10th April 2018

against him is seeking to put forward that the monies which belonged to Kinscorp has been retained by Kinscorp lawyer, Mr. Lennox Lawrence.

[15] Mrs. Felix-Evans in an excellent and succinct manner submitted that an analysis of the amended ancillary statement of claim discloses that the statement of case under scrutiny is a defence which can be viewed as an explanation by Lawrence against the claim filed against him by Kinscorp. That in the claim Lawrence is asserting that the monies have been paid over to or retained by Mr. Lennox Lawrence in his capacity as Counsel to Kinscorp and in his claim Lawrence is seeking to justify his actions with this explanation. That in the circumstances this is improper to do by way of this ancillary claim in which counsel in this matter is not a party to the matter.

[16] Learned Counsel went on to submit that in view of this ancillary claim that it is improper for Mr. Lennox Lawrence, Counsel with conduct of the matter on behalf of Lawrence, to continue to represent Lawrence in this suit.⁵

Respondent's Case

[17] Learned Counsel Mr. Lennox Lawrence on behalf of Lawrence submitted to this court that an ancillary claim is a claim by a defendant against any person whether or not already a party for contribution of indemnity or some other remedy; and accordingly Lawrence as a defendant can properly file an ancillary claim against the applicants for a contribution of indemnity in the circumstances of this case.

[18] It was submitted by Counsel Mr. Lennox Lawrence that the court is at this juncture required to determine whether there is a reasonable ground pursuant to CPR 2000 part 26.3(1)(b) for Lawrence to seek indemnity or contribution against the Applicants pursuant to Part 18.(1)(a) of CPR 2000.

⁵ Counsel signaled her intention in her submissions of applying to have him removed from the proceedings as Counsel

[19] Learned Counsel Mr. Lennox Lawrence submitted that Lawrence in the case at bar acted as a director of Kinscorp and that as a director he utilised the property (monies) of the company to settle a debt incurred by the company when he was a director.

[20] Learned Counsel Mr. Lennox Lawrence went to submit that Lawrence (as defendant) could properly file an ancillary claim against the applicants as (ancillary defendants):

- (1) "Where there is a question of whether or not he acted properly as a trustee of the said directors;
- (2) Whether the ancillary directors were liable to indemnify its director and trustee where there is no mala fides on his behalf; or
- (3) Where he has directly or indirectly acted to settle debt or where he has not objected to the proper debt being settled"⁶

[21] Learned Counsel Lennox Lawrence also submitted that there is no merit in the application to strike by the applicants because where the issue of "piercing of the corporate veil, indemnity, contribution or mala fides arises" and " where the ancillary defendants had incurred a debt , had created or utilized a structure between themselves to avoid their financial obligations, and where the debt has been settled notwithstanding the said structure",⁷ Lawrence can properly file an ancillary claim asking the court to pierce the corporate veil and request that he be indemnified by Ibank Corporation⁸ for the sum of \$39,547.00 which was applied to settle an acknowledged debt of the said applicants when he Lawrence, was a director of the companies.⁹

Considerations

[22] "It is trite law that a claimant who comes to the court must state a case that is known to or created by law. The case...stated must disclose sufficient facts that are material to

⁶ See paragraph 7 of Lawrence's submissions filed on the 19th April 2018

⁷ See paragraph 8 *ibid*

⁸ Lawrence contends that Ibank Corporation is the alter ego of Kinscorp

⁹ See Paragraph 9 of Lawrence's submissions filed on the 19th April 2018

the issue to render the claim viable and which would permit the person who has to answer the case to know what case he has to meet. Pursuant to Part 26(3) of CPR and in its inherent jurisdiction the Court can strike out a statement of case which discloses no cause of action, or parts of the case which are vague, immaterial, unknown to law, or which is found to be abusive of the process of court or is frivolous or vexatious.”¹⁰

[23] A court may be inclined to exercise its power to strike out the whole or part of a statement of case is where that statement of case discloses no reasonable grounds for bringing or defending a claim. Such cases include particulars of claim or a defence which:

- I. do not set out facts indicating what the claim is about,
- II. those which are incoherent and make no sense,
- III. those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognizable claim against the other party or do not amount in law to a defence to the claim, and
- IV. are vexatious, scurrilous or obviously ill-founded. In making the assessment, the court will assume that each of the allegations pleaded are true.

The Principles for Striking Out:

[24] In civil litigation, courts have the power to remove the whole or part of a statement of case. The court is enabled to do so by Part 26.3 of CPR. The relevant paragraphs of CPR 26.3 provides:

“Sanctions – striking out statement of case

26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

¹⁰In *Bernard McDonald Christopher v Roosevelt Skerit & the AGDOMHCV 287/2010 @ para 12*

...

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) 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; or

...

[25] The principle upon which a judge may strike out a statement of case is not in doubt and is well established. When considering such an application a court is to act cautiously because the exercise of this jurisdiction denies 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 striking out of a party's statement of case or any part thereof is a severe step which is only to be taken in exceptional cases.

[26] It is important that a court is 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.

[27] In the case of **Baldwin Spencer –v- The Attorney General of Antigua and Barbuda**¹¹ the dicta of Sir Dennis Byron is instructive: He said "This summary procedure should only be used in clear and obvious cases, when it can clearly be seen, on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."

- i. Among the governing principles stated in Blackstone's Civil Practice 2009 the following circumstances are identified as providing reasons for not striking out a statement of case;
- ii. where the argument involves a substantial point of law which does not admit of plain or obvious answer; or the law as in a state of development;

¹¹ CIV. APP. NO.20A of 1997 (Antigua & Barbuda)

or where the strength of the case may not be clear because it has not been fully investigated.

[28] It is also well established and settled law that before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Further, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and that the court's power must be exercised in accordance with the overriding objective of dealing with cases justly.

[29] It is to be noted that there is the situation where there are those cases which when a review is conducted of the statements of case the party whose case has been reviewed does not stand any chance of success and to allow the defence to stand or the claim in some instances to stand would likewise cause injustice and would also amount to an abuse of the courts processes to have the party on the other side put to the expense of defending or prosecuting a claim when it is plain and evident that it cannot be successful.

[30] The question to be considered in the case at bar is whether Lawrence's statement of case discloses a reasonable ground for prosecuting the claim against the ancillary defendants and whether he has real or any prospect of succeeding in litigating the matter at trial.

[31] It is concerning to note that the statements made in the statement of claim do not all refer to the actions of the Remy Lawrence but the actions of Learned Counsel Lennox Lawrence ("Counsel"). In other words it would appear to this court that Lawrence is presenting to this court in his ancillary statement of claim that it is counsel and not Lawrence who took certain actions based on a debt to counsel ...further there is no right to set off arising between Lawrence and the applicants of Kinscorp as Lawrence is not asserting money owing to him personally ... the monies due and owing according to the case made out it to Counsel ...its clearly counsel's claim and not Mr Lawrence.

[32] It is clear from the case at bar that whatever actions Lawrence took regarding the funds belonging to Kinscorp can constitute a defence to the claim made out against him. However, it is inconceivable as to how he can seek to bring a claim against the applicants for a debt which he claims is owed by them to Counsel Mr. Lennox Lawrence.

[33] Clearly this claim cannot possibly form part of an ancillary claim or a claim brought by him. This is a clear and obvious case as set out in the test for striking out of matters to be struck out and accordingly it is his claim that is improper, frivolous and vexatious and is in fact an abuse of the courts process and will accordingly be struck out with an award of costs made against him for same.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar