

**5EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2014/0805

BETWEEN:

VIRGINIA AIMABLE

Claimant

And

LUBECO 1991 LTD

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Mrs. Lydia Feisal for the claimant

Mr. Deale Lee for the defendant

2016: April 19

2017: January 5

- [1] The application before this court is to strike out paragraphs 19 and 21 of the claimant's statement of claim filed on 14th October 2015.

Background Facts

- [2] Mr. Ambrose Descartes, the deceased, was a former employee of the defendant company, with responsibility for the maintenance and beautification of the exterior of the defendant's business place in Vieux Fort. The deceased was also required to use various insecticides to treat the interior of the said business place.
- [3] The claimant, a representative of the deceased estate, filed a dependency action seeking damages for loss of expectation of life, damages for pain and suffering, loss of amenities and other reliefs.

- [4] The claimant avers that the deceased was never given protective clothing or facial mask from the outset. The claimant avers that the deceased started feeling sick and was sent off work on extensive sick leave. The claimant further avers that the deceased failed to report to work after the expiration of the sick leave resulting in the termination of his employment by the defendant company. The claimant avers that the deceased developed cancer while in the employment by the defendant company and succumbed to his illness shortly after the termination of his employment.
- [5] The claimant avers that the defendant owed the deceased a duty of care to provide him with a safe place of work and safety equipment. The claimant avers that the defendant company failed to provide the necessary safety equipment thereby exposing the deceased to toxic chemicals/pesticides in excess of two years. The claimant avers that the deceased's lungs and body became afflicted by virtue of the exposure to the toxic chemicals and developed a type of cancer known as Hodgkin Lymphoma of mixed cellularity type which resulted in his untimely death.
- [6] The claimant in the statement of claim referred to the death of one "Urban Fanus" who was a previous employee of the defendant's company. The claimant avers that "Urban Fanus" had also been exposed to similar toxic chemicals and died of the same or similar cause as the deceased claimant in the present case.

The defendant's application

- [7] The defendant applies pursuant to CPR 26.3(1) to strike out paragraphs 19 and 21 of the claimant's statement of claim on the grounds that the claimant seeks to rely on the death of a person who is not a party to the claim, for whose death no liability has been attributed to the defendant and whose claim, if one existed, would be prescribed. Counsel for the defendant avers that the claimant seeks to rely on the alleged fact that another employee of the defendant died of cancer in 2007 to help prove its claim.

[8] The alleged offensive paragraphs which the defendant seeks to expunge read as follows :

“19. In its case against the Defendant the Claimant will rely on the following established facts from which it will invite the Court to draw the appropriate inferences:

- a. That Urban Fanus worked with the Defendant and was involved in the treating of the interior of the Defendant's business with insecticide;
- b. That he had worked with the Defendant for more than two years and until his death on the 19th September 2007 as shown by his death certificate.
- c. Like the Deceased, Urban Fanus had been exposed to toxic chemicals by virtue of his work with the defendant;
- d. That Urban Fanus died at the age of 38 years whilst in the Defendant's employ and his death was caused by the following illnesses:
 - i. Respiratory failure
 - ii. Pulmonary infiltration
 - iii. Metastatic Malignancy...

21. The Claimant avers that Urban Fanus and the Deceased died of the same or similar causes and in the same or similar circumstances”

[9] Counsel contends that the death of the third party on which the claimant seeks to rely is more prejudicial than probative and therefore is an abuse of the court's process and an obstruction to the just disposal of the proceedings.

[10] The defendant contends that offending paragraphs should be struck out for the following reasons;

1. There are many types of cancer each of which may have multiple causes. It has not been proved that the employees died of the same disease. While the two deceased employees had similar symptoms the Deceased died of a particular form of cancer that is not listed as a cause of death in relation to Mr. Fanus.

2. There has been no finding by any competent authority that the Defendant/Applicant was the cause of the first employee's illness. Before the Claimant/Respondent can seek to rely on Mr. Fanus' death she must prove that the Defendant/Respondent was legally responsible for his illness and death. This would require the Court to investigate the circumstances of Mr. Fanus' death to the same extent as the Deceased's death.
3. It would be inordinately expensive to determine at this time the cause of Mr. Fanus' illness as expert evidence would be required to indicate the nature and cause of Mr. Fanus' death. Such expert evidence would be expensive and is in addition to the evidence required in relation to the Deceased's illness. In essence the Court would be required to conduct a duplicate inquiry into the death of Mr. Fanus.
4. Reliance on Mr. Fanus' death would also require proof of a number of collateral matters e.g. whether Mr. Fanus was engaged in the spraying of insecticide, what insecticides were used and what equipment and training was provided to Mr. Fanus which will significantly extend the trial. This would further add to the length and cost of the trial.
5. The pleading in relation to Mr. Fanus' death places the Defendant/Applicant at a disadvantage because the personnel files relating to Mr. Fanus who passed away in 2007 are no longer available and also the practical difficulty of accessing the confidential medical records of a deceased person who is not a party to the claim.

[11] The defendant avers that striking out the references to Mr. Fanus' death will not affect the claimant's cause of action or remedies, if successful at trial. However, excising the offending paragraphs would result in a more efficient trial process and would reduce the prejudice to the defendant. The defendant avers that questions of the admissibility of evidence has not yet arisen, however the application is worth considering the general principles of admissibility of evidence as they may assist in

determining whether the impugned paragraphs of the Statement of Claim are prejudicial or would otherwise prevent the just disposal of the claim.

[12] The claimant in response states that it is a fact that Urban Fanus died of similar causes whilst in the defendant's employment. The claimant avers that the fact that both young men died of similar causes while in the defendant's employ raises the probability that the defendant may not have operated a safe system of occupational health and safety as required by law. The claimant contends that the fact that a claim was never filed against the defendant in respect of the death of Urban Fanus or that any such claim is prescribed, does not prevent the Court from considering all evidence that will be presented at trial with a view to determining whether or not that the defendant provided a safe working environment as mandated by law.

[13] The claimant avers that the evidence concerning Urban Fanus' death and circumstance of his employment are wholly similar to the circumstances surrounding the death and employment of the deceased, Ambrose Descartes. The burden of proving that Urban Fanus was also afflicted by the same circumstances that afflicted Ambrose Descartes rests on the claimant. The claimant accepts that the defendant cannot be penalised regarding the death of Urban Fanus because all limitations for civil proceedings have expired and could not be prosecuted either for negligence or statutory breach of duty. The claimant avers that there is no prejudice to the defendant.

[14] The claimant further avers that the Laws of Saint Lucia permit the admissibility of similar fact evidence as long as the evidence is relevant. The claimant avers that the evidence is directly relevant because it arises from circumstances concerning the defendant and its employee who died from the exact cause as the deceased Ambrose Descartes whilst in the claimant's employ. The claimant places reliance on the court to the following cases:

- (1) **In Hales v Kerr [1908] 2KB 601**, a negligence action, a plaintiff alleged that he had contracted ringworm from a dirty razor used by the defendant,

a hairdresser. Evidence was admitted that two other customers shaved by the defendant had also contracted ringworm.

- (2) **In Joy v Phillips, Mills & Co. 1916 [1 KB] 849**, a claim was made for workmen's compensation by a father of a deceased stable boy. The boy was kicked by a horse and found nearby holding a halter. Evidence that the boy had previously teased horses with a halter was held to be admissible in rebuttal of the applicant's application allegation that the accident had occurred in the course of the boy's employment.
- (3) **In Jones v Greater Manchester Police Authority [2002] EWHC 4, DC** civil proceedings for a sex offender order under section 2 of the Crime and Disorder Act 1998. It was held that evidence of propensity to commit sexual offences against young males was relevant and admissible because the purpose of the proceedings was to seek to predict the extent to which past events gave rise to reasonable cause for believing that an order was necessary to protect the public from serious harm; and that the admission of such evidence did not breach either Article 6 or Article 8 of the European Convention on Human Rights and did not render the proceedings unfair.
- (4) **In Mood Music Publishing Co. Ltd v De Wolfe Publishing Ltd [1976] Ch. 119**, similar fact evidence was admitted in an action for infringement of copyright. The defendants admitted the similarity between the copyright and the work which they had produced, but alleged that the similarity was coincidental. Evidence was admitted to show that the defendant had produced musical works bearing a close resemblance to musical works which were the subject of the copyright. The Court of Appeal held that the evidence had been properly admitted to rebut the allegation of coincidence.

- (5) In the leading case of **O'Brien v Chief Constable of South Wales Police** [2005] 2 WLR 2038, HL, the House of Lords held that evidence had been properly admitted to show that the test of admissibility in civil cases was different from that which applied in criminal cases.

Analysis

[15] The principles governing same fact evidence in civil cases were laid down by Lord Bingham Of Cornhill in the House of Lords decision in **O' Brien v Chief Constable of South Wales Police** (2005) 2 AC 534. The case confirms a two-stage test; first, the question to be posed is whether the similar fact evidence is admissible. To be admissible, it must be logically probative of an issue in the case and evidence, which is not sufficiently similar to the evidence in the case before the court must be excluded. At this stage, the inquiry must be fact sensitive. Second, once it is decided that the evidence is admissible, the court must then ask itself whether it ought, in the exercise of its discretion, to refuse to allow it to be admitted.

[16] The defendant's challenge to the allegedly offensive paragraphs is essentially about relevance and admissibility of the evidence of the death of the past employee who is not a party to the claim. The defendant contends the offensive paragraphs, if impugned, will not affect the claimant's cause of action or remedies if successful at trial. The defendant also contends that the previous deceased had not brought any proceedings against the defendant and limitation of action would arise if pursued at this late stage. The defendant avers that excising the paragraphs would result in a more efficient trial process and reduce the prejudice to the defendant.

[17] The claimant's pleadings have outlined the cause of action against the defendant. The claimant is seeking to establish that the defendant owed a duty of care to the deceased, failed to provide a safe place of work and exposed the deceased to the toxic substances which eventually led to the untimely death. The claimant in an attempt to buttress her assertions has referenced the fact that another employee

who was engaged in similar type of duties as the deceased case met his demise from a related type disease. The claimant is not seeking to make the defendant liable for both deceased past employees. I am of the view that the fact that the deceased "Fanus" is not made a party to the claim is of no moment. The claimant is merely seeking to establish a nexus between the causes of death of persons purportedly exposed to noxious substances during employment at the defendant's business place. The claimant produced the death certificates to reflect that both deceased persons died of respiratory failure among other diagnosis.

[18] Whether this assertion is probative and admissible to the claimant's case is a matter to be determined after all the evidence and disclosure is complete. Expert evidence would have to be provided to assist the court to make such a decision. I am of the view that the issue of similar fact evidence is not appropriate for striking out at case management stage. It would result in a pre-emptive decision as to the admissibility or probative value of the evidence in advance of the full disclosure and evidence.

[19] The defendant conceded on that point but was of the view that the claimant would not be prejudiced. I am of the contrary view as it would deny the claimant an opportunity to properly present her evidence at a very early stage in the process. This would be an exercise not in keeping with the overriding objectives.

[20] I am of the opinion that the issues raised in the defendant's application are issues to be determined after consideration of all the evidence before the court after full disclosure either at pre-trial or trial. To strike out the paragraphs at this early stage may cause an injustice to the claimant and his ability to prove her claim. The question of the probative value of the alleged similar fact evidence is a matter to be left for consideration by the trial Judge.

[21] The Court of Appeal in **Joseph W. Horsford v Geoffrey Croft**¹ per Blenman JA.

States :

“ It is noteworthy that the issue of whether or not a case management judge should deal with the question of admissibility of evidence at a preliminary hearing was addressed in **Stroude v Beazer Homes Ltd.**¹⁰ In this case the Court of Appeal of England answered the question in the negative. It held that:

“In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action...”

[22] In deciding how to exercise its discretion, the court must consider the overriding objective of enabling the court to deal with cases justly in accordance with the CPR 2000. It is for the trial judge to determine the weight or probative force of the similar fact evidence and whether or not it should be expunged. In making that decision the court would also take into account any potential tendency of lengthening the proceedings, added costs and complexity to weigh against admissibility unless there are strong arguments to rule otherwise.

[23] The responsibility to convince the court that the evidence is relevant and admissible rests on the claimant. It is for the court at pretrial or at trial to decide whether the evidence is relevant to the entire issue. It would be unjust to deny the claimant an opportunity to so do at this early stage. The claimant would be deprived of her reliance of the similar fact evidence which may strengthen her case through the process of disclosure and other court proceedings such as a request for further information. The defendant on the other hand can be adequately compensated in costs if the court is persuaded otherwise.

¹ ANUHCVP2014/0006

[24] Accordingly, for the reasons outlined above I am of the view that the defendant's application to strike paragraphs 19 and 20 of the claimant's statement of case is premature and is therefore refused. I also award costs to the claimant in the sum of \$750.00.

Order

[25] In summary it is hereby ordered as follows:

1. The defendant's application to strike out paragraphs 19 and 21 of the claimant's statement of case is refused.
2. Costs to the claimant in the sum of \$750.00.
3. The matter shall be listed for further case management during the month of February 2017, on a date to be notified by the court office.

**AGNES ACTIE
MASTER**