

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2015/0280

Between:

BUZZMAKER LLC

Claimant

and

LINDSAY FITZ-PATRICK GRANT

Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Ms. Kurlyn Merchant for the Claimant

Mr. Jonel Powell with Ms. Kimloy Walker for the defendant

2016: September 12

Summary Judgment – Striking Out - Contract with Unincorporated Associations – Liability of Individuals Who Expressly or Impliedly Authorise Contract – Foreign Law – Requirement to Plead and Prove Foreign Law

JUDGMENT

[1] **CORBIN LINCOLN M** : The claimant has applied for summary judgment or alternatively to strike out the defence.

The Claim

[2] The statement of claim avers that:

(1) The claimant is a company registered in Virginia, United States of America.

- (2) The defendant is a barrister and was at all material times a member and political leader of the People's Action Movement ("**PAM**"), an unregistered political party.
- (3) By a contract in writing dated 29th May 2009 between the claimant and the defendant, as a member and political leader of PAM, the claimant agreed to provide services as a political consultant and or campaign strategist and or web campaign strategy manager for the 2010 St. Kitts and Nevis election campaign ("**the contract**").
- (4) It was an express term of the contract that the claimant would invoice the defendant on a monthly basis for services provided.
- (5) The claimant invoiced the defendant for services rendered during the period July 2009 through December 2009 for a total of US\$28,841.20. The defendant has paid a total of US\$18,235.00 , the last payment being on 14th November 2011.
- (6) The claimant seeks the sum of US\$10,606.20 which is outstanding plus interest in accordance with the terms of the agreement at a rate of 5% for every 15 calendar days the outstanding sum remains unpaid.

The Defence

[3] The defence avers that :

- (1) The defendant in his capacity as then political leader of PAM and only in that capacity executed the contract on behalf of PAM with the claimant for consulting and related services.
- (2) The defendant ceased to act as political leader of PAM in September 2012.
- (3) The defendant has never in his personal capacity entered into a contract or agreement with the claimant.

- (4) The defendant denies that it was an express term of the contract that the claimant would invoice the claimant on a monthly basis. Paragraph 3 of the contract entitled "Invoicing & Payment" provides that "Buzzmaker shall render monthly invoices to PAM"
- (5) As to paragraph 7 that " *The defendant admits to paragraph [sic] to the extent that the Claimant did issue an invoice in relation to the subject matter contract however such invoice was issued to PAM as the party privy to the respective contract.*"
- (6) The defendant neither admits nor denies the sum alleged to have been paid and alleged to be outstanding and relies on matters set out in (1) and (2) above. I note that the defendant does not state why he neither admits nor denies these allegations.
- (7) The defendant neither admits nor denies the claim for interest pursuant to the contract and relies on matters set out in (1) and (2) above.
- (8) The defendant denies any claim made against him by the claimant.

The Claimant's Application

[4] The grounds of the claimant's application are that:

- (1) The facts set out in the defence, even if true, do not amount in law to a defence.
- (2) The defendant by his defence has admitted that he entered into the agreement with the claimant in his capacity as then political leader of PAM.
- (3) PAM is an unregistered unincorporated entity which has no legal personality and as such can neither sue or be sued on contracts made in its name or on its behalf.
- (4) The defendant is a member of the said entity and authorized the contract.

(5) The defendant has no real prospect of successfully defending the claim.

(6) The defendant has produced nothing to persuade the court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant.

[5] The application is supported by an affidavit of Matthew McMillan. The affidavit states, among other things, that:

(1) The defendant by his own defence is purporting to have acted as an agent for PAM, an unregistered unincorporated entity.

(2) At all times the defendant impliedly or expressly authorized the giving of the order to contract the services of the claimant and all of the dealings of the claimant were had with the defendant.

(3) The deponent is not a member of PAM and therefore does not know who all of its members are. He is however aware that the defendant was and is still a member.

(4) The defendant has therefore provided no evidence to disclose any reasonable ground for defending the claim and has shown no real prospect of successfully defending the claim.

The Defendant's Response

[6] On 12th April 2016 the court directed the defendant to file and serve an affidavit in answer to the claimant's application for summary judgment. The defendant failed to comply with this order.

[7] The defendant did file an affidavit of Delrose Norford on 21st April 2016. This affidavit is in response to the claimant's affidavit filed on 1st April 2016 opposing the defendant's application for an extension of time to file a defence and relief from sanctions. Since the defendant's application for an extension of time to file a defence was heard and determined at the hearing on 12th April 2016 I am unable to ascertain the purpose of the affidavit filed on 21st April 2016.

- [8] The result is that the evidence adduced by the claimant in support of the application for summary judgment is unchallenged. The defendant filed submissions.

The Principles Governing Striking Out of a Statement of Case and Summary Judgment

- [9] **CPR 26.3 (1) (b)** states that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim.

- [10] It is well established that the power to strike out should be used sparingly. In **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al**¹ Sir Byron J put it thus

*"this summary procedure should only be used in clear and obvious cases, when it can be seen **on the face of it** (emphasis mine), that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."*

- [11] **CPR 15.2** states that the court may give summary judgment on the claim or a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or the issue;

- [12] Civil Procedure, Volume 1, White Book Service 2008, paragraph 24.2.3, in discussing rule 24.2.5 of the UK CPR (equivalent to rule 15.2 of the CPR 2000) states that:

'in order to defeat the application for summary judgment it is sufficient for the respondent to show some 'prospect' i.e some chance of success. That prospect must be 'real' i.e the court will disregard prospects that are false, fanciful or imaginary...The respondent is not required to show that his case will probably succeed at trial. A case may be held to have a 'real prospect' of success even if it is improbable.'

¹ Civil Appeal No 20A of 1997

[13] In **Swain v Hillman**², Lord Woolf, in addressing the reasons for the *contrast in the language* between the 2 equivalent UK CPR rules, explained that under rule 3.4, (*equivalent to Rule 26.3 CPR 2000*) unlike under rule 24.2 (*equivalent to Rule 15.2 CPR 2000*) the court was generally only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending a claim. In **Monsanto plc v Tilly**, The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ opined that rule 24.2 (*equivalent to Rule 15.2 of the CPR 2000*) gives somewhat wider scope for dismissing an action or defence.

[14] In **Dr. Martin G.C Didier et al v Royal Caribbean Cruises Ltd.**³ it was held that:

“The legal tests for entering summary judgment pursuant to CPR 15.2 and striking out a party’s statement of case pursuant to CPR 26.3(1)(b) are not the same and should not be confused with each other. The summary judgment and strike out procedures are distinct – they have different procedural requirements, are used in different circumstances and have different legal consequences. In particular, the two cannot operate simultaneously. In disposing of a claim using the Part 15 summary judgment procedure, the legal issues in the case are considered by the court and then it is determined, on a balance of probabilities and in light of the affidavit evidence adduced by the parties, whether one party or the other has no real prospect of succeeding on the claim. A judgment entered on a summary judgment application is a judgment on the merits which operates as issue estoppel. No further litigation on the same issue(s) will be entertained by the court. On the other hand, an application for a party’s statement of case to be struck out pursuant to CPR 26.3(1)(b) is decided by the court solely on the parties’ pleaded cases before it. All facts pleaded in the statement of case are assumed to be true for this purpose and no additional evidence is adduced. If the court finds that the pleadings are untenable as a matter of law and disclose no reasonable ground for bringing or defending the claim, then the statement of case may be struck out. Striking out, however, does not produce a judgment on the merits and a party whose claim is struck out is not precluded from remedying its faults and bringing further legal proceedings in relation to the same dispute.”

² [2001] 1 All ER 91

³ SLUHCVP2014/0024

Summary Judgment

- [15] In determining the claimant's application for summary judgment the court is required to consider the legal issues and determine on a balance of probabilities and in light of the affidavit evidence adduced by the parties whether the defendant has a real prospect of successfully defending the claim.

Foreign Law

- [16] The defendant submits that:

“ Clause 10 of the agreement provides that the law under which the contract is to be construed is the law of the District of Columbia, United States of America. The decision as to the personal liability of the Defendant/Respondent must be made in accordance with the laws of the District of Columbia. Questions of foreign law are questions of facts that must be determined upon the admission of expert evidence. Once proper evidence is received the court can make a determination as to whether to rely on that statement of law or may conclude that the law of the District of Columbia and the law of the Federation of Saint Christopher and Nevis are sufficiently interrelated so that the law of the Federation is to be used. A cursory view of the law of the District of Columbia indicates in Division V, Title 29, Chapter 11, Section 8 of the District of Columbia Code that the debt of an unincorporated association is the debt of the association and not the debt of the member or manager. More detailed advice is required for the court to make a proper assessment. Because this question has to be determined we submit that summary judgment cannot be granted in this case”

- [17] The defendant provided no legal authority in support of the above submissions.

- [18] The claimant submits that the defendant must plead and prove the difference between foreign law and local law. The claimant provided no authorities on this point.

[19] The applicable principles on pleading and proving foreign law were succinctly stated by the learned authors of **Dicey, Morris and Collins on the Conflict of Laws**⁴ thus:

“(1) **Foreign law a fact.** The principle that, in an English court, foreign law is a matter of fact has long been well established: it must be pleaded, and it must be proved: ... It is also said to follow that if the parties elect not to prove the content of foreign law, a case will be decided by the application of English domestic law as though the case were a wholly domestic one, and this is generally true. But in recent years there have been increasing signs that this cannot invariably follow, and in cases where it would be wholly artificial to apply rules of English law to an issue governed by foreign law, a court may simply regard a party who has pleaded but who failed to prove foreign law with sufficient specificity as will allow an English court simply to apply it, as having failed to establish his case without regard to the corresponding principle of English domestic law.

(i) ***Foreign law must be pleaded.*** The general rule is that if a party wishes to rely on a foreign law he must plead it in the same way as any other fact. Unless this is done, the court will decide a case containing foreign elements as though it were a purely domestic English case ...

(ii) ***Foreign law must be proved.*** English courts take judicial notice of the law of England and of notorious facts, but not of foreign law. Consequently, foreign law must be proved in each case: it cannot be deduced from previous English decisions in which the same rule of foreign law has been before the court, although such decisions may be admissible in evidence for the purpose of proving foreign law. Indeed it is perfectly possible for the English court to reach different conclusions in different cases as to the effect of a given rule of foreign law ...'

[20] These principles have been held to apply in this jurisdiction.⁵

⁴ 15th edn, 2012, paras 9-002 to 9-004

⁵ Ronald Green v Petter St. Jean and Maynard Joseph v Roosevelt Skerit DOMHCVAP2012/0001.

- [21] The defendant, in submissions, seeks to rely on foreign law in relation to the determination of the issue of whether the defendant can be held personally liable. The hurdle which the defendant faces is that he has not pleaded the foreign law - which is a question of fact - on which he relies.
- [22] In the absence of such pleadings the defendant would be unable to adduce evidence in response to this application or at trial on the foreign law on which he now seeks to rely by way of submissions. In the absence of any pleadings on foreign law the court is entitled to determine the case based on domestic law.
- [23] In my view these principles apply even in cases such as this where the contract may contain a governing law clause in favour of a foreign law. It is for the party who wishes to rely on the foreign law to plead and prove it. If neither party raises the issue of the foreign law then the court is entitled to decide the case based on domestic law. Thus for example in **Aluminium Industrie Vaasen B.V. v. Romalpa Aluminium Ltd** ⁶ the contract in issue contained an express governing law clause in favour of Dutch law but was nonetheless decided according to English domestic law as neither party invoked Dutch law.
- [24] In the absence of any pleadings on foreign law I will proceed to determine the issues before the court based on domestic law.

Does the Defendant Have A Real Prospect of Defending The Claim?

- [25] The claimant's statement of claim avers that a contract was entered into with the defendant for services. A perusal of the contract shows that the contract was made between the claimant and PAM. The claimant submits that PAM is an unregistered unincorporated association which has no legal personality and as such can neither sue or be sued on contracts made in its name or on its behalf. Further, the defendant by his own defence is purporting to have acted as an agent for PAM, an unregistered unincorporated entity.

⁶ [1976] 1 WLR 676

[26] The issues arising for consideration are:

- (1) What is the nature of the organization PAM?
- (2) Is the defendant a proper party?
- (3) If so, does the defence disclose any reasonable grounds for defending the claim.

[27] As stated, the defendant had not adduced any evidence in relation this application and thus the evidence of the claimant is unchallenged.

The Nature of PAM

[28] The claimant's statement of claim avers that PAM is an unregistered political party organized in 1965. This is not expressly denied by the defendant and if a denial is to be implied no alternative position is advanced in relation to the legal status of PAM.

[29] The evidence of the claimant is that PAM is an unregistered unincorporated entity which has no legal personality. This is not disputed and I therefore proceed on the premise that PAM is an unregistered unincorporated association.

Is the Defendant a Proper Party?

[30] The contract was made between the claimant and PAM, an unregistered and unincorporated association. Is the defendant therefore a proper party to this claim?

[31] In **Currie v Barton**⁷ O'Connor LJ, in relation to unincorporated associations, said that the law:

"does not recognise that those bodies have any corporate or separate legal existence. They cannot be sued or sue in their own names. You cannot make a contract with the body, because in law it does not exist. It consists of all its members."

⁷ The Times, February 12th 1998 (CA)

[32] If a contract cannot be made with an unincorporated association is the contract between the claimant and PAM a nullity? According to **Chitty on Contracts** ⁸:

“ An unincorporated association is not a legal person and therefore cannot sue or be sued... nor can a contract be made so as to bind all persons who from time to time become members of such an association. But a contract purportedly made by or with an unincorporated association is not necessarily a nullity. If the person or persons who actually made the contract had no authority to contract on behalf of the members they may be held to have contracted personally. On the other hand if they have the authority express or implied of all or some of the members of the association to contract on their behalf the contract can be enforced by or against those members as co-principals to the contract by the ordinary rules of agency.

[33] The learned authors of **Halsbury's Laws of England** ⁹ in discussing contracts with unincorporated associations stated:

“ Where work has been done for, or goods have been supplied to, such an association and there is no statutory provision to the contrary, the question of liability is governed by the rules which applied to contracts made through an agent. The only persons who can be made liable are those who actually gave the order for the work or the goods, or who either expressly or impliedly authorize the giving of the order on their behalf, or rectified the order after it had been given.”

[34] It is not in dispute that the defendant signed the contract as political leader of PAM. The defendant has also not disputed that he remains a member of PAM. The undisputed evidence of the claimant is that all of the dealings of the claimant company were had with the Defendant. The defence has not averred that the defendant did not have authority, express or implied, to contract on behalf of PAM and no evidence to this effect was led. Of course if the defendant did assert that he had no authority then he may be held to have contracted personally.

⁸ 32nd Edition, Vol 1, Part 3, Chapter 10 Section 2(a).

⁹ Volume 22 (2012) /4 , paragraph 350

[35] It may very well be that in addition to the defendant other members of PAM authorized the contract although I note that there is no averment of this or evidence to this effect. The evidence of Mr. McMillian is that he is not a member of PAM, he does not know who the members are and all of his dealings were with the defendant. The defendant is the only person who signed the contract on behalf of PAM. In my view the signing of the contract by the defendant is evidence that the contract was expressly or impliedly authorized by him and thus through the rules of agency he can be made liable for the contract.

[36] In the circumstance I find that the contract can be enforced against the defendant based on the rules of agency. The defendant is therefore a proper party to this action.

Does the defence disclose any reasonable grounds for defending the claim?

[37] The defence does not challenge the existence or validity of the contract or deny the debt. The essence of the defence is that the contract was entered into by the defendant in his capacity as then political leader of PAM and not in his personal capacity.

[38] Having regard to the finding that the contract can be enforced against the defendant based on the rules of agency, the pleadings and the evidence adduced I find that the defendant has no real prospect of successfully defending the claim.

[39] The claimant's application for summary judgment is therefore granted.

[40] I considered entering summary judgment for the sum which the statement of claim avers is owing and interest claimed pursuant to contract. However, upon consideration of the claim I am unable to do so for the following reasons:

- (1) The statement of claim avers that it was an express term of the agreement that the claimant would invoice the defendant monthly. The contract does state this but it does not state a specific sum payable under the contract. It states that the claimant must provide invoices which must be paid in 48 hrs. The statement of claim avers that invoices were provided but the

invoices are not exhibited.

(2) There is a discrepancy in the pleadings with respect to the quantum paid by the defendant.¹⁰

(3) The statement of claim avers that interest is payable pursuant to the contract. However it is not expressly stated the total period for which interest is being claimed, the total amount of interest claimed up to the date of the claim and the daily rate at which interest will accrue after the date of the claim.

[41] In the circumstance summary judgment is entered for the claimant in an amount to be determined by the court.

Striking Out

[42] While it is not necessary to consider the application to strike out the defence having regard to the finding that the defendant has no real prospect of successfully defending the claim, for completeness I will, in the alternative, address the application to strike out the claim

[43] In determining an application to strike out the court considers the pleadings only. Taking into consideration the law with respect to pleading foreign law and the liability of persons who expressly or impliedly authorise contacts on behalf of unincorporated associations discussed above, I find that the defence does not disclose any reasonable grounds for defending the claim.

Costs

[44] The defendant shall pay the claimant prescribed costs on the amount agreed or ordered to be paid on assessment.



Fidela Corbin Lincoln

Master

¹⁰ Paragraph 6 states that \$16,875.80 was paid but the particulars state that \$18,235.00 was paid