

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2013/0157

IN THE MATTER OF THE ESTATE OF ERNEST C. WILKINSON, DECEASED

BETWEEN:

CICELY WILKINSON
ROSLYN WILKINSON
(Personal Representatives of the estate of Ernest C. Wilkinson, deceased)
Claimants

and

KENRICK BANFIELD
VENESCIA FRANCIS-BANFIELD

Defendants

Appearances:

Mrs. Celia Edwards Q.C and M. Shireen Wilkinson for the Claimant
Ms. Venescia Francis-Banfield for the Defendants

2013: June 13
October 24

DECISION

- [1] **MOHAMMED, J.:** The Defendants have applied to strike out the Claimants' claim on the basis that it is an abuse of process since it fails to disclose a cause of action against them.
- [2] According to the Claimants' statement of claim on 8th April 2011, E.C. Wilkinson ("the Deceased") agreed with the Grenada Co-operative Bank ("the Bank") to

guarantee the Defendants' indebtedness to the extent of \$200,000.00. He also authorized the Bank to hold \$200,000.00 as security for the indebtedness of the Defendants. The Deceased passed away on 2nd May 2012 and shortly thereafter the Claimants were appointed his legal personal representatives having obtained a grant of probate. In an effort to complete the administration of the estate of the Deceased, the Claimants attempted to withdraw the said \$200,000.00 from the Bank when they were informed of the hold on the sum. The Claimants then called upon the Defendants to take steps to have the guarantee released, which the Defendants have failed to do. It is the Claimants' case that as a result of the Defendants' failure to take steps to obtain a release of the guarantee and by extension the \$200,000.00 they are unable to complete the administration of the estate of the Deceased.

- [3] The Defendants' application to strike out is based on a few limbs, namely that: the action is premature since the debt is not due and owing; there is no cause of action between the Claimants and the Defendants since there is no privity of contract between them; the Bank as an affected third party should be a party to the action and the guarantee executed by the Deceased is an open, continuous, unrestricted and binds the heirs of the Deceased.
- [4] The Claimants' position is the claim is not premature since they have a cause of action in equity against the Defendants and they have no claim against the Bank.
- [5] The sole issue to be determined by the Court in this application is whether the Claimants' pleaded case has established a cause of action against the Defendants.
- [6] CPR 26.3(1) (b) provides the Court with the power to strike out an action. Striking out is a draconian step which a Court is well advised to use sparingly and only do so in obvious case.

[7] In **Citgo Global Custody v Y2K Finance**¹ Edwards JA provided some guiding principles which the Court ought to have when determining whether to strike out a statement of claim as:

“...the following circumstances are identified as providing reason for not striking out; where the argument involves a substantive point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully developed. It is also well settled that the jurisdiction to strike out ought to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial and the ability to strengthen its case through the process of disclosure and other court procedures such as request for information; and the examination and cross-examination often change the complexion of the case. Also, before using CPR 26.3 (1) to dispose of ‘side issues’, one should be taken to ensure “that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding whether to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in any application must be exercised in accordance with the overriding objective of dealing with cases justly.”

[7] The Defendants' application is dismissed for the following reasons:

- (a) The Claimants have established that they have a cause of action in equity against the Defendants. The Claimants are seeking an order of the court to direct the Defendants to obtain a discharge of the guarantee from the Bank and to ensure that the Bank releases the \$200,000.00 which it now holds. The Claimants as legal personal representatives of the estate of the deceased have a duty to call in and distribute the estate (**Tristram & Coote's Probate Practice**). The obligation to honour the guarantee is a liability on the estate of the Deceased and the Claimants are entitled to seek relief from the Court to have the Defendants release the estate from this obligation/liability. **Ascheron v Thedegar Dry Dock and Wharf Company Limited**³ established the position that a surety has a right in equity to compel a debtor to be relieved from his obligation under a guarantee once the debt is due and owing. In my view the Claimants in this matter is seeking to pursue their equitable rights in

¹ BVICVA No 22/2008

² 28th ed at page 510

³ [1909] 2 Chancery 401

having the Defendants, who are the debtors, to discharge the debt or seek to have them released from the guarantee of having the debt discharged.

- (b) The Claimants have acted properly in not joining the Bank as a party since the relief they seek is against the Defendants. According to **Atkins Court Forms Volume 20**⁴ which I paraphrase, a surety has no right against the creditor to seek a discharge but it has an equitable right against the debtor to seek to be indemnified once the debt has become payable and to call upon the debtor to discharge the debt. I do not share the Defendants' view that the action as set out by the Claimants is not proper since it fails to include the Bank as a party to this matter. In my view the Bank is a third party which has the benefit of the guarantee which was secured due to an arrangement between the Defendants and the Deceased. The only way the Bank can release the obligation of the surety, in this case, the Deceased's estate, is if satisfactory alternative arrangements are made by the Defendants with the Bank. In my view, there is nothing for the Bank to do or to be ordered to do. The primary duty to repay the disbursed loan remains with the Defendants and by extension the surety, the Deceased's estate, and the Bank will suffer no prejudice. It is for the Defendants to secure the release, not the Bank.
- (c) The action is not premature. In the instant matter it was not disputed that the \$200,000.00 for which the guarantee was executed by the Deceased has been disbursed by the Bank to the Defendants. **Tate v Crewdson**⁵ endorsed the position that once the sum has been disbursed the debt is due and owing and there is no need for a formal demand for the cause of action to accrue. In my judgment, the total sum having been disbursed bank is now due and owing to the Bank despite the Defendants having not fallen into arrears with the repayments.

⁴ Page 116

⁵ [1938] 3 All ER at page 43

- (d) There are substantive issues which arise from the claim to be determined at the trial of the action which include: (i) whether the guarantee executed by the Deceased can be determined upon the death of the Deceased; and (ii) if not, how does the subsistence of the guarantee which is a liability for the estate of the Deceased impact on the Claimants' duties as legal personal representatives of the estate. This list is by no means exhaustive.

Order

- [8] The Defendants' notice of application filed 9th May 2013 is dismissed with costs to the Claimants to be assessed if not agreed.

Margaret Y. Mohammed
High Court Judge