

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO: 235 of 2014

BETWEEN

TOMMY LYNN HAUGEN

CLAIMANT

AND

**CAYE INTERNATIONAL BANK LIMITED
JOEL M. NAGEL**

**1st DEFENDANT
2nd DEFENDANT**

Keywords: Striking out a Statement of Claim as it does not disclose a reasonable ground for bringing the claim against a Defendant.

Whether desirable or just to remove a Party.

Capacity of Party: as Agent or in Personal Capacity.

Limitation Period.

The removal of Party from Claim as likely to obstruct the just disposal of the proceedings.

Before the Honourable Mr. Justice Courtney A. Abel

Hearing Dates: 17th November 2014
8th June 2015

Aparances:

Mrs. Julie Ann Ellis Bradley for the Applicant/2nd Defendant.

Ms. Pricilla J. Banner for the Respondent/Claimant.

DECISION
Delivered on the 8th day of June 2015

Introduction

- [1] This is a written decision of an oral decision made on the 17th November 2014 that the 2nd Defendant, Joel M. Nagel, should not be removed as a Defendant from the present claim.
- [2] The 2nd Defendant is arguing that he should be removed as a Defendant as:
 - (a) The Statement of claim does not disclose a reasonable ground for bringing the claim against him;
 - (b) It is undesirable that he should be a party;
 - (c) All dealings between him and the claimant was in his capacity as a spokesperson and general counsel for the 2nd Defendant and not in his personal capacity;
 - (d) The limitation period may apply to any claim against him;
 - (e) It is just to remove him;
 - (f) The removal of the 2nd Defendant from the claim is not likely to obstruct the just disposal of the proceedings.
- [3] The central question for determination is whether the claim and statement of case discloses a reasonable ground for bringing the present claim.

Background

- [4] On the 8th May 2014 the Claimant filed a Claim supported by a Statement of Claim in which he sought various reliefs from both Defendants for fraudulent misrepresentation and inducement.
- [5] The 2nd Defendant filed an application on the 2nd July 2014 applying to be removed as a Defendant. The application is on the above grounds¹ all of which are supported by an Affidavit sworn by the 2nd Defendant on the 1st July 2014. The Claimant sought to substantiate his application for removal by deposing to certain facts and/or making allegations objecting to the claim on the basis that it does not disclose any reasonable claim and or cause of action against him personally.

¹ See Paragraph 2 above.

- [6] The 2nd Defendant deposed to being the Chairman of the Board of the 1st Defendant Company registered and operating in Belize and which company had applied for a class ‘A’ Banking Licence under the laws of Belize. Also that the claim is really against him in his capacity as agent for the 1st Defendant and not against him personally; and that all matters may be conveniently tried between the Claimant and the 1st Defendant without him (2nd Defendant) as a party.
- [7] The claim alleges that:
- (1) The 2nd Defendant, as a promoter of the 1st Defendant Company:
 - (a) on or about 14th May 2003, fraudulently and falsely misrepresented that the 1st Defendant had a class ‘A’ Banking Licence under the laws of Belize and thereby induced the claimant to subscribe for shares in the 1st Defendant, and
 - (b) fraudulently and falsely represented that between September 2003 and 2012 the Claimant was a shareholder of the 1st Defendant.
 - (2) The representation that the 1st Defendant had a class ‘A’ Banking Licence under the laws of Belize was at the time false in that the 1st Defendant had not been formed until the 14th August 2003 and did not have a class ‘A’ Banking Licence under the laws of Belize but only acquired one on the 29th September 2003.
 - (3) The representation that the Claimant was a shareholder of the 1st Defendant was at the time false in that the Claimant was never a registered shareholder of the 1st Defendant.
- [8] The 2nd Defendant alleges that the above representations (that the 1st Defendant had a class ‘A’ Banking Licence and that the Claimant was a shareholder of the 1st Defendant) were in substance and in fact true and was not made fraudulently and with an intention to defraud or deceive the Claimant but were made honestly believing the same to be true and were true and such representations were made in the 2nd Defendant’s capacity as counsel, chairman and or ‘spokesperson’ of the 1st Defendant company.
- [9] The 2nd Defendant also alleges and sought to prove by evidence that (a) the Central Bank of Belize required that a prospective applicant for a banking licence must

have a “spokesperson” and the 2nd Defendant was so named, and (b) that the Central Bank of Belize had in fact on the 4th March 2003 advised the 2nd Defendant of the granting of an unrestricted class ‘A’ offshore banking licence subject to certain terms and conditions.

- [10] The 2nd Defendant also deposed to having read an advance and draft Defence and Counterclaim of the 1st Defendant and verily believed that he should be removed as a Defendant and that all matters may be conveniently tried between the Claimant and the 1st Defendant and exhibited a copy of this draft Defence.

The Issues

- [11] Whether the Statement of claim discloses a reasonable ground for bringing the claim against the 2nd Defendant.
- [12] Whether it is undesirable that the 2nd Defendant should be a party to the present claim?
- [13] Whether all dealings between the 2nd Defendant and the Claimant was in the 2nd Defendant’s capacity as a spokesperson and general counsel for the 1st Defendant and not in his personal capacity?
- [14] Whether the limitation period may apply to any claim against the 2nd Defendant?
- [15] Whether it is just to remove the 2nd Defendant from the claim?
- [16] Whether the removal of the 2nd Defendant from the claim is not likely to obstruct the just disposal of the proceedings.

Whether the Statement Of Claim Does Not Disclose A Reasonable Ground For Bringing the Claim Against Him?

- [17] I have carefully perused the Statement of Claim and the authorities on the subject, some of which I have reviewed in my recent decision given in the Belize case: **Anthony Rath & Naturallight Productions Ltd v Birdsall, Voss & Associates Inc; Anthony Rath & Natural light Productions Limited v The Belize Tourism Board & The Belize Hotel Association**², and I have concluded that the claim discloses a reasonable cause and ground for bringing the claim against the 2nd Defendant.

² Consolidated Claims Nos: 456 of 2011 and 26 of 2013. See Paragraphs 29 – 37.

- [18] Paragraph 3 of the Statement of Claim does in my view contain a typographical error (where it is pleaded that the 2nd Defendant was at all material times a promoter of the “Claimant” instead of the “1st Defendant”) which could be corrected by an amendment. Also the legal basis of the alleged fraudulent misrepresentation (contract or tort) could have been expressly pleaded.
- [19] Other aspects of the claim, which may be tenuous, is nevertheless sufficiently pleaded, in my view, to ground a reasonable cause of action not to be struck out at this stage - as it is not bound to fail.
- [20] Further, the claim does disclose a reasonable cause of action against the 2nd Defendant by pleading the 1st Defendant making a representation, as its pre-incorporation promotor and does purport to make a sufficient and reasonable claim against the 2nd Defendant personally (although it could have been spelt out in more explicit terms) for fraudulent misrepresentation and inducement.
- [21] The present application for strike out, in my view, is not a plain and obvious case for disposal by this summary process as it is not an obvious case, from the face of the claim, that it is unsustainable or cannot succeed; nor is it a case that is obviously unsustainable; and neither does it obviously fail to disclose a legally recognizable claim against the 2nd Defendant.
- [22] In my view any defects in the claim can be cured by a suitable amendment to the Statement of claim or be proved by appropriate evidence in the witness statement or at trial.
- [23] In my view this is a case where the strength of the case may not be clear because it has not been fully investigated as it is a claim which raises matters for evidence to be proved at trial (including the capacity in which the 2nd Defendant was acting, whether on behalf of the 1st Defendant or in his own personal capacity); and is a matter for such evidence and the possible strengthening process of disclosure and other court procedures. Also it is a case where examination and cross-examination of witnesses at trial can possibly change the complexion of the case prior to determination by the judge at trial.

- [24] I have determined that in all the circumstances that the claim discloses a reasonable ground for bringing the claim and that I should not exercise my discretion to remove the 2nd Defendant from the claim.
- [25] Also fraudulent misrepresentation is sufficiently pleaded with particularity to disclose the substance of the claim which the 2nd Defendant has to meet.
- [26] In my view bearing **CPR 2005** and the overriding objectives is there to discourage applications such as the present one, which in my view is where such defects can be cured by either an appropriate amendment or by the filing of appropriate witness statement at an early stage (to put the 2nd Defendant on notice of the nature of case which he has to meet at trial).

Whether it is Undesirable that the 2nd Defendant Should Be a Party?

- [27] I have determined that in all the circumstances of the pleaded claim it is not desirable to remove the 2nd Defendant from the claim at this stage and that the Claimant should be given an opportunity to amend the claim with an appropriate cost order.

Whether All Dealings Between the 2nd Defendant and the Claimant in the Claim was in 2nd Defendant's capacity as a Spokesperson and general counsel for the 1st Defendant and not in his Personal Capacity?

- [28] I have determined that in all the circumstances of the pleaded claim it is not possible or desirable to make a factual determination that all dealings between the 2nd Defendant and the Claimant was in the 2nd Defendant's capacity as a spokesperson and general counsel for the 1st Defendant and not in his personal capacity.
- [29] The substance of the claim is sufficiently pleaded for the 2nd Defendant to know the substance of the claim against him and it is now for the Claimant to prove his claim at the trial by appropriate evidence and for the court to make a determination then and not now.

Whether The Limitation Period May Apply To Any Claim against 2nd Defendant?

- [30] I have determined that in all the circumstances of the pleaded claim it is not possible or desirable to make a determination as to whether the limitation period may apply to any claim against the 2nd Defendant.

[31] I will allow the 2nd Defendant in his Defence and at the trial to raise this question and will make a determination as part of the trial process and will make a ruling based on the evidence (including when the Claimant discovered the alleged misrepresentation and inducement and whether the Claimant exercised reasonable or any diligence to discover any such misrepresentation or inducement).

Whether it is Just to Remove 2nd Defendant?

[32] I have determined that in all the circumstances of the pleaded claim it is not just to remove the 2nd Defendant from the claim.

Whether the Removal of the 2nd Defendant from the Claim is likely to obstruct the Just Disposal of the Proceedings?

[33] I have determined that in all the circumstances of the pleaded claim, including the above matters, the removal of the 2nd Defendant from the claim is unlikely to obstruct the just disposal of the proceedings and that a just order would involve the Claimant being given the opportunity to amend the Claim and paying costs to the 2nd Defendant.

Conclusion

[34] I have therefore concluded, having carefully considered the 2nd Defendant's arguments, that the 2nd Defendant, Joel M. Nagel, should not be removed as a Defendant from the present claim.

[35] I will make an order that the Application by the 2nd Defendant, to strike out the claim as against him, is dismissed with costs in the sum of BZ\$1,000 to be paid by the Claimant to the 2nd Defendant by reason of the typographical error in the Statement of Claim (which may be corrected by permission being granted to make an amendment).

[36] I have given direction for the further management and conduct of the claim.

The Hon. Mr. Justice Courtney A. Abel