IN THE HIGH COURT OF BELIZE A.D. 2018

CLAIM No. CV614 of 2018

BETWEEN:

[1] MERIDIAN ENTERPRISE LIMITED

Claimant/Respondent

and

[1] FYFFES GROUP LIMITED

1st Defendant/Applicant

[2] BANANA GROWERS ASSOCIATION

2nd Defendant

Appearances:

Mr. Eamon H Courtenay SC and Pricilla J. Banner for the Claimant/Respondent

Mr. Rodney Williams and Mr. Nigel O. Ebanks for the First Defendant/Applicant

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2024: February 7th ;

May 13th.

REASONS

[1] **ALEXANDER, J.**: On 7th February 2024 I refused the applications of the 1st defendant/applicant ("Fyffes") to strike out the claim and to set aside service. Fyffes has appealed that decision. I now provide my reasons for my decision.

[2] There were two applications before me. On the strike out application, Fyffes stated that the claim is abusive as it relates to Fyffes. The claimant/respondent ("the claimant") is not a party to any agreement with Fyffes. There are no reasonable grounds advanced by the claimant for bringing the claim. The court does not have the jurisdiction to entertain the claim.

[3] On the application to set aside service out of the jurisdiction, the court should proceed cautiously in exercising the extraordinary or exorbitant power to take jurisdiction over a

foreign resident. Service should be set aside, as the claimant has not established that its claim qualifies as one over which the court ought to exercise its jurisdiction.

[4] The claimant advances that the application is to be refused. The court is not in a position to resolve the issue at this stage, based on the insufficiency of evidence and conflicts on the affidavits.

[5] The applications were disposed of based on pleadings and legal submissions.

Reliefs sought

[6] Fyffes sought the following reliefs:

1. An order setting aside service of the Claim Form and Statement of Claim purportedly effected on the 1st Defendant outside the jurisdiction;
2. An order declaring that this Court does not have jurisdiction to try the Claim as against the 1st Defendant;
3. Alternatively, an order that the Court declines to exercise its jurisdiction to try this Claim as against the 1st Defendant;
4. Alternatively, an order that the Claim be struck out as against the 1st Defendant;
5. In the further alternative, an order pursuant to CPR 9.7 that the period for filing a defence herein be extended to twenty-one (21) days from the date on which the court determines this application.
6. An order that the Claimant pay the costs of this application;
7. Any such further or other relief as the court sees just.

Issues

[7] The issues as the court finds them are:

1. Whether the court has jurisdiction to entertain the claim?
2. Whether the claim is an abuse of process or discloses no reasonable ground for bringing it?
3. Whether permission to serve out of the jurisdiction should be set aside for material non-disclosure?

The Law

[8] Rule 26.3 (1) (b) & (c) of the Civil Proceedings Rules gives the court the authority to strike out a claim in specified circumstances. It reads:

> 26.3 (1) In addition to any other powers 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 –
>
> (a) …
>
> (b) that 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;
>
> (c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim.

Strike-out Application

Jurisdiction

[9] The claim alleges breach of a banana supply contract. The claimant seeks damages and other relief for breach of a written agreement dated 11th October 2012 or alternatively, for breach of an "oral" agreement that was partly oral, partly in writing and/or made partly by conduct.

[10] Fyffes says that a previous claim ("Claim 98 of 2017") against it was struck out. The court in Claim 98 of 2017 was not satisfied that the claimant was a party to the contract on which it had sued the defendants. That decision was appealed but withdrawn after Fyffes made a preliminary objection to strike out the appeal. Before withdrawing the appeal, the claimant commenced the instant claim.

[11] Fyffes states that the claimant's conduct in bringing this claim is abusive as far as it relates to Fyffes. Fyffes provides the following bases to substantiate its application:

i. Both Claim 98 of 2017 and this present claim arise from the same facts.
ii. Both the claimant and Fyffes are parties to both claims.
iii. In both claims, the claimant has sought essentially the same reliefs from Fyffes.
iv. There is nothing on the facts of this case to justify either:
    a. Bringing this claim as a separate claim; or

b. In any event, litigating in increments whatever issues may be in dispute between the claimant and Fyffes.

[12] Fyffes relied on a wealth of cases (most distinguishable) to support its arguments that the instant case must fail on its pleadings, as an abuse and as disclosing no reasonable grounds for bringing or defending it. The main thrust for the abuse argument was that the claimant has returned to court seeking reliefs on the same facts, with the same parties for the same reliefs, as in Claim 98 of 2017. Counsel for Fyffes, Mr. Rodwell Williams, decried the "incremental" litigating of issues by the claimant. In written submissions, Mr. Williams cited **Reynolds-Greene v Bank of Nova Scotia**[1] where it was stated that:

> Cases where striking out is appropriate … include: (a) where the statement of case raises an unwinnable case where continuing the proceedings is without possible benefit to the respondent and would waste resources on both sides; (b) where the statement of case does not raise a valid claim … **A statement of case ought also to be struck out if the facts set out do not constitute the cause of action** … alleged, or if the relief sought would not be ordered. [Emphasis added].

[13] In response, the claimant's counsel, Mr. Courtenay, posits that in the several affidavits (in support and in opposition) in this matter, there is a dispute as to who are the parties to the 2013-2017 Agreement. More particularly, in issue is whether the claimant is a party to the 2013-2017 Agreement for exclusive sale and purchase of bananas to Fyffes. The question of the identity of the parties to the 2013-2017 Agreement is to be tried as a preliminary issue. Fyffes has neither applied for this nor for the cross-examination of the claimant's affiants.

[14] On the jurisdiction point, Mr. Courtenay referenced CPR 26.3(1)(b) & (c) which makes provision for the jurisdiction to strike out under certain conditions. Mr. Courtenay argues that the jurisdiction to strike out is a summary procedure and should be used sparingly. Its use is only appropriate in the most plain and obvious cases. The instant case is not such an obvious or clear case to justify the exercise of this jurisdiction. He relied on several cases including **CITCO Global Custody NV v Y2K Finance Inc.**[2] and **Biscombe et al v Fadelle et al**.[3] In **Biscombe**, the court cited the judgment of Sir Dennis Byron CJ in **Baldwin Spencer v The Attorney General of Antigua et al** (Civil Appeal No. 20 A of 1997) that cautioned that the

[1] AG 2008 HC 23
[2] HCV AP 2008/022, British Virgin Island, Court of Appeal para 12.
[3] Claim No. DOMHCV 2010/0022.

strike out jurisdiction should, "be sparingly exercised in clear and obvious cases, when it can clearly be seen, on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court."[4]

Discussion

[15] My obligation at this stage of the proceedings, faced with the application to strike out, was to determine whether the claim should proceed to trial or be struck out as an abuse of process and/or one that discloses no reasonable cause for bringing or defending it.

[16] On my deliberation on the question of **abuse**, I did not find that the claim is incoherent or defective on its pleadings. There was no argument to be made by Fyffes that it could not ascertain from the pleadings the cause of action against it. The claim before me advances a cause of action that was properly pleaded and particularized, alleging breaches of contract against Fyffes and the second defendant. It is not a claim which at first blush fails to raise a viable cause of action or was unsustainable.

[17] Generally, a claim is not suitable for strike out if it raises a serious live issue of fact that can only properly be determined by hearing oral evidence.[5] I considered Fyffes argument that as against it, the claim did not amount to a viable claim because in the previous Claim 98 of 2017 that court was not satisfied that the then claimant (Meridian) was a party to the contract on which it had sued Fyffes.

[18] The test for striking out under CPR 26.3 (1)(b) requires a decision to be made solely on the parties' pleaded case. There is no need for additional evidence to be adduced.[6] All facts pleaded in the statement of case are assumed to be true for the purpose of getting the order.

[19] In the present claim, the claimant has pleaded the existence of a contract that is part written and part oral, which is a matter for trial. The dispute in the present claim involves determining "parties" to the contract sued on and is a live issue. No defence has been filed yet by Fyffes.

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[4] Biscombe at para. 30.
[5] Reynolds-Greene at para 50.
[6] Citco Global Custody NV v Y2K Finance Inc. BVIHCVAP2008/0022 (delivered 19th October 2009, unreported).

At this point, I must take the pleadings as true. Fyffes does not dispute this or the fact that at this stage, the evidence cannot be tried "unless plainly contradicted by insurmountable material". I haboured no doubt about the soundness of the present pleadings. In my view, the instant claim does not admit of a plain and obvious answer. In the circumstances, I did not find it to be an appropriate case where the claimant should be deprived pre-emptively of its right to a trial based on abuse of process.

[20] I next considered if there were no reasonable grounds for bringing or defending the claim. Fyffes says that as against it, as first defendant, the claimant has shown no reasonable grounds to try the case against Fyffes. To satisfy this ground, Fyffes needed to satisfy me that the claim, on its face, fails to disclose a sustainable claim as a matter of law. This issue too is determined by reference to the pleadings itself. No affidavit evidence needs to be filed.

[21] In **Belize Telemedia Limited et al v Magistrate Ed Usher**[7] Conteh CJ referred to the jurisdiction to strike out a case for disclosing no reasonable grounds for bringing or defending the claim as "a salutary weapon in the court's armoury" that can be used at the CMC stage to sheath the time and resources of the court and parties. He poses two critical questions for consideration of any court faced with these applications. At paragraph 20 of the decision, Conteh CJ emphasised, and I identified wholesale with his statements:

> 20. it is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore **necessary to focus on the intrinsic justice of the case from both sides**: why put the defendant through the travail of a full blown trial when at the end, because of some inherent defect in the claim, it is bound to fail, or why should a claimant be cut short without the benefit of trial if he has a viable case?

[22] It is a proverbial conundrum that Conteh CJ so aptly captures in his description. I, therefore, accept that I must strike out the present claim if it involves engaging in a full-length trial of a defective and unsustainable claim. It is simply a humongous waste of the court's time and resources to allow such a claim to proceed. If, however, a claimant has a viable case, he ought not to be cut short from having his day in court. I have read the statement of claim in the present matter. As it stands, it is not one that is insufficient or justifies a ruling that Fyffes' defence (still to be filed) should be sheath from being filed or from being put to the test in

[7] Action No. 695 of 2008.

these proceedings. On the pleadings, I remain unsatisfied that the claimant has no reasonable grounds for bringing the claim such as it should be cut short at this stage, where the defence is yet to be filed.

Is an Amendment necessary?

[23] Fyffes advances that somehow the claimant would require an amendment to cure defects. It states that any application for an amendment should fail as an amendment cannot put right defects in the claimant's pleadings. There was a lack of clarity here in the argument raised by counsel on the amendment issue. In submissions, Mr. Courtenay for the claimant argued that Fyffes did not disclose what aspect of the pleadings would require curing by amendment. In any event, the claimant did not concede any defect in its claim but maintained that it has the right to cure same, if any exists.

[24] In my view, the claim is not at the stage where the court can issue a ruling, refusing an application that is not before it. Further, there is no defence filed in this matter and I do not have the privilege of a draft defence. Indeed, the trigger for a case management date (close of pleadings) had not yet arrived. Since this claim has yet to come up for case management conference where the issue of amendments will fall for consideration by the court, this argument is preconceived. In any event, CPR 20.1 allows a party to make amendments without the permission of the court at any time before the first CMC. The question of an amendment does not fall for my consideration at this point and, in any event, is not a basis to prohibit a claim from going forward or, indeed, for the grant of a strike out application.

Henderson Principle

[25] I must discuss here the **Henderson v Henderson** principle[8] that holds that there must be finality to litigation. Fyffes, in its attempt to boot out the present claim as not sustainable, relies on the **Henderson** rule to argue that the claimant is attempting to re-litigate issues on which judgment was already obtained in Claim 98 of 2017.

[8] Henderson v Henderson (1843) 3 Hare 100.

[26] There was no disagreement by both learned senior counsel in the application before me that as a broad principle, any claim that seeks to re-litigate an already closed matter or to launch a collateral attack on a previous decision of the court, without legitimate grounds, is an abuse. Thus, if the present claim amounted to "re-litigation", it could be struck out as an abuse.

[27] Mr. Courtenay advanced that abuse of process in the form of "re-litigation" relates to "re-litigation where the party failed to bring his whole case forward in one go and wishes to supplement or bring in other parties in a second set of proceedings." The **Henderson** rule holds that a party must bring his whole case before the court and not do so in a piecemeal fashion to get a "second bite". To determine if litigation amounts to an abuse under this rule, all the circumstances of the case must be looked at and the burden of proving that the re-litigation amounts to an abuse of the court's process lies solely with the party alleging abuse. There is no fundamental disconnect between parties as to **Henderson** or of the need for the court to examine the factual circumstances of each case carefully in holding that the rule applies. The **Henderson** rule operates in the general interest of the public as well as in the interest of the parties themselves.

[28] In **Henderson**, the claim was determined on its **merits**, and it was stated that:

> … the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

[29] I had to seriously consider if the claim at bar, coming as it did after Claim 98 of 2017, was harassing and necessarily abusive. I accepted the crisp pronouncement on **Henderson** in **Barrow v Bankside Members Agency Ltd.**[9] that, "… litigation should not drag on for ever and … a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

[9] [1996] 1 WLR 257, 260.

[30] In **Johnson v Gore Wood**,[10] Lord Bingham stated (demonstrating the development of the law) that it would be "wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive".[11] It seems that to find proceedings are abusive, a court must conduct a broad merit-based judgment taking into account the public and private interests as well as all the facts of the case.[12] The fact that proceedings ended in settlement, or by a judgment, is not determinative of abuse. In effect, there is no presumption against the bringing of successive actions and the burden rests on he who alleges to show it is oppressive or an abuse of process for him to be subjected to the second action.

[31] I find instructive the analysis of the Court of Appeal in **Davies v Carillion Energy Services Ltd et al**[13] where a first action was not litigated to trial and was struck out for non-compliance with an unless order. The judge in the second action found that the second claim was not an abuse. The decision was appealed. The COA identified two types of cases where the question of abuse may arise:

i. Claims struck out on procedural grounds, without considering its merits; and
ii. Claims that raise in a second action issues or facts, which could and should have been, but were not, raised in a first action, which action had resulted in a substantive adjudication or settlement.

[32] The COA in **Davies**, after detailing all the relevant principles, stated:

> Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However, in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been "inexcusable".

[33] It would have been remised of me not to consider the circumstances in which the previous claim was struck out. In the previous litigation (Claim 98 of 2017), there was no defence or conclusion on its merits when it was struck out. There was no evidence tendered or disclosure on the question of the "contracts" if any between the parties in Claim 98 of 2017.

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[10] [2002] 2 AC 1, HL.
[11] Johnson v Gore Wood [2002] 2 AC 1, 31C.
[12] Johnson supra.
[13] [2018] 1 WLR 1734.

The "nuclear option" was exercised against that prior claim based on the pleadings alone. That court rightly found that there was no reasonable ground for bringing the claim since the pleadings did not demonstrate the existence of a contract. There was no adjudication or resolution of the prior claim on its merits. Yes, an appeal was filed in that Claim 98 of 2017 and then withdrawn. I do not see an appeal or its withdrawal as constituting *inexcusable* conduct by the claimant. The claimant had failed in Claim 98 of 2017 to comply with the rules and, rightly, faced the consequences for so doing by having its claim struck out. That created a procedural prohibition not an absolute bar to approaching the court a second time. In this regard, I considered the stellar guidance of Pereira CJ in **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**[14] that on strike out applications:

> … the pleadings alone are examined and if the court finds that they are untenable as a matter of law a party may have his/her claim or defence struck out. This does not preclude that party however, from remedying the faults of their claim or defence and bringing further legal proceedings in relation to the same dispute. They are perfectly entitled to do so.[15]

[34] I have considered all the circumstances of the instant claim before me as against the strike out tests and principles. I satisfied myself that, on the pleaded case, this is not a claim that requires no further investigation or is unlikely to be strengthened if the matter is to proceed beyond the point of this application. As opined in **Davies**, "**the importance of the efficient use of the court's resources does not … trump the overriding need to do justice.**"[16] I find no inexcusable conduct by the present claimant, or abuse, nor did I find any reasonable grounds that the claimant should be shut out from bringing its claim. I find no reasons that I should strike out the present case. I refused the application.

Service out of the Jurisdiction.

[35] CPR 7.7 was considered in determining this application. Fyffes is a foreign defendant and does not naturally fall within the territorial jurisdiction of Belize. On 28th November 2018, the claimant was granted permission to serve Fyffes with the claim and associated court process out of the jurisdiction in the United Kingdom. This was done on a without notice basis. Mr.

[14] SLUHCVAP2014/0024 ECS, Court of Appeal.
[15] Didier para. 28, page 19.
[16] Davies, para. 55.

Williams invited this court to make an order that the permission of the court for the claimant to serve Fyffes out of the Jurisdiction should be set aside for material non-disclosure. Indeed, Mr. Williams argued, the claimant had no standing to secure such permission as the claimant was not a party to any agreement made with Fyffes, whether orally or by conduct, as averred in its pleadings. Counsel argued that there is no *lis* or issue joined between the parties on the pleadings, so the court has no jurisdiction over Fyffes to try the claim. In oral submissions, the question of non-disclosure was the focus of the argument of counsel for Fyffes. He relied on numerous authorities including: **The Siskina**,[17] **Societe Generale de Paris v Dreyfus**,[18] **Brownlie v Four Seasons Holdings Inc.**,[19] **Lauro Rezende v Companhia Siderurgia Nacional**,[20] and **The Hagen**.[21]

[36] On the strength of these cases, Mr. Williams argued that this court ought to treat claims against foreign defendants, like Fyffes, cautiously until the court is satisfied that the claim qualifies for the exercise of such a jurisdiction. Counsel decried the failure of the claimant or its neglect to make full disclosure that in the previous Claim 98 of 2017, that court concluded that the claimant was not a party to the written 11th October 2012 agreement. Mr. Williams stated that factually, nothing has changed. The claimant's name is not on the agreement and "Andy Sanchez" whose signature is appended thereto on behalf of the claimant is not connected to the claimant company. Mr. Williams referred to the averment at paragraph 6 of the statement of claim that "… Andres Sanchez ('aka Andy Sanchez'), a director and member of Meridian, signed the Agreement on behalf of Meridian" as a "fleshless allegation", which goes to show that Andy Sanchez signed on his own behalf and not the claimant. Counsel argued, further, that the claim is contradictory, unmeritorious and ought to be filtered out of the system. By its non-disclosure of certain material facts, the claimant's case would have appeared stronger. Counsel was adamant that the permission was wrongly granted and/or should be set aside for non-disclosure.

[37] In response, Mr. Courtenay pointed out that Fyffes' reliance on the cases provided was misplaced. In particular, he referenced **Rezende**, where the Court of Appeal overturned an

[17] [1979] AC 210.
[18] 29 Ch D. 239, 242-243.
[19] [2018] 1 WLR 192.
[20] Civ. App. No. 23 of 2009, Belize.
[21] [1908] P 189 at 201.

order for injunctive relief on a resident outside of Belize in circumstances where no permission for service out of the jurisdiction was sought or obtained prior to the injunctive order. He stated that the present claim is distinguishable from **Rezende**. The instant claimant had applied for and obtained the leave of the court to serve Fyffes out of the jurisdiction. The claimant had satisfied the test under CPR 7. In oral submissions, Mr. Courtenay conceded that there was non-disclosure of the prior claim but there was no ulterior motive in this failure. He asked that service out of the jurisdiction not be set aside, as no prejudice was caused to Fyffes who has had to pursue other grounds of its application. According to Mr. Courtenay, "The setting aside of service is not the only relief sought and as such any perceived failure may be compensated by an appropriate order of costs". Further, should the service be set aside the issue of limitation may come into play. In supplemental submissions, the claimant advanced that even if the court found that there was material non-disclosure, the court was at liberty to make an appropriate costs order to Fyffes as was done by the court in **Masri v Consolidated Contractors International Co. SAL.**[22]

[38] I was not satisfied that the present claim is bound to fail or is in any way "fanciful" and/or it is one that warrants setting aside the order for service out of the jurisdiction. I refused to set aside the order for service out of the jurisdiction.

[39] It follows from the above discussion that these were the considerations in my mind when I refused the applicant's applications.

Disposition

[40] It is ordered refusing the applications and extending time to 8th April 2024 for the filing and service of the defence in the matter with costs to the first defendant in the sum of $25,000.

Martha Alexander
High Court Judge

[22] [2003] EWHC 2890 at 62-67.