SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2009/001A

BETWEEN:

[1] INTRUST TRUSTEES (NEVIS) LIMITED
[2] INTRUST LIMITED
[3] STEVEN SLOM

Appellants (Defendants)

HAIM SAMET STEINMETZ, HARING & CO.

(Non-party Appellant)

and

NAOMI DARREN
also known as Naomi Darabaner

Respondent (Claimant)

Before:

The Hon. Mde. Janice George-Creque — Justice of Appeal

Appearances:

On the written submissions of:
Ms. Asure-Dee T.C Liburd of Mryna Walwyn & Associates for the Appellants
Ms. M. Angela Cozier of Cozier & Associates for the Respondent.

2009: June 9

Civil Appeal – Procedural Appeal – whether the claim ought to have been brought by fixed date claim form – declaration of discontinuance and costs – whether the Law Firm had standing to apply for such a declaration and costs – whether the claim was discontinued as against the Law Firm – whether leave was required to discontinue – whether leave was required to amend the claim form in the circumstances of the case - Part 67 of the Civil Procedure Rules 2000

The 1st and 2nd appellants are co-trustees of the Black Horse Trust ("the Trust"), of which the 3rd appellant is Protector. The respondent, the beneficiary under the Trust, instituted proceedings in the court below for breach of trust and sought injunctive relief, damages and an accounting of Trust assets. The claim as first filed named Haim Samet Steinmetz, Haring & Co ("the Law Firm") as a defendant; Mr. Slom and the Law Firm being treated in essence as one person and referred to in the particulars of claim as the "3rd named

Defendants". In the amended claim form filed in April 2008, the Law Firm was omitted as a party notwithstanding that a freezing order had earlier been entered and continued as against the Law Firm. The respondent sought leave of the court to cure the alleged clerical error by reinstating the name of the Law Firm on the claim. By application in the court below, the appellants sought a declaration of discontinuance as against the Law Firm on account of the omission, as well as costs on discontinuance. The appellants further sought to strike out the claim on the ground that the wrong form had been used (Form 1 claim form as opposed to the Form 2 Fixed Date Claim form).

The appellants' application for a declaration of discontinuance was dismissed on the ground that the Law Firm had no standing to make the application, being a non-party. The strike out application was dismissed on the ground that Part 67 of the Civil Procedure Rules 2000 did not apply so that the correct claim form had been used. The respondent's application for leave to amend the claim form was also dismissed on the ground that no leave was required. The appellants have appealed against these findings.

Held: dismissing the appeal with costs to the respondent:

1. Fixed Date Claims are reserved to be used in respect of specified types of claims as set out in CPR 67.1. Part 67.1 clearly contemplates and affords an avenue for executors, trustees and the like to seek the court's guidance and directions in a non-adversarial manner with regard to the administration of a deceased's estate or with respect to the execution or administration of a trust. The Part 67 procedure is not designed and accordingly is not intended to resolve factual disputes.

2. The respondent's claim for breach of fiduciary duties and breach of trust is an action in tort which calls for a determination of serious and complex factual issues. Such a claim does not fall to be considered under the Part 67 procedure. The master accordingly did not err in holding that the claim was properly brought by way of Form 1.

   Queensway Trustees Ltd. v The Cardinal Trust NEVHCV 2001/0084 and Steele Douglas v Pinneys Investment Co. Ltd. NEVHCV 2001/0101 distinguished.

3. If there was a discontinuance as against the Law Firm, the Law Firm was entitled to apply for an order for costs as against the claimant and in so doing could not be considered for those purposes as being a non-party or lacking standing to do so in the proceedings.

4. The court's permission was required in the circumstances of this case to discontinue the claim against a defendant, the Law Firm, there being in force an injunction against it. No such permission was sought or granted so that there was no discontinuance as against the Law Firm. Further, there is no evidence to suggest that the omission was not clerical inadvertence. The clerical error could have been corrected by amending the claim form, for which no leave was required.

The master did not accordingly err in dismissing the application for the declaration albeit for the wrong reasons.

JUDGMENT

[1] GEORGE-CREQUE, J.A.: The Order in this matter was made on June 9, 2009. These are the written reasons for that decision. This procedural appeal arises from a decision made on 6th February 2009, by the learned master in a claim begun by a Form 1 claim form in which she dismissed:

(a) the appellants' application to strike out the amended claim form of the respondent/ claimant;

(b) the appellants' application for discontinuance of the claim as against, presumably, the co- third appellant namely, the law firm Haim Samet Steinmetz, Haring & Co("the Law Firm"), and for summary judgment; and

(c) the respondent's application for leave to further amend the amended claim form and statement of case so as to reinstate the Law Firm as a defendant on the ground that no leave was necessary.

[2] She also ordered that the claim should continue in the form as instituted [i.e. Form 1], fixed a date for case management and made consequential costs orders in respect of the various applications referred to in paragraph [1] above.

The grounds of appeal

[3] The grounds of appeal though ten (10) in number may, in my view, be captured in the following formulation:

(a) That the claim falls into the category of claims procedurally regulated by CPR 67 which deals generally with administration claims and as such ought to be brought by Fixed Date Claim [i.e. Form 2] and accordingly, the learned Master erred in law in not striking out the claim having been brought as a Form 1 type claim and allowing the claim to proceed on that basis; and

(b) That the learned Master erred in dismissing the Law Firm's application for a declaration of discontinuance as against it and costs on discontinuance, on account of the Law Firm's lack of locus standi.

Nature of the claim and background

[4] In order to gain an appreciation of the circumstances giving rise to this appeal a brief background and statement as to the nature of the claim as filed is set out:

(1) It is common ground that the respondent is a beneficiary under a trust called "the Black Horse Trust" set up under the laws of Nevis by her mother, now deceased. The 1st and 2nd appellants, a Nevisian IBC and a UK company respectively, are co-trustees of the Trust;

(2) The 3rd appellant Steven Slom, an Israeli lawyer, is Protector of the Trust. It is not clear on the record whether the Law Firm is also a Protector of the Trust. In the statement of case Mr. Slom and the Law Firm are treated in essence as one person and are together referred to in the particulars of claim as the "*3rd named Defendants."*

(3) The respondent alleges in the claim that the appellants are in breach of trust and seeks inter alia, injunctive relief, an accounting of the Trust assets and damages for breach of trust.

(4) The claim as first filed named the Law Firm as a defendant and indeed a freezing order was obtained ex parte against all the defendants. That order was subsequently set aside but only as against the 1st and 2nd defendants. In April 2008, the respondent amended her claim in which the name of the Law firm was omitted as a party. The respondent says that this was a clerical error and that as soon as it was realized, made this known to the solicitors for the appellants who refused to accept the omission was in error and countered by saying that they were prepared to go to court thereon.

(5) The respondent then sought leave of the court to further amend her claim so as to, in essence, cure the error by reinstating the name of the Law Firm on the claim.

(6) The result is that the appellants sought to treat the omission of the Law Firm as a discontinuance as against it and sought a declaration to this effect and costs on discontinuance. They further sought to strike out the claim as having been commenced in the wrong form being Form I instead of by way of Form 2 as a Fixed Date Claim.

(7) None of the appellants' applications found favour with the learned master.

The type of claim and nature of the proceedings

[5] The appellants contend that the claim is defective being an administration claim which must be brought by Fixed Date Claim. The learned master after consideration of the authorities of Queensway Trustees Ltd v The Cardinal Trust[1] and Steele Douglas v Pinneys Investment Co. Ltd.[2] relied on by the appellants concluded that those authorities were not on all fours with the present application.[3] After a review of the CPR 67 which was adequately set out in her written decision, and a consideration of the claims made by the respondent and the relief sought therein, the master also concluded that the claim was properly brought by utilization of the Form 1 type claim. She opined that the Part 67 procedure contemplates the granting of relief to executors, administrators and trustees in their capacity as such, whereas, even though the respondent is a beneficiary under a trust, the main allegations are for breach of trust, for which not only injunctive relief but damages for breach of trust are sought.

[6] I agree with the master that the Queensway and the Steele Douglas decisions are not on point with the instant case. In both cases the proceedings purported to be commenced by notice of application [Form 6 of CPR] - a procedure reserved

[1] NEVHCV 2001/0084 – a decision of Master Rawlins (as he then was) dated 27 December, 2001
[2] NEVHCV 2001/0101 – a decision of Rawlins J (as he then was) dated 28 August 2002
[3] Paragraph 7 of the Decision

for interlocutory applications.[4] Accordingly, there was no originating process. CPR 8.1(1) states in essence that proceedings are started by filing a claim form. In the instant case a claim form was filed albeit not a Fixed Date [Form 2 type] claim. A claim form may take one of two forms - a Form 1 type claim form or a Form 2 type claim form called the "Fixed Date Claim".

[7] Fixed Date Claims are reserved to be used in respect of specified types of claims. CPR 67.1(2) says in effect that administration claims and claims to determine any question or grant any relief relating to the administration of the estate of a deceased person or the execution of a trust must be brought by Fixed Date Claim. The claim in this case is clearly not an administration claim as defined by CPR 67.1(3)[5]. Accordingly, unless the claim is one which falls to be considered under CPR 67.4 (i.e. a claim for any relief or for the determination of any question without bringing an administration claim), then the Form 2 (Fixed Date claim) procedure would not apply. With respect to the issuance of such a claim under CPR 67.4 however, it is to be noted that sub-paragraph (1) states that an executor, administrator or trustee may issue such a claim. CPR 67.4 (2) sets out the types of questions which an executor, administrator or trustee may ask the court to determine and 67.4(3) sets out the kinds of relief which may be obtained.

[8] The tenor of CPR 67 clearly contemplates and affords an avenue for executors, trustees and the like to seek the court's guidance and directions in a non-adversarial manner with regard to the administration of a deceased's estate or with respect to the execution or administration of a trust. The Part 67 procedure is not designed and accordingly is not intended to resolve factual disputes.

[9] The instant case cannot on any view be considered as being non-adversarial. The respondent alleges breach of fiduciary duties and breach of trust in respect of duties which in essence she says were owed to her as a beneficiary in relation to the appellants, as Trustees and Protector of a trust. She seeks damages from the

[4] Save in the case where a remedy is sought before the commencement of proceedings.
[5] CPR 67.1(3) defines administration claims as claims for the administration of the estate of a deceased person; and for the execution of a trust under the direction of the court.

appellants personally in relation to the alleged breaches. In short, this is an action in tort. I agree with counsel for the respondent that this would clearly call for a determination of serious and complex factual issues and thus not one suited to the CPR 67 procedure. Indeed I venture to say that the claim, given its nature as set out, does not fall to be considered under the CPR 67 procedure at all. Accordingly, I find that the master was quite right in concluding that the claim brought by way of Form 1 was properly brought. This ground of appeal accordingly fails.

[10] Further, as correctly stated by the master, it would be quite a draconian approach to strike out the claim in such circumstances and were it properly to have been brought by way of Form 2, it would have been quite right in the exercise of her discretion under CPR 26.9(3) to order that the matter proceed as if by Fixed Date claim and thereby put matters right. This would be wholly in keeping with the overriding objective of CPR. To sacrifice substance by way of slavish adherence to form for the purpose of defeating a genuine claim defeats the overriding objective of CPR rather than gives effect to it.

[11] Having read the skeleton arguments coupled with the history of the proceedings leading to the very applications made, the orders from which have given rise to this appeal, one discerns an approach to this hotly contested litigation which is tinged with a hint of hostility. This no doubt explains the slow progress of the proceedings. This affords me the opportunity to remind legal practitioners of the overriding objective of CPR which is to deal with cases justly and that legal practitioners themselves on behalf of their clients are duty bound as are their clients, to assist the court in giving effect to the overriding objective.[6]

Was the claim discontinued as against the Law Firm?

[12] The learned master, before dealing with the application of the respondent to re-instate the Law Firm on the claim form, dealt with the Law Firm's application

[6] CPR 1.1 and 2

seeking a declaration as to discontinuance as against it. This, coupled with the respondent's application to strike out the Law Firm's application based on lack of standing, may have caused the learned master to fall into error in holding that the Law Firm had no standing to make the application for the declaration as to discontinuance and costs, on the basis that the Law Firm whose name at that time no longer appeared on the amended claim was now a non-party.

[13] It is common ground that no notice of discontinuance was filed in accordance with CPR 37. Furthermore, interim injunctions being in force as against Mr. Slom and the Law Firm, there could be no discontinuance as against the Law Firm without the court's permission.[7] It is common ground that no such permission was sought. I agree with counsel for the appellants that if there was discontinuance then, as contemplated by CPR 37.6(1), that defendant against whom the action was discontinued is entitled to apply for an order for costs as against the claimant and in so doing cannot be considered for those purposes as being a non-party or lacking standing to do so in the proceedings. To hold otherwise would defeat the objective of CPR 37.6(1).

[14] I agree with counsel for the appellants that a practical approach ought to have been adopted. The issue of locus standi in my view ought not to have been the focus. Rather, the master who at the time also had before her an application seeking leave to amend the claim form so as to cure the clerical error which had been made in the previous amendment by the omission of the name of the Law Firm ought to have asked herself whether, the omission of the name amounted in effect to a discontinuance as against the Law Firm. There is no evidence to suggest that the omission was not clerical inadvertence. Had she focused her mind on this issue I have no doubt, given the material before her coupled with her later finding in any event that the respondent did not require leave to amend so as to replace the name of the Law Firm, that she would have arrived at the conclusion that in effect there was no discontinuance. On this ground the learned master was right in dismissing the application for such a declaration albeit for the wrong

[7] CPR 37.2(2)

reasons. I make no comment on the alternative application for summary judgment as this is not addressed in the grounds of appeal.

Conclusion

[15] For the reasons given above, I would dismiss this appeal. The appellants shall bear the costs of this appeal fixed in the sum of $2,000.00.

Janice George-Creque
Justice of Appeal
16th June 2009