THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2010/0775

BETWEEN:

SEA STAR LIMITED

Claimant

AND

TIMOTHY DUPONT-STINEDURF
BLUE A DESIGN COMPANY INC.

Defendants

Before:
Master Cheryl Mathurin

Appearances:
Ms E Ann Henry and Ms C Debra Burnette for the Claimant
Mr. Charlesworth Brown for the Defendants

2011: 6th December
2012: January 16th

RULING

[1] **MATHURIN, M:** This ruling determines all applications filed herein.

[2] **Application filed 6th June 2011**

This application by the Claimant is for summary judgment pursuant to Part 15 after the defence was filed for the relief of removal of a Restriction placed by the Land Registrar, a declaration that the Restriction was wrongful and for compensation. Essentially the application mirrors the relief sought in the claim.

Whilst it is clear that the Court has the unfettered jurisdiction to hear and determine this application, I am guided by the Court of Appeal in **Antigua Aggregates Limited v AG of Antigua, Antigua Commercial Bank Limited,** wherein it was determined that the lack of notice of the proceedings coupled with the fact that the removal of the restriction was sought by way of interlocutory proceedings prevented a proper ventilation of the matter by way of a full trial on the merits. That Court suggests that the manner in which this application is being moved deprives the Registrar of an opportunity to defend her decision which applicant is stating is wrong, and also prevents the opportunity for cross examination in arriving at a determination as to whether the restriction ought to be removed. Further, as it is a presumption that the decision of the Registrar is correct in law, it would, in my mind be critical to have the reasons for her decision to move the matter forward. There being no evidence that the Registrar of Lands has been served with this proceeding, the application is hereby dismissed.

[3] **Application dated 18th July 2011**

This application is for dismissal of the counterclaim filed herein with the defence on the 25th March 2011 on the ground that the Defendants have no cause of action against the Claimant who is not party to the agreement which is the subject matter of the counterclaim.

The counterclaim is premised on an agreement which the Defendants allege the Claimant has breached. A perusal of the agreement exhibited by both parties to this claim however does not suggest that this was anything but an agreement between Mr. Frans Vingerhoedt and the 2nd Defendant to build an extension on to, renovate existing bedrooms and a general clean up of a residential home owned by Mr. Vingerhoedt. The Defendants however assert in the counterclaim that Mr. Vingerhoedt was the sole director of the Claimant Company and that the home was on the premises of the Claimant Company and that the contract with Mr. Vingerhoedt must have been one wherein he was acting in his capacity as such. The question of the ownership of the house by the sole director of the Claimant Company being separate to ownership of the land by the Claimant company is one that clearly is in need of further ventilation. This is a question of fact that needs be determined on further evidence at trial and as such, the application is dismissed.

[4] **Application dated 4th November 2011**

This application is one by the Defendant for an order striking out the statement of claim on the ground that it should have been commenced by way of fixed date claim in accordance with Rule 8(5) of CPR 2000 which mandates that the fixed date claim must be used where by any enactment, proceedings are required to be commenced by originating summons or motion. The Defendants seek to persuade the Court that an application under the Registered Land Act for an order removing the restriction entered on the Land Register must be an originating process and therefore the application referred to therein is tantamount to an originating summons. As attractive as that sounds, the Defendants have provided me with no authority to suggest that this is the case. I am cognizant that summons, applications, motions etc all have specific meanings and without more, I am not prepared to arrive at the conclusion of the Defendants and as such the application is dismissed.

In the event that I may be wrong, it is not the practice of the Court in any event to dismiss matters that have commenced by way of the wrong procedure as opposed to making an order to set things right. In the case **Intrust Trustees (Nevis) Limited v Haim Samet Steinmetz Haring & Co and Naomi Darren; Civil Appeal No 1A of 2009; St Kitts and Nevis** Perreira JA upheld the ruling of the Master who refused an application to strike out on the ground that it was commenced by ordinary claim as opposed to fixed date claim and stated as follows;

> *"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."*

[5] The issue of costs with regards to these applications is settled by Rule 11.3(1) and (2) which mandates that applications should be listed for hearing at a case management conference. If an application for summary judgment does not determine the issue, the court must treat the hearing as a case management conference. The prescribed costs regime covers all work that is required

to prepare the proceedings for trial including, in particular the costs involved in attendance and advocacy at the trial including attendance at any case management conference. (Rule 65.7)
The first case management was set down for the 28th July 2010 when the applications for summary judgment and dismissal of the counterclaim were listed. That conference was adjourned to facilitate settlement by parties which did not materialize and subsequently the applications, including the application of the Defendant to strike out the claim, were given directions and reserved for decision. I consider that the applications were properly considered at the adjourned case management conference and as such, costs fall within the prescribed costs regime which will be considered on completion of the matter. In the circumstances, there will be no order as to costs.

[5] A summary of the order is as follows;

(a) That the applications of the Claimant for summary judgment and dismissal of the counterclaim are dismissed with leave to the Claimant to defend the counterclaim within 21 days hereof.
(b) That the application of the Defendant to strike out the claim is dismissed.
(c) That there be no order as to costs
(d) That the matter be listed for continuation by the Court Office as soon as practicable after the filing of the defence to the counterclaim herein.

Cheryl Mathurin
Master