EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SKBHCV 2011/0200

BETWEEN:

[1] TRANS-AMERICAINVEST (ST. KITTS) LTD
[2] NATALIA BITTON
[3] JOHN ZULIANI

Claimants

and

[1] SUSAN DODGE
[2] ANTHONY ZAPPAROLI

Defendants

Before:
Ms. Agnes Actie — Master [Ag.]

Appearances:
Ms. Angella Cozier of counsel for the Claimants
Mr. Anthony Ross of counsel for the Defendants

2012: November 7;
2013: January 16.

JUDGMENT

[1] ACTIE M [AG.]: By Claim Form with Statement of Claim filed on 8th July 2011 and an amended claim filed on 16th December 2011 the claimants claim against the defendants an order by the Court declaring that:

(1) The claimants, in particular the First Named Claimant was improperly joined in proceedings in SKBHCV 2001/0191;

(2) A consequent order that the garnishee proceedings in SKBHCV 2001/0191 against the claimants in particular the 1st named claimant

instituted on 21st March 2011 be dismissed against the claimants in particular the First Named Claimant;

(3) A stay of the further consideration of the garnishee proceedings to make final the provisional order made on 24th March 2011, pending the first determination.

[2] The claimants contend that the Court never made an order to add the 1st named claimant as a party to the proceedings. The claim further contends that the failure of the mandatory compliance with CPR 2000 Rule 19.3 deprived the 1st named claimant of its right to be heard in the application for costs.

[3] A defence was filed by the 2nd named defendant on 31st January 2012 and the 1st named defendant on 19th April 2012 respectively. An amended defence and counterclaim was filed on 19th June 2012. The defence denies that the 1st named claimant did not have notice of the application.

[4] The claimants by notice of application filed on 24th September 2012 applied for the counterclaim to be struck out and for summary judgment granting the reliefs sought in the statement of claim. It is to be noted that the defendants have discontinued the counterclaim and the only issue to be determined in this application is the request for summary judgment.

[5] The defendants have by notice of application filed on 28th September 2012 applied to strike out the claim and amended claim form entirely pursuant to CPR 2000 Rule 26.3.

The Background

[6] A dispute between the parties with regard to property in St. Kitts gave rise to proceedings in a court action in Ontario, Canada between Michael Simanic, Ray Dodge and Tony Zapparoli v Royal St. Kitts Ltd, Leo Tofoli and Aleco Zuliani. The Ontario Court in a judgment delivered on 19th January 1996 ordered the defendants to transfer property in St. Kitts to the claimants.

[7] By Claim 2001/0191 the defendants (then claimants) commenced a claim in St. Kitts to give effect to the Ontario judgment. On 5th December 2008 Belle J ordered that the Ontario Court Judgment be recognized and registered as an Order of the Court. The Order also issued an interim and permanent injunction against the defendants from selling or dealing with the property in any other way other than to give effect the said transfer.

[8] Upon attempting to give effect to the Order of Belle J made on 5th December 2008 it was discovered that the said property was transferred on 27th February 1996 by Royal St. Kitts Limited to Trans-Americainvest (St. Kitts) Limited.

[9] The claimants by application dated 28th April 2008 filed against Royal St. Kitts Casino Limited, Alceo Zuliani, Leo Tofoli and Trans-Americainvest (St. Kitts) for an order to set aside the transfer of title dated 27th February 1996 comprising of 14,455 sq. ft. made by Royal St. Kitts Casino Limited to Trans-Americainvest (St. Kitts).

[10] The application seeking to set aside the transfer of title states at:

(1) Paragraph 3 " if required, an Order adding Trans-Americainvest(TAI);

(2) Paragraph 4 of the application states if required, an Order dispensing with, or alternatively, validating service of the application material herein on TAI;

(3) At Paragraph 5, the application makes reference to CPR 2000, including 11.1, 11.2, 11.11, 11.12, 19.2 and 19.3.

[11] By Order dated 25th June 2010 Belle J ordered that the parcel of land which was transferred from Royal St. Kitts Casino Limited to Trans-Americainvest (St. Kitts) Limited (TAI) be set aside with effect that the title reverts to Royal Casino Limited such that effect can be given to the Order made on 11th October 2009 with costs to be determined.

[12] By Order dated 23rd July 2010 Her ladyship Ola Mae Edwards Justice of Appeal declared the notice of appeal filed by Royal St. Kitts Casino Limited and Alceo Zuliani on 1st July 2010 without leave a nullity consequentially struck out and dismissed the application for a stay of oral examination proceedings and the notice of appeal. It is to be noted that Trans-Americainvest (St. Kitts) was not a party to the appeal.

[13] By Order dated 17th August 2010 Belle J pursuant to costs order made on 25th June 2010 ordered the respondents Royal St. Kitts Casino Limited, Alceo Zulliani and Trans-Americainvest (St. Kitts) Limited jointly and severally to pay costs to applicants in the sum of $58,783.77 plus disbursements for a total of CDN$69,627.69 or the equivalent in Eastern Caribbean Currency.

[14] By Notice of Application dated 21st March 2011, the defendants filed for debt attachment proceedings against the defendants.

[15] The defendants by notice of application dated 28th September 2012 seeks an order that the claim and amended claim be struck out on the following grounds:

(1) the claim fails to plead any cause of action against the defendants;
(2) no relief has been sought against the defendants; and
(3) the subject action is an abuse of process as it is res judicata.

The defendants aver that the claimants are seeking a second opportunity to litigate issues already raised and fully dealt with under Claim No. SKBHCV 2001/0191. The defendants claim this is an abuse of process and they should be estopped from pursuing it.

[16] The claimants also filed an application to strike out the defendants counterclaim and for summary judgment. The defendants have since withdrawn the counterclaim. The application to strike out the claim will be dealt with firstly, which if successful,I would in effect render the claimants application for summary judgment otiose.

Striking Out Statement of Case

[17] The Court has jurisdiction to strike out a Statement of Case under CPR 2000 Rule 26.3(1) which states follows:-

> "In addition to any power 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 that;-
> (a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings:
> (b) The statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
> (c) The statement of case or the part to be struck out is an abuse of the process of the court or likely to obstruct the just disposal of the proceedings."

[18] In addition to the power the under CPR 2000 Rule 26.3, the Court has the inherent jurisdiction to strike out, dismiss or stay any proceedings which amount to an abuse of the Court's process.

[19] The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in exceptional cases. The seminal test for striking out was restated by Dennis Byron CJ [Ag.] (as he then was) in Baldwin Spencer v the Attorney General of Antigua & Barbuda (Civil Appeal No. 20A of 1977) where he stated:

> "This summary procedure should only be used in clear obvious cases when it can be seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court".

[20] The defendant submits that the claimants are seeking to re-litigate issues previously dealt with in SKBHCV 2001/0191 and this amounts to an abuse of process.

[21] As a general rule a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction. Also, where a matter becomes the subject of litigation, parties to that litigation should bring forward the whole of their cases. Henderson v Henderson (1843) 3 Hare 100.

[22] In Koshy v Deg-Deutsche (2008) EWCA Civ. 27, it was held that where a claimant had elected to continue with his appeal against a costs order on a limited basis before the Court of Appeal rather than having the issue of non-disclosure remitted for trial, he accepted that the price of pursuing his appeal was the abandonment of all alternative procedural routes in the vent of failure. Accordingly a second action raising the same issue was an abuse of process.

[23] A potential form of abuse is where a party mounts an attack on a final decision adverse to them which has been made by a court of competent jurisdiction. In Hunter v Chief Constable of the West Midlands Police [1982 A.C. 529 it was held that it was abuse of process to initiate:

> "proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending(Claimant) which had been made by another court of competent jurisdiction in previous proceedings in which the intending (Claimant) had full opportunity of contesting the decision in the court in which it was made."

However, it was recognised in Hunter that it may not be an abuse of process if the claimant can show that they had fresh evidence which entirely changed the previous case and that the further evidence could not by reasonable diligence have been obtained beforehand.

[24] A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleadings or the form of the issue was open to him in the former one: Halsbury Laws para 1533 Vol. 16 page 1033.

[25] The claimants' main contention is that the Court never made an order adding the 1st named claimant to these proceedings. The claimants state the rules governing the addition and substitution of parties are set out in CPR 2000 Part 19 and compliance with these rules required the addition of the 1st named claimant as a new party to the proceedings particularly given the extremely advanced stage of the proceedings at this point, being the enforcement stage. The original proceedings the claimants contend commenced over twenty-one years ago and

there being a legitimate issue as to whether the defendants were statute barred from adding the 1st named claimant at this late stage. The claimants state that an order to add the respondent as a party could not therefore have been made after over twenty years as it would have been well over the limitation period of six years for actions of this kind and therefore statute barred as contemplated by Rule 19.4 of the Civil Procedure Rules 2000. The claimants further aver that even if the 1st claimant could have been added as a party at this late stage, Rule 19.3 of the Civil Procedure Rules 2000 dictates the procedure by which a new party may be added to a proceeding and mandates in Rule 19.3(5) that an order for the addition of a new party must be served on any new party so added.

[26] The claimants further took issue with the costs order made against the 1st named claimant and state that even if the costs order were to be made against the 1st named claimant as a non-party, CPR 2000 Rule 64.10 dictates that the Court was obligated to afford the 1st named claimant a hearing to show cause why the order should not be made against it, which was never done in this case. The claim avers that the 1st named claimant was denied the right to a hearing on costs, despite the fact that the defendants were permitted to make full oral arguments pertaining to fraud, without having pleaded fraud, and in the absence of any legal representation on behalf of the 1st named claimant. The claimants referred to page 3 of the transcript of the hearing where counsel for the defendants admitted that oral submissions were made in the absence of legal representation for the respondent.

[27] The Court is of the view that the claimants' argument is flawed in many respects. It is conceded that CPR 2000 Rule 19 outlines the procedure for adding or substituting parties. However the fact that a party was not added in the manner prescribed by the CPR 2000 Rule 19 does not circumscribe the Court's jurisdiction to make an order against a person who was not made a party in the manner prescribed by the CPR 2000 Rule 19. The Court has the inherent jurisdiction to make orders affecting non-parties to a claim. CPR 2000 is also replete with provisions where the court can make orders against non-parties. CPR 2000 Rule

64.10 to which the claimants refer permits the Court to make a costs order against a person who is not a party. CPR 2000 Rule 42.12 provides for service of orders on persons who are not parties to the claims. The Order for Costs made by Belle J on 17th August 2010 clearly named the claimant and I reproduce for emphasis. The Order reads:

> "The Respondents Royal St. Kitts Casino Limited, Aleco Zuliani and Trans-Americainvest (St. Kitts) Limited shall jointly and severally pay to the Applicants…their costs of the application…"

[28] The transcript of proceedings provides further proof of participation of counsel for the 1st named claimant at the hearing of the application to set aside the Deed of Transfer where in making appearance counsel states at page 4:

> "May it please you, my Lord,… I seek at this stage… my Lord that there is nothing on the file a formal notice of change of solicitor in this matter. But I wish to at this stage in this matter to enter a verbal appearance for the second, third, not fourth. Sorry my Lord, the respondent being Transamerica, so for the parties for which I appear are Royal St. Kitts Casino Limited, Mr. Zuliani, the respondent and Trans Americainvest St. Kitts Limited."

The evidence before the court shows that the claimant participated in the proceeding before the court which resulted in the costs order now being challenged by the claimants. The Costs Order of Belle J expressly named and directed the 1st claimant jointly or severally with the other named parties to pay costs. The naming of the 1st claimant in the costs order conferred the unfettered right of appeal guaranteed by the Constitution and the Supreme Court Act, even if the 1st claimant was not properly added in the manner prescribed by CPR 2000 Rule 19. The time for filing an appeal has long expired. The claimants are only now seeking, at the enforcement stage, by way of a new action to challenge the extant order of the Court. This is not permissible.

[29] A person named in an order made by the Court is bound by the terms of the order or judgment. The Privy Council in the case of Isaacs v Robertson 3 WLR 705 held that an order of the Court is valid unless set aside, varied or successfully appealed.

[30] The argument that the claimants were not parties fails. The claimants were not identified by conjecture but were expressly named by the judge. The Order of Belle J having not been appealed by the 1st named claimant stands. I am of the view that the claim before this court is tantamount to an application to dismiss the order of a judge of coordinate jurisdiction, which clearly is not permissible.

[31] A Court of coordinate jurisdiction does not have the jurisdiction to dismiss its own judgment. The claim before the court is tantamount to an appeal against the decision of a parallel court which the court cannot do.

[32] In MARIE CLARKE-JOHNEY v EVARISTE AMBROSE SLUHCV 2008/0438 GEORGES J [Ag.] in an application to dismiss the judgment of court said:

> "…Claimant relying largely on her written legal submissions urged that a court of coordinate jurisdiction did not have the authority to dismiss the judgment of a judge of parallel jurisdiction as this would be tantamount to exercising appellate jurisdiction. The Defendant's recourse in such circumstances, Counsel argued was to appeal the decision. I fully agree and this is illustrated in the Privy Council Appeal No. 22 of 2004 – Leymon Strachan v The Gleaner Company Ltd et al.
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> "Judgment in the instant matter Counsel contended was entered on 2nd June 2009, by the High Court of Justice. The Defendant now asks this same court to set aside its judgment thus in effect requesting the court to exercise an appellate jurisdiction which it plainly cannot do. The Defendant's application is before a court of coordinate jurisdiction which does not have the jurisdiction to dismiss its own judgment:
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> (Leymon Strachan v The Gleaner Company Ltd et al Privy Council Appeal No. 22 of 2004 at paragraphs 15, 16, 17, 32, 33) which merit replication:
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> In that case Lord Millett in delivering the opinion of Her Majesty's Board held that:
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> "15. There is no doubt that section 258 of the Judicature (Civil Procedure Code) Law of Jamaica gives a judge of the Supreme Court power to set aside a default judgment, whether it be a judgment for damages which remain to be assessed (which is interlocutory) or for liquidated damages (which is final). The question for decision in the present appeal, therefore, is not whether the judgment which Walker J purported to set aside was interlocutory or final, but whether it was a

default judgment. That depends on whether the interlocutory judgment for damages to be assessed was spent when the damages were assessed or (to put it another way) whether it was superseded or overtaken by the final judgment for a liquidated sum; and if so whether the final judgment can be said to be a default judgment when the Defendant appeared at and participated in the hearing to assess damages.

16. In their Lordships' opinion these questions are easily answered if three points are borne in mind. The first is that, once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the Defendant cannot dispute liability at the assessment hearing: see *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307 citing *Lunnon v Singh* (unreported) 1 July 1999, EWCA. If he wished to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata.* The second is that, whether the Defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the Claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the Claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of such damages which remains to be determined.

17. Accordingly it cannot be said that a judgment (whether after a contested hearing or by default) for damages to be assessed is spent once damages are assessed; it remains the source of the plaintiff's right to damages. Nor can it be said that in such a case the interlocutory judgment is overtaken or superseded by the final judgment for a liquidated sum; it would be more accurate to say that it is completed and made effective by the assessment. By entering final judgment for the amount of the damages awarded by the jury, Bingham J gave combined effect to the default judgment on liability and the quantification of damages by the jury.

32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow case*) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be

corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.

33. In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was *res judicata.* As a judge of co-ordinate jurisdiction Smith J had no power to set it aside."

Conclusion

[33] Upon reviewing the facts, the reliefs sought by the claimants and the principles enunciated in the authorities previously mentioned I am of the view that the claim filed by the claimants is an abuse of process and should be struck out. The claimants especially the 1st named claimant being dilatory in pursuing his right of appeal, which was the only recourse available, is now seeking to engage other course of action which is not permissible. The claimants cannot now be allowed to re-litigate an issue which has been determined by a court of competent jurisdiction. The Court must seek to give effect to the overriding objective which is to deal with cases justly. The claim having been struck out renders the claimants application for summary judgment otiose.

Order

(1) The statement of claim and the amended statement of claim are struck out as an abuse of process.

(2) Costs the defendants to be assessed if not agreed within 21 days of this order.

Agnes Actie
Master [Ag.]