

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2012/0501

BETWEEN:

DIANE WILSON

Claimant

and

**ALBERT CASTLE
(Executor of the Estate of Bernard Castle, Deceased)**

Defendant

Appearances:

Ms. Anyika Johnson for the Claimant

Ms. Shireen Wilkinson for the Defendant

2013: January 29,
March 7.

DECISION

- [1] **MOHAMMED, J.:** Albert Castle, the Defendant ("the Defendant") has applied to strike out the Claim Form and Statement of Claim in accordance with Part 26 of the Civil Procedure Rules 2000 ("CPR"). Alternatively, the Defendant has also applied for paragraphs 7, 8, 9, 10, 11 and 12 of the statement of claim to be struck out.
- [2] The Claimant was married to Bernard Castle, deceased ("the Deceased") during the period 1989 to 2005. The marriage ended in divorce in 2005. On 10th July 2012 the Deceased executed his will leaving the entire property situate at Mont

Toute ("the property") to his brother, the Defendant. The Deceased passed away on 28th July 2012 and subsequently the Defendant obtained a grant of probate of the Deceased's estate.

[3] The Claimant instituted these proceedings against the Defendant seeking a declaration that she is entitled to a 50% share and interest in the property on the basis that the Deceased held the said share on trust for her. She seeks an order that the Defendant convey the said 50% share to her or for the property to be valued and she be paid for her said share. She also sought interim relief to stop the Defendant from leasing, conveying or disposing of the property without the Claimant's or Court's permission until the determination of the substantive action and on the 29th January 2013 I refused the Claimant's application for the interim relief.

[4] The grounds for the Defendant's application are:

- (a) The Claimant had failed to use the correct procedure to initiate the action i.e. Fixed Date Claim Form which is prescribed by Part 8 and Part 68 of the CPR for any action concerning land or probate respectively;
- (b) The court lacks jurisdiction to divide property, in the manner sought by the Claimant, which has already been divided under the will;
- (c) The Claimant failed to particularize loss and prejudice;
- (d) The action should have been instituted under ancillary relief proceedings in the divorce action between the Claimant and the Deceased, and there has been unreasonable delay. Consequently, the doctrine of laches and the provisions of section 20 of the Limitation of Actions Act Cap 173 prevent the Claimant from obtaining the relief sought.

[5] In support of the application is an affidavit of the Defendant filed on the 7th January, 2013. Most notably there is no affidavit filed in response by the Claimant to answer any of the allegations made by the Defendant in the said affidavit. However, Counsel for the Claimant submitted that the claim is not in breach of

Parts 8 or 68 of the CPR respectively since it is not a claim for land or a probate action but rather it is grounded in trust.

- [6] The issues to be determined are:
- (a) Did the Claimant use the appropriate originating process, and
 - (b) Whether the Claimant has any ground for instituting this action.
- [7] Paragraph 26.3 CPR confers a discretion on the court to strike out a Statement of Claim in any of the following circumstances:
- (a) Failure to comply with a rule or practice direction, order or direction given by the court in the proceedings.
 - (b) Abuse of process of the court or likely to obstruct the just disposal of the proceedings.
 - (c) Disclose no reasonable grounds for bringing of the proceedings.
 - (d) It is prolix or does not comply with the requirement of paragraphs 8 or 10.

Did the Claimant use the appropriate originating process?

- [8] The Claimant is seeking certain declarations concerning property which she claims was held on trust by the Deceased for her. She has not grounded her action as a land dispute, although it touches and concern property. Neither has she pleaded her action as a probate matter. At paragraph 9 of the Statement of Claim¹ she specifically pleads *"By his Will dated the 10th day of July, 2012, the Deceased wrongly left the entire Mont Toute Property to the Defendant, to the exclusion of the Claimant and their children (the children of the Deceased and the Claimant)"*. At paragraph 11 of the Statement of Claim² she alleges: *"For approximately five years prior to his death, the Deceased suffered from brain cancer and his physical and mental condition became progressively worse in the months and weeks prior*

¹ Filed on December 5, 2012

² Filed on December 5, 2012

to his death. He purportedly executed his Will approximately three weeks prior to his death.”

- [9] While in form the Claimant may have appeared to have used the appropriate originating process, in substance, paragraphs 9 and 11 of the Statement of Claim, in my view, amount to a challenge of the will of the Deceased and as such ought to have been instituting by a Fixed Date Claim Form. However, even if the Claimant's action was instituted using the incorrect originating process, I am of the view that the learning in **Intrust Trustees (Nevis) Limited et al v Naomi Darren**³ where George-Creque JA stated “to sacrifice substance by way of slavish adherence to form for the purpose of a genuine claim defeats the overriding objective of CPR rather than gives effect to it” is applicable. In the circumstances, I am not minded to strike out the Claim Form and Statement of Claim on this basis.

Is there reasonable ground for commencing this action?

- [10] In **Tawney Assets Limited v East Pine Management Limited and Ors**⁴ Mitchell JA provided guidance on the approach to be taken by the court in applications to strike out a Claim Form and Statement of Claim:

“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 reason for proceeding cautiously has frequently been explained as that the exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial. The proper approach

³ Saint Christopher and Nevis High Court Civil Appeal No 1A of 2009 (delivered 9th June 2009 unreported)

⁴ Civ Appeal HCVAP 2012/007 at paragraph 22

to be taken in striking out a statement of case as disclosing no facts upon which the court can proceed has been described by Pereira CJ [Ag.], in her judgment in the interlocutory appeal in **Ian Peters v Robert George Spencer**⁵ where she found that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be determined by hearing oral evidence.”

[11] At paragraph 23 Mitchell JA drew an analogy with the approach under the CPR rule with the old rules when he said:

“Even under our old rules, the striking out of a claim was a jurisdiction which was to be exercised sparingly. In the words of Sir Dennis Byron in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al**⁶:

‘This summary procedure should only be used in clear and obvious cases, when it can clearly 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 court⁷.’

There is no reason to believe that this is not still good guidance under the new CPR.”

[12] I am mindful that to strike out a Claimant’s claim is a drastic step which is only taken in exceptional cases. However, I am of the view that the Claim Form and Statement of case discloses no reasonable grounds for bringing the action against this Defendant. I have decided to strike out the Claim Form and Statement of Claim for the following reasons:

- (a) **Abuse of process:** The Claimant has grounded her cause of action on trust but the facts pleaded in her Claim Form and Statement of Claim all

⁵ Antigua and Barbuda High Court Civil Appeal No. 16 of 2009 (delivered 22nd December 2009, unreported) following *Citco Global NV v Y2K Finance Inc* Territory of the Virgin Islands High Court Civil Appeal No 22 of 2008 (delivered 19th October 2009, unreported)

⁶ Antigua and Barbuda High Court Civil Appeal No. 20A of 1997 (delivered 8th April 1998, unreported)

⁷ *Ibid*, p.5

relate to the property which was acquired during her marriage. At paragraph 5 of the statement of claim⁸ the Claimant admits that the property was the matrimonial home; at paragraph 6⁹ she admits that the Deceased's name alone was on the title deed; and the facts pleaded in paragraphs 8 to 12 of the amended statement of claim¹⁰ all relate to her contribution during the marriage. In my view it is an abuse of process of this court for the Claimant to pursue a claim in trust which should have been pursued under ancillary relief proceedings between the Claimant and the Deceased where the latter could have been called upon to address the allegations pleaded by the Claimant in her Claim Form and Statement of Claim and amended documents. The Claimant has not denied that the instant action is an abuse of process since she failed to place any affidavit in response to the Defendant's application.

- (a) **Delay:** In the instant case, the Claimant has delayed for at least 6 years after the conclusion of the divorce to institute the instant civil action. In my view this is a claim which ought to have been pursued in the ancillary proceedings in the matrimonial suit between the Claimant and the Deceased. This delay has not been denied by the Claimant since she failed to place any affidavit in response to address this material ground.

Order

[13] The Claimant's Claim Form and Statement of Claim are struck out.

⁸ Filed on December 5, 2012

⁹ Filed on December 5, 2012

¹⁰ Filed 18th January, 2013

[14] The Claimant to pay the Defendant cost of the application to be assessed in default of agreement.

Margaret Y. Mohammed
Margaret Y. Mohammed
High Court Judge