**ANGUILLA**

**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**(CIVIL)**

CLAIM NO AXAHCV2013/0102

**In the Matter of the Arbitration Act**
**And the Civil Procedure Rules 2000 Part 43**

**AND**
**In the Matter of an Application for the enforcement of an arbitration award**

BETWEEN:

**[1] RICHARD VENTO**
**[2] LANA VENTO**
**[3] GAIL VENTO**
**[4] RENEE VENTO**
**[5] NICOLE MOLLISON**
**[6] FIRST NEVIS TRUST COMPANY LTD**
**(as trustee of:**
**MUCH LOVE INTERNATIONAL DYNASTY TRUST**
**VITA INTERNATIONAL DYNASTY TRUST**
**LOKI INTERNATIONAL DYNASTY TRUST**
**FOUNDERS INTERNATIONAL DV DYNASTY TRUST)**

Respondents/Applicants

AND

**[1] KEITHLEY LAKE**
**[2] FIDELITY INSURNCE CO, LTD**
**[3] ALLIANCE ROYALTIES, INC**
**[4] WESTMINISTER, HOPE & TURNBERRY, LTD**

Applicants/Respondents

Appearances:

Mr Michael Bourne for the Applicants/Respondents Keithley Lake et al
Mr Gerhard Wallbank and Mr Wesley George for the Respondents/Applicants Richard Vento et al

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2014: February 3; 6
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## RULING
## INTRODUCTION AND PROCEDURAL CHRONOLOGY

[1] **LANNS, M:** On 31st October 2013, the Applicants, Richard Vento, Lana Vento, Gail Vento, Nicole Mollison, First Nevis Company Ltd (as trustee of: Much Love International Dynasty Trust, Vita International Dynasty Trust, Loki International Dynasty Trust, Founders International DV Dynasty Trust) (the Vento Entities) filed a Notice of Application, accompanied by a Certificate of Urgency, the supporting Affidavit of Alan Feuerstein, and a draft Order, seeking the following Orders:

1. That the final arbitral award dated 23rd August 2013 of Lawrence M Watson Jr., who is the arbitrator appointed by the parties in the United States Virgin Islands (USVI) under and by virtue of an agreement to arbitrate, dated 13th August 2012(the Arbitration Agreement), be registered and enforced in the High Court of Justice, Anguilla Circuit, the said arbitral award being in the applicants' favour against the Respondents jointly and severally in the sum of US$7,419,000.00.

2. That the costs of the Application be provided for

[2] On 19th November 2013, the application came before her Ladyship Mme Justice Cheryl Mathurin, and it was adjourned to 16th December 2013 for service.

[3] When the matter came back before the Learned Judge on 16th December 2013, she ordered the Vento Entities to file and serve any additional evidence and submissions by 31st December 2013. The Respondents herein (the Alliance Entities) were to file and serve submissions in response by the 20th January 2013, and the Vento Entities were to reply by 7th February 2014. Bundles were to be filed by 14th February 2014, and the matter was adjourned to 20th February 2014.

[4] None of the parties were able to comply with the timelines, and thus, by Applications filed on 3rd January 2014 (by the Vento Entities); and on 20th January 2014 (by the Alliance Entities) they sought and obtained an extension of time within which to comply.

[5] Meanwhile, on 28th November 2013, the Vento Entities filed an "Amended Notice of Application". By this Amended Notice of Application, the Ventor Entities asked the court for the following Orders:

1. That permission be granted to enforce the final award of Lawrence Watson Jr dated 23 August 2013; and /or;

2. That the said award be registered so that it may be enforceable as if it were an order of the court; and

3. That Judgment be granted to the Ventor Entities against the Alliance Entities jointly and severally in the sum of US$7,419,000.00

4. That the costs of the Application be provided for.

[6] That application is accompanied by the Further Affidavit of Alan Feuerstein, with three documents exhibited thereto.

[7] What is now pending before the court is an application by the Alliance Entities dated 14th January 2014 seeking various orders which are summarised thus:

1. That the Notice of Application filed on 31st October 2013 and the Amended Notice of Application filed 28th November 2013 be struck out;

2. That the Further Affidavit of Allan Feurnstein filed 28th November 2013; as well as the Third Affidavit of Allan Feurnstein filed 31st December 2013 be struck out

3. Further or alternatively, that paragraphs 16, (2nd sentence) and 24 (2nd sentence, 2nd paragraph) of the Third Affidavit of Allan Feurnstein be struck out pursuant to CPR 26.3 (1) (a) and or CPR 30.3 (3);

4. That paragraphs 17 to 22, 24 (1st paragraph); 30 to 32; 33 (d) last paragraph; and 41 to 47of the third Affidavit of Allan Feurnstein; and Tabs 5, 6 and to 11 of the Exhibits therein be struck out pursuant to Rule 30.3 (3) of the CPR;

5. That the costs of and occasioned by the Application be borne by the Vento Entities.

[8] The Application is accompanied by a Draft Order and the supporting Affidavit of Lynnesia Budhoo.

**GROUNDS OF THE APPLICATION**

[9] In relation to the Notice of Application and the Amended Notice of Application, two grounds are put forward. In summary, they relate to the power conferred on the court to strike out a statement of case or part of case or part of a statement of case. The second ground is premised under Part 43 of the CPR in particular, rule 43.10 (5) (b) by including an address for service of the Alliance Entities.

[10] In relation to all the Affidavits of Alan Feurnstein, they relate to the failure of the Vento Entities to comply strictly with the procedural requirements for the form of documents pursuant to CPR 26.3 (1) and 30.2, that is to say the alleged failure of the Ventor Entities to mark the Affidavits at the top right hand corner thereof, and on the back sheet with the name of the party on whose behalf it is filed; the initials and surname of the deponent; the number of the affidavit in relation to the deponent; the identifying reference of each exhibit referred to in the affidavit; the date when sworn; and the date when filed.

[11] In relation to the Third Affidavit of Alan Feurnstein, the grounds further relate to the allegation that the second sentence of paragraph 16 and the final sentence of paragraph 24 contain statements of belief that do not meet the requirements of Part 30.3 (2) and thus those paragraphs should be struck. Additionally, the grounds relate to the allegation that certain portions of the Third Affidavit contain material that is scandalous and or irrelevant.

The Vento Entities oppose the application. They filed skeleton arguments and Counsel Mr Gerhard Wallbank addressed the Court.

[12] The Alliance Entities did not file any skeleton arguments, but Counsel Mr Bourne made oral submissions.

**SUBMISSIONS ON BEHALF OF THE ALLIANCE ENTITIES**

[13] For the most part, the submissions of Learned Counsel Mr Bourne repeat the grounds of the application and need not be rehearsed. A brief summary of Counsel's arguments /submissions augmenting those grounds will suffice:

1) Both application suffer from the same defect, that is to say, they do not give an address for service of the person against whom the Applicant seeks to enforce the award.

2) In relation to this failing, CPR 26 provides an avenue to the court under which it may deal with non-compliance with the Rules.

3) Part 26.3 provides the sanction for non compliance with the rule. Additionally, Part 43 is not expressed as permitting the defect complained of.

4) To be admissible, the Further and Third Affidavits of Allan Feurnstein must comply with the requirement of Part 32 (d).

5) There are multiple paragraphs within the Third Affidavit of Allan Feurnstein that ought to be struck pursuant to Part 30.3 (d) as the content thereof is irrelevant to the application at bar. Sentences 3 and 4 of paragraph 17 are wholly irrelevant; In paragraph 18, there are three words in that paragraph which are scandalous in so far as they suggest a particular misfeasance; we say the word "scheme" is a scandalous word.

6) Paragraph 19 should be struck out in its entirety in so far as the saying is based on a power point presentation in arbitration and which represents opinions and not facts established.

7) Paragraph 20 is scandalous and paragraphs 21 and 22 are scandalous and irrelevant as they make imputations of the conduct of four government personnel.

8) Paragraph 32 is scandalous and irrelevant and the records in paragraph 33, (Tab 11)

9) Paragraphs 41 through 47 are irrelevant to the application at bar.

10) Certain documents exhibited to affidavit Allan Feurnstein, in particular, the document listed at Tab 5 which is a power point presentation; Tabs 8, 9, 10; and in relation to the plaintiff's opposition are irrelevant to the application at bar; those documents, and the grand jury verdict; the deposition of Duane Crithfield have no bearing whatsoever on the outcome or determination of the application at bar. The documents are inflammatory and are outside the scope of the application at bar.

[14] To support of his submissions on non-compliance with the rules of court, Mr Bourne cites cases which he says show the Court's thinking on the application of the rules of court. These cases include:

i) **Michael Baptiste v Youland Bain-Joseph, HCVAP 2006/026;**
ii) **Pendragon International Limited Anguilla Civil Appeal No 3 of 2007;**
iii) **Arbuthnot Latham Bank Ltd and others v Trafalgar Holdings Ltd and others; Chishty Coveney & Co (a firm) v Raga**
iv) **The Attorney General (Appellant) v Universal Projects Limited (Respondent), [2011] UKPC 37; Privy Counsel Appeal No 0067 of 2010 from the Court of Appeal of Trinidad and Tobago.**

[15] During the course of his submissions, Mr Bourne indicated that the Vento Entities Application should have come by way of Fixed Date Claim Form. This submission may very well have some merit, but this was not the basis of the application before the Court, and in my judgment, it would be not be prudent for this court to act upon that observation. However, if I were required to comment, I would say that even if Counsel is right, in his opinion that the matter should have commenced by way of Fixed Date Claim Form, the Court does not normally strike out a matter begun on the wrong form. Normally, the Court would exercise its case management powers and put things right so that the case can proceed, thus furthering the overriding objective of ensuring that the case is dealt with expeditiously.

**SUBMISSIONS ON BEHALF OF THE VENTO ENTITIES**

[16] Learned Counsel Mr Wallbank grounded his replying submissions on the following arguments summarised thus:

1) "To sacrifice substance by way of slavish adherence to form for the purpose of a genuine claim defeats the overriding objective." Per George –Creque JA in **Intrust Trustees (Nevis) Ltd v Naomi Darren, Nevis High Court Civil Appeal No 1A of 2009).**

2) The application to strike out on grounds of non-compliance with the formal requirements of the CPR is grossly disproportionate and should have never been brought.

3) Mr Keithley Lake, a long established attorney practicing in Anguilla, and who is the principal of the Alliance Entities, must have been aware of the principle of proportionality, as articulated in CPR Part 1 that the overriding objective of the Rules is to enable the court to deal with cases justly.

4) It is the duty of the parties to help the court to further the overriding objective.

5) There is considerable authority from the Eastern Caribbean Supreme Court addressing the manner in which the court is to deal with striking out applications. These authorities include the cases of:

   i) **Clive Hodge v Elflida Hughes,** Claim No AXAHCV2012/0005, the critical paragraphs being paragraphs [2], [3], and [4] which Counsel quoted.

   ii) **Tawney Assets Limited v East Pine Management Limited et al**, HCVA 2012/007, the critical paragraphs being paragraph [22], and [23] which Counsel quoted.

6) There is no material whatsoever in the Alliance Entities' application for strike out advancing a case that the claim is obviously unsustainable, cannot succeed, or in some other way is an abuse of the process of the court thus warranting strike out of the Vento Entities' application.

7) The application for enforcement of the arbitration award was brought on inter partes, even though the application could have been made without notice under CPR 43.10 (3);

8) The application for enforcement has already been the subject of two case management hearings before Mathurin J who dealt with the objections of the Alliance Entities as to form of the application for enforcement. The Judge opined that the Alliance entities, having already filed evidence going to the substance of the matter, were now too late to bring procedural objections as to form

9) None of the alleged defects go to the substance of the matter, which is whether the legal requirements are satisfied, and the court should exercise its substantive jurisdiction to grant recognition and enforcement of an arbitration award.

<u>Failure to comply with CPR 43.10 (5):</u>

10) The point raised by Mr Bourne about service is wrong because the Third Affidavit of Mr Feuerstein gives evidence as to service. At no stage was there any confusion as to service. The allegation that Vento Entities did not include an address for service of the Alliance Entities is not only wrong, but is without any substantive effect upon the matter as a whole. That allegation is not an instance of such an exceptional case which warrants the Court exercising its sparingly used powers to strike out a case and thus deprive the Vento Entities of their application for recognition and enforcement of the arbitration award.

11) The Alliance Entities have failed to mention the availability of other court powers of case management to make orders to progress a case. They have bypassed proportionate and balanced judicial procedures and powers by trying to persuade a differently constituted court to knock out the application even though the Judge had already said that she is not interested in substance than in procedural detail.

12) The Alliance Entities are seeking to delay and frustrate the enforcement of an award of US$7,419,000 against each of the Alliance Entities jointly and severally.

13) The rules in question do not specify the consequences of failure to comply; and the Court has a general power to rectify matters where there has been a procedural error. This power applies where, as in the present case, the rules in question do not specify the consequence of failure to comply; and the court may rectify with or without an application.

Alleged breach of CPR Part 30.3 (2) – Inclusion of statements of information:

14) The application by the Vento Entities is a summary procedure[1] and there is no good reason for excluding statements of information and belief. No authority has been provided for saying that an affidavit in support of an application for registration and enforcement of an arbitration award cannot include statements of information or belief because it is not an affidavit in support of a procedural interlocutory or summary judgment application. Indeed the making of such an application is provided for in Part 43.

Application to strike paragraphs 17 – 22 and first paragraph of paragraph 24 of the affidavit of Allan Feurnstein.

15) These paragraphs are not irrelevant. They explain the opening two sentences of paragraph 17 that "Mr Lake was a central individual in the matters that were referred to Arbitration. He was no bystander."

16) The statement was given in evidence by Mr Feuerstein in response to statements made in the Affidavit of Duane Crithfield filed in these proceedings on 16th December

[1] See National Ability SA v Tinna Oils & Chemicals Ltd [2009] EWCA Civ 1330 which speaks about the methods of enforcing an arbitration award.

2013 on behalf of the Alliance Entities. The evidence the Alliance Entities would now like struck from Mr Feuerstein's Affidavit is evidence which confirms why liability did, in the arbitration award, and should extend to the individual non-corporate including Mr Lake.

Paragraph 33 (d) last paragraph of 3rd Affidavit f Alan Feurnstein

17) This paragraph is part of he overall picture without which this Court would have a truncated and distorted view and consequently understanding of the matter. It should not to be struck out.

Paragraphs 41 to 47 of 3rd Affidavit of Allan Feurnstein

18) These paragraphs contain information about the attempts to obtain a resolution of the matter through mediation and the Alliance entities failure to honour payment obligations. It would be incorrect to leave the Court with the impression that no such resolution had been attempted when in fact it had. The learned Judge had focused her regard towards the Vento Entities to seek an alternative form of resolution. It was therefore appropriate for the Vento Entities through Mr Feurnstein to adduce evidence that the Ventor Entities had already tried alternative dispute resolution; that a settlement agreement had come out of that, but Alliance Entities had failed to honour their payment obligations deriving therefrom.

Tabs sought to be excluded

19) The Tabs sought to be struck out are exhibited to Mr Feuerstein's 3rd Affidavit They are on the whole subsidiary to the text paragraphs in that Affidavit that the Alliance entities are seeking to exclude.

Paragraphs 19 to 22 allegedly scandalous statements

20) These paragraphs seek to have struck out from Mr Feurnstein's 3rd Affidavit evidence explaining Mr Lake's role in the underlying matrix. They do not explain which information is objectionable on grounds that it is scandalous and why. That information given concerning MR Lake does not portray his involvement in a good light is not itself grounds for its removal.

21) The Alliance Entities through the Affidavit of Mr Crithfield sough to argue in this Court that Mr Lakes's personal and individual liability under the arbitration award should be excluded on the basis that he had no personal involvement. They cannot now properly object when, in response to that, the Vento Entities present evidence contradicting the Alliance Entities' version of events.

**Costs**

22) The Court should make a wasted costs order against the Alliance entities legal practitioners as the application should never have been brought.

**DISCUSSION AND DECISION**

[17] Having fully considered the Notice of Application of the Alliance Entities, the supporting Affidavit of Lynnesia Budhoo filed 14th January 2014; the Notice of Application of the Vento Entities, the supporting Affidavit of Alan Feuerstein and documents exhibited thereto dated 31st October 2013; the Amended Notice of Application of Vento Entities and Further Affidavit of Alan Feuerstein dated 28th November 2013 and the documents exhibited thereto; AND having heard the oral submissions of Counsel for the respective parties; AND having reviewed the written submissions of Counsel for the Vento Entities; AND having reviewed the authorities cited by both Counsel;

The Court is of the opinion that the application of the Alliance Entities to strike out the Vento Entities' Notice of Application and their Amended Notice of Application be and the same is hereby dismissed in its entirety for the following reasons:

[1] It is well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its rights to a fair trial. It is also well settled that before using CPR 26.3 (1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. Finally, in deciding to strike out, the judge should consider the effect of the order on any parallel proceedings and the power of the court in every application, must be exercised in accordance with the overriding objective in dealing with cases justly." (Per Edwards JA in **Citco Global Custody NV v Y2K Finance,** BVI Civil Appeal No 22 of 2009:

[2] The documentary evidence, and the conduct of the parties, do not support the allegation of Alliance Entities that the Vento Entities did not include an address for service. Even if there was no address for service, this in and of itself does not warrant the court striking out the Notices of Applications filed by Vento Entities, thereby depriving them of a fair trial of their application for recognition. This allegation seems to be a preemptive strike employed by the Alliance Entities to gain advantage. This allegation fails. It is devoid of merit.

[3] In relation to the defects of form of the Affidavits of Mr Feuerstein, the court notes that this allegation has merit. However, it is well established

that procedure does not trump form, **(Harrigan v Harrigan).** Furthermore, as noted by George-Creque, JA in **Intrust Trustees (Nevis) Ltd v Naomi Darren, Nevis High Court Civil Appeal No 1A of 2009:** "To sacrifice substance by way of slavish adherence to form for the purpose of a genuine claim defeats the overriding objective." If it were necessary to do so, at this stage, the CPR gives the Court the power to put things right so that the case can proceed. To my mind, this would be time consuming and costly, and would further delay the trial of the substantive matter. Moreover, as the transcript of the proceedings seems to indicate, the Learned trial Judge who has been seized of the matter has apparently indicated in the presence of the parties that she is more interested in substance than procedural details; it therefore makes no sense to order the refiling of the Affidavits. It would be a waste of costs and time. This submission therefore fails.

[4] In relation to the several paragraphs of the Affidavits of Alan Feuerstein which are under attack for their alleged relevance and or scandalous nature; or their admissibility, I am of the view that this is a grievance that should be dealt with by the trial judge who would be better placed to weigh all the evidence and its degree of relevance or admissibility.

The grievances of the Alliance Entities can also be addressed at trial at the cross examination stage, if any. With skillful cross examination, the court will be able to determine whether in all the circumstances, the impugned paragraphs should be excluded.

[5] In the case of **Wilkinson v West Coast Capital and others [2005] EWHC 1606,** the Mann J stated at paragraph 5:

"A court which is asked to approach these questions at the interlocutory stage ... should be that much more careful in forming a view that the evidence is going to be irrelevant, or if relevant, unhelpful and /or disproportionate. One must also bear in mind the extent to which it is desirable to consider these matters at all at an interlocutory stage. One must be on one's guard, in applications such as this, not to allow case management in relation to witness statements to give rise to significant time and cost-wasting applications; those should not be encouraged. In my view, I should only strike out the parts of the witness statement which I am currently considering if it is quite plain to me that, no matter how the proceedings look at trial, the evidence will never appear to be either relevant, or if relevant, will never be sufficiently helpful to make it right to allow the party in question to address it."

5. I am of the view that the dicta of Mann J in **Wilkinson v West Coast Capitol and others** quoted herein are applicable in the present case even though the court in that case was dealing with an application to strike out portions of Witness Statements. I adopt them. With those dicta in mind, I

am unable to say that the trial judge would not wish to hear nothing at all about the impugned paragraphs, sentences and exhibits. The extent to which the court might wish to go into those paragraphs may be limited, but it is inappropriate for me to say at this stage, how limited that would be. In the circumstances, I decline to strike out portions of the Affidavits of Alan Feuerstein which the Alliance Entities seek to strike out as being inadmissible or irrelevant or scandalous. The Alliance Entities can make submissions on the issue to the trial judge who will be much better placed to make a fairer judgment as to the relevance or admissibility of these paragraphs, sentences and exhibits. It follows that the Court prefers and accepts the submissions of Counsel for the Vento Entities, and I am in agreement with the submission of Mr Wallbank that the application to strike out the Notices of Application should never have been brought in the light of the observations of the Learned Judge, and given the nature of the substantive Application before the Court.

[18] In the foregoing premises, I remit the matter to the court office to be set down for hearing of the substantive matter on the adjourned date as fixed by the Learned trial Judge.

**CONCLUSION**

[19] The application by the Alliance Entities is hereby dismissed in its entirety with costs to the Vento Entities to be assessed if not agreed. If the parties cannot agree on costs of the application, I invite them to prepare brief submissions on the issue for consideration at the next sitting of the master in Anguilla.

[20] The matter is remitted to the Court Office, and the Court Office is directed to set down the matter for hearing before the Learned Judge on 20th February 2014, which is the adjourned date fixed by the Judge.

[21] Last but not least, I would like to express my thanks to Counsel on each side for their very helpful submissions and authorities. I would be remiss, however, if I did not specially recognize the impressive written and oral submissions of Counsel Mr Wallbank which greatly assisted me in the preparation of this ruling in a timely manner.

**PEARLETTA E LANNS**
MASTER