

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

DOMHCV2013/0376

BETWEEN:

**JAMESON DEFOE
MIKEY LUKE**

(As beneficiaries of the Estate of James Michael Luke, deceased)

Claimants

and

GLENDA LAFOND

(As Personal Representative of the Estate of James Michael Luke, deceased)

Defendant

Appearances:

Mr. Stephen Isidore with Miss Ernette Kangal for the Claimants

Mr. Anthony Commodore for the Defendant

2015: October, 17

2016: March, 9

RULING

[1] **Stephenson, J.:** By fixed date claim form filed on 11th November 2013 the first named claimant Jameson Defoe filed an action against the defendant Glenda Lafond seeking the following relief:

- (1) An order for the revocation of the grant of probate issued in the estate of James Michael Luke, deceased and registered as No. 145 of 2013;

- (2) An order that the alleged will of the deceased dated 4th January 2013, which is exhibited in the said grant of probate in the estate of the deceased be pronounced for in solemn form;
 - (3) Costs;
 - (4) Further and or other relief as the court deems fit.
- [2] An affidavit sworn to by the claimant was filed on the said 11th November 2013 with exhibits.
- [3] The proceedings were served with the leave of the court by advertisement in the local newspaper.
- [4] On 19th February 2014 the defendant acting in person, filed an affidavit in reply to the claimant's affidavit in support of claim.
- [5] On 20th February 2014 Learned Counsel Mr. Anthony Commodore filed a notice of appointment of solicitor in the matter.
- [6] On 19th August 2014 the claimant filed a supplemental affidavit in support of his claim.
- [7] On 6th January 2015 the claimant filed an application to lodge the probate in court supported by an affidavit of even date.
- [1] On 23rd January 2015 the defendant filed an affidavit in reply to the affidavit in support to lodge the grant of probate in the court. This application was withdrawn with leave of the court on 27th March 2015 and the first hearing of the fixed date claim form was fixed for 28th May 2015.

[2] On 20th May 2015 the claimant filed an amended fixed date claim form which amendment added the second named claimant Mikey Luke and amended the claim as follows:

“ The Claimants Jameson Defoe of Morne St Joseph in the Parish of St Joseph in the Commonwealth of Dominica and Mikey Luke of St Croix, USVI, claims against the Defendant Glenda Lafond of St Joseph Village in the Parish of St Joseph in the Commonwealth of Dominica presently residing at Anna’s Retreat, St Thomas, USVI being named the executrix in the alleged Last Will dated January 4th 2013 of James Michael Luke, late of St Joseph in the parish of St Joseph, in the Commonwealth of Dominica who died on the 25th January 2013 to have the grant of probate of the alleged/pretended will of the deceased dated January 4th 2013 revoked and the said pretended will pronounced against, costs and such further or other relief as this Honourable Court thinks fit.”

[3] A statement of claim setting out the claimants’ case was filed on 20th May 2015.

[4] On 2nd July 2015, the claimants filed a notice of application pursuant to Part 26.3 of the Civil Procedure Rules 2000 (“CPR”) seeking an order that the affidavit in reply to the affidavit in support of the claim filed on 19th February 2014 be struck out, judgment be entered in favour of the claimants, the grant of probate issued in the Estate of James Michael Luke deceased registered as No. 145 of 2013 be revoked, costs and further or other relief as the court deems fit. The grounds for the application are stated in the application and will be dealt with shortly. This application was accompanied by an affidavit in support of even date with exhibits.

[5] On 29th July 2015 the defendant filed an affidavit in reply to the affidavit in support of application to strike out defence with affidavits.

[6] The parties were ordered to file and serve written submissions with authorities in support of their positions and oral arguments were heard to supplement the said submissions after which I reserved judgment.

Application to strike

[7] The grounds for the application to strike were as follows:

- (1) That James Michael Luke died on 25th January 2013. A caveat was filed on 7th February 2013 at the Registry forbidding the sealing of any grant in the estate of the deceased without notice to the caveators' solicitors and the siblings of the claimants who are also beneficiaries of the estate of the deceased.
- (2) That the caveat subsists for six months from the date of its lodgment.
- (3) That on 14th June 2013 the defendant caused an application to be lodged on her behalf for the issue of a grant of probate.
- (4) On 25th June 2013 whilst the caveat was subsisting against the estate of the deceased and without notice to the caveators' solicitors, the Registrar sealed a grant of Probate in the estate of the deceased.
- (5) That said grant was improperly sealed and granted by the Registrar as there was a subsisting caveat which forbids the sealing of the grant in the estate of the deceased at the time it was issued.
- (6) That the claimants caused a fixed date claim to be filed requesting the revocation of the said grant.
- (7) That the respondent on 19th February 2014 caused an affidavit in response to the claim to be filed.
- (8) The said affidavit does not disclose any reasonable ground for defending the claim.

The applicant stated in his application that the grounds of the application are further developed in the affidavit sworn by the first named claimant.

[8] In his affidavit in support of the application to strike the defendant's defence the only statements made by the deponent which in my view falls to be considered in the application is at paragraphs 8, 9 and 10 of the affidavit when he stated as follows:

(8) "In the said affidavit the defendant stated at Paragraph 3 that "I admit that the claimant and his siblings apparently did file a "Caveat" against the probate however I have been informed by my solicitor and verily believe the "Caveat" entered against the Grant of Probate was not in keeping with the provisions of the Law, therefore, it had no legal force and could not and did not prevent the Registrar from granting probate of will to me.

(9) It is clear admission from the contents of the defence that the caveat was subsisting at the time of the grant but it was alleged to be not in keeping with the Law. I have been informed by my Solicitor and verily believe that the only authority that can decide on the validity of the caveat is the court and not the registrar.

(10) Given that, I have been informed by my Solicitors and verily believe that the Affidavit in Reply filed by the Defendant does disclose any reasonable ground for defending the claim and should accordingly be struck out."

[9] The defendant in her affidavit in reply asked the court to deny the claimants' application to strike out her affidavit in reply. In her affidavit the defendant is in essence challenging the *locus standi* of the claimants, the truth of the averments in the affidavit in support of the application and claims that she has a 'clear cut case before the court'¹.

¹ See paragraph 15 of the Affidavit in reply to affidavit in support of application to strike out defence filed on behalf of the defendant on the 24th July 2015.

[10] The defendant in her affidavit also sought to challenge the promptness of the claimants' application in that the claimants have been in possession of her affidavit some 16 months before they made the application currently before the court.

[11] This is an application to strike out the defendant's affidavit in reply which in the case at bar is in essence the defence in the matter. I have considered the written and oral submissions made by the claimants and the defendant in this matter.

The Law

The Principles for Striking out

[12] Part 26 of CPR 2000 empowers the courts to remove the whole or part of a statement of case. . The relevant paragraphs read

CPR 26.3 provides:

“Sanctions – striking out statement of case

26.3 (1) In addition to any other 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 the 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 is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

(2) If –

(a) the court has struck out an applicant's statement of case;

(b) the applicant is ordered to pay costs to the defendant; and

(c) before those costs are paid, the applicant starts a similar claim against the same defendant based on substantially the same facts;

the court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid.”

CPR 26.4 stipulates:

“Court’s general power to strike out statement of case

26.4 (1) If a party has failed to comply with any of these rules or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the court for an “unless order”.

(2) Such an application may be made without notice but must be supported by evidence on affidavit which –

(a) contains a certificate that the other party is in default;

(b) identifies the rule or order which has not been complied with;

and

(c) states the nature of the breach.

(3) The court office must refer any such application immediately to a judge, master or registrar who may –

(a) grant the application;

(b) direct that an appointment be fixed to consider the application and that the court office give to all parties notice of the date, time and place for such appointment; or

(c) seek the views of the other party.

(4) If an appointment is fixed the court must give 7 days notice of the date, time and place of the appointment to all parties.

(5) An “unless order” must identify the breach and require the party in default to remedy the default by a specified date.

(6) The general rule is that the respondent should be ordered to pay the assessed costs of such an application.

(7) If the defaulting party fails to comply with the terms of any “unless order” made by the court that party’s statement of case shall be struck out.

(8) Rule 26.9 (general power of the court to rectify matters where there has been a procedural error) shall not apply.

□Rule 11.16 deals with applications to set aside any order made on an application made without notice.”

CPR 26.5 provides that:

“Judgment without trial after striking out

26.5 (1) This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the “unless order” by the specified date.

(2) If the party against whom the order was made does not comply with the order, any other party may ask for judgment to be entered and for

prescribed costs appropriate to the stage that the proceedings have reached.”

- [13] The principle upon which a judge may strike out a statement of case is not in doubt and is well established. The striking out of a party’s statement of case, or most of it, is a severe step which is only to be taken in exceptional cases. In taking such action a court is to act cautiously because the exercise of this jurisdiction denies 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.
- [14] It is important that a court is 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 or that there is no point in having a trial².
- [15] The proper approach to be taken in striking out a defence which is a statement of case on the ground that it does not disclose any reasonable ground for defending the claim has been described by the court on numerous occasions as being appropriate only in plain and obvious cases.
- [16] In the Court of Appeal Decision **Tawney Assets Limited –v- East Pine Management Limited et al**³ it was held that the striking out of a party’s statement of case, is a drastic step which should only be used in clear and obvious cases, when it can be clearly seen on the face of it, that the claim is obviously unsustainable, cannot succeed or in some other way is in abuse of process of the

² “no point in having a trial” – Blackstone’s Civil Practice 2009 at paragraph 33.6

³ HCVAP201/0007 (Territory of the Virgin Islands)

court. The court must therefore be persuaded either that a party is unable to prove the allegation made against the other party or that the statement of case is incurably bad; or it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.

[17] Is this the case in the matter before me?

[18] The essence of the claimants' case as pleaded is that James Michael Luke died having made a will naming the defendant as executor. That prior to the granting of probate to the defendant a caveat was lodged on behalf of the beneficiaries of James Michael Luke prohibiting the sealing of any grant in the said estate without notice to the claimant's solicitors who were acting on behalf of the said beneficiaries.

[19] The probate was granted in the face of the caveat without the solicitors being informed of same. The claimant(s)⁴, based on the contents of his fixed date claim form⁵ is seeking to have the said probate revoked and to have a probate in solemn form pronounced.

[20] In the amended fixed date claim form filed on 20th May 2015 the claimants asked for the following relief; that the probate be revoked and that the 'pretended will be pronounced against'.

[21] The said Amended fixed date claim form states:

"The claimant claims:

⁴ The claim was initiated by a single Claimant in the first instance and amended to include the second named claimant

⁵ Op Cit

- (i) An order for the revocation of the Probate issued in the estate of James Michael Luke, deceased and registered as No 145 of 2013.
- (ii) Costs
- (iii) Further and other reliefs as the court deems fit"

[22] In the statement of claim filed with the amended fixed date claim form the claimants repeat the reliefs stated in the fixed date claim form.

[23] In her affidavit in response to the claimants' affidavit in support of the claim first filed in the matter the defendant stated that the grant of probate is a valid one and challenges the *locus standi* of the first named claimant to bring the claim. It is noted that the defendant did not file an amended affidavit in reply, further affidavit in reply or defence to the amended proceedings before the court.

[24] The defendant also challenged the validity of the caveat filed in the matter.

[25] What therefore is the issue before the court? Based on the claimant's claim it would be the validity of the probate granted to the defendant. The defendant is saying that it is a valid grant and also her reasons as to why it is a valid grant. The claimant is claiming that the grant is invalid and should be revoked and states why they say so.

[26] It is clear based on the statements of case before the court, that there are central issues which are in dispute. In such circumstances it would not be appropriate for me to strike out the defence. A perusal of the statements of case before the court reveals that this case involves a substantial point of law which does not admit of a plain and obvious answer and which may be best determined upon a full ventilation of the matter and it would therefore not be safe to strike out the defence in that circumstance.

[27] In their respective submissions before the court, counsel sought to expound on the issues that arise in the case. I find it prudent not to delve into the said issues save to say that there is a triable issue which ought to be ventilated at trial. This is an unsuccessful application to strike out and I am guided by the decision in **Baltic Real Estate Ltd (No 1)**⁶ and will not express any reason why this application is dismissed no more than to say that based on the statements of case before the court that there is a serious issue to be tried in this matter.

[28] I accordingly dismiss this application to strike the defendant's defence and award costs in the sum of \$1,000.00 to the defendant. This matter is now adjourned to the 7th day of April 2016 for directions to be given in the matter.

(Sgd.)M.E.B. Stephenson
M E Birnie Stephenson
High Court Judge

⁶ [1993] BCLC 498 as mentioned in Blackstone's Civil Practice 2009 at paragraph 33.6 page 430