IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

(CIVIL) -

DOMHCV2016/160

BETWEEN:-

LEVI MAXIMEA

Claimant/Respondent

And

THE DOMINICA AGRICULTURAL INDUSTRIAL AND DEVELOPMENT BANK

GERALD BURTON CHAMBERS

Defendants/Applicants

Appearances:

Mrs Colleen Felix Grant for the Defendants/Applicants

Claimant/Respondent in person

Considered on the written submissions submitted by:

Mrs Colleen Felix Grant for the Applicants

Mr Levi Maximea in person

2016: August 19

2017: February 3

RULING

[1] **Stephenson, J**. This is an application filed by the defendants to strike out the claim filed herein as an abuse of process. The application is filed pursuant to Rule 26.3 of CPR 2000. The relevant parts of Rule 26.3 states

> "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 –
> (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 …

[2] In this case, the claimant/ respondent ('the respondent') issued proceedings against the defendants/applicants ('the applicants') for damages for breach of contract, defamation, slander and malicious prosecution as well as exemplary and aggravated damages and damages for breach of constitutional rights.

[3] The striking out of a statement of case (Claim) is a draconian step which a court would only take in exceptional circumstances. I am guided by the decision in **Baldwin Spencer v The Attorney General of Antigua and Barbuda et al[1] where** Dennis Byron CJ (Ag.), had this to say about the test that should be applied by the court in applications such as the one in the case at bar.

> *"This summary procedure should only be used in clear obvious cases, when it can be seen on the face of it, that a claim is obviously unsustainable, cannot succeed or in some other way is an abuse of the process of the court… striking out has been described as 'the nuclear power' in the court's arsenal and should not be the first and primary response of the court."*

[4] In **Tawney Assets Limited v East Pine Management et al[2]**, Acting Justice of Appeal Don Mitchell QC said that:

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[1]Civil Appeal No. 20A of 1997
[2]BVI High Court Civil Appeal No. 7 of 2012)

". The court must therefore be persuaded either that a party is unable to prove 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".

[5] Learned Counsel for the applicants, has submitted that the claim filed by the respondent should be struck out as it is an abuse of process. In the case of **Swainv Hillman**[3]in looking at the role of the judge in applications to strike Lord Woolf said that:

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24[4]. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and, I would add, generally, that it is in the interests of justice. ***If a claimant has a case which is bound to fail****, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant shouldknow this as soon as possible. Useful though the power is under Part 24, it isimportant that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial." (emphasis mine)*

[6] In the Anguilla case of **Robert Conrichv Ann Van Der Elst**[5]Rawlins J said that

*"It is only where a statement of case****does not amount to a viable claim*** *or defence or is beyond cure that the court may strike out"(Emphasis mine)*

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[3][2001] 1 All ER 91

[4]Part 24 of the CPR in the UK is in similar vein as Part 15 of CPR 2000

[5]AXAHCV2001/0002

[7] In this application to strike out the claimthe determination that has to be made is whether or not the claim is bound to fail and in that regard this court is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing the claim. Consequently, the claimant ought not to be permitted to continue to pursue a case which has no real prospect of success.

[8] This is of course in keeping with the overriding objective of the CPR2000 that is, to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases.

The claim:

[9] The claimant seeks damages against the defendants based on the torts of libel, slander and malicious prosecution. In a nutshell, he claims that the defendants'actions to commence legal proceedings in another matter[6] have caused him injury, loss, and damage.

[10] Judgment was since entered against the respondent in the said claim.

[11] In the case at bar, the respondent claims that allegations made in that case that he had defaulted on his mortgage amounted to libel and defamation causing him damage and that the applicants also prosecuted him maliciously.

Malicious Prosecution

[12] The tort of malicious prosecution has over the years not be generally available in respect of civil proceedings and has been generally been only admitted in a few cases where it was found that there was an initial abuse of legal process which caused arguable. immediate and in some cases irreversible damage to the reputation of the victim.[7]

[13] In the very recent case of **Willers –v- Joyce,**[8] it was held that the tort of malicious prosecution includes the prosecution of civil proceedings. It was heldthat it seems instinctively unjust for a person to suffer injury as a result of the malicious prosecution of legal proceedings for which there is no reasonable ground, and yet not be entitled to compensation for the injury intentionally caused by the person responsible for having instigated it. Therefore in the case at bar, it is possible for the respondent to bring a claim for malicious prosecution against the applicants.

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[6] DOMHCV2014/0217 Dominica Agricultural and Industrial Development Bank –-v- Levi Maximea et anor
[7] G*regory v Portsmouth City Council*[2000] 1 All ER 560 at 566,
[8] [2016] UKSC 43, [2016] 3 WLR 477, [2016] All ER (D) 97 (Jul)

[14] Having said that, though, it is now incumbent upon the court to review the statement of case in an effort to ascertain whether or not the respondent has a case which is sustainable in law. Does the claim as brought by the respondent have a real prospect of succeeding at trial?

[15] In order for the respondent to succeed in a claim for malicious prosecution he must be able to prove the following four key elements:

i. that the original case which was instituted against him was terminated in his favor;
ii. that the applicants played an active role in the original case;
iii. that the applicant did not have probable cause or reasonable grounds to support the original case;
iv. that the applicants initiated or continued the initial case with an improper purpose.

[16] The respondent in the case at bar would have an insurmountable task in that the case brought against him by the first named applicant with the second named applicant acting on its behalf was not terminated in his favour. The defence which he sought to raise at first instance was struck out and judgment entered in favour of the applicant to be assessed by the court.

[17] His application for leave to appeal was not allowed and the court of appeal held*inter alia* that respondent bankwaswellwithin its'rights to seek to have the appellanthonour the terms of the mortgage agreement he signed with the bank[9].

[18] It is clear that the respondent would fail on the issue that there was no probable cause or reasonable grounds for the applicants to bring the case against him as the court of appeal stated and I repeat "the appellant was "well within its' right to seek to have the appellant honour the terms of the mortgage agreement he signed with the bank.

[19] Based on the facts of the case brought by the first named applicant as reported and on the ruling of the court of appeal clearly, it cannot be said that the case was brought with animproper purpose.

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[9] DOMHAP2015/0017

Therefore the respondent's claim which he is seeking to bring against the applicants for malicious prosecution has no prospect of succeeding.

Defamation and slander

[20] The respondent in his written submissions sought to raise a number of issues which are not pertinent or relevant to the issue at hand. It is the respondent's case that he was wrongfully accused by the first named applicant of being a mortgage loan defaulter, a bad debtor and of shameful conduct which was communicated to other banks and financial institutions which is slanderous in that conveys a defamatory imputation tending to lower him in the estimation of right-thinking members of the banking and financial institutions generally.

[21] The respondent admitted that he defaulted on his loan however he insisted that he was not at fault that he was a victim of unlawful termination of his employment which deprived him of the means whereby he could service his obligations that in spite of knowing this the first named applicant still brought proceedings against him.

[22] The respondent submitted that the breach of the mortgage agreement arose out of the failure of the first named applicant to exercise a duty of care owed to him to protect his interest. That the first named applicant was obliged to take reasonable care not only to ensure that the monthly installments from the reward from his tenure of office were applied to the loan but also to ensure that there was compliance with the standing order on the salary.

[23] This defence was soundly rejected by the courts both at first instance and by the court of appeal and that argument certainly has no validity in the claim as currently placed before the court.

[24] The respondent also submitted that the allegations made by the first named applicant are slanderous in that it conveyed a defamatory imputation tending to lower him in the estimation of right-thinking members of the banking and financial institutions generally.

[25] The respondent contended that action lay against the applicants for the communication of information which was false in fact and injurious to his good name, reputation, and character and that there was a need to protect him from falsehood. The respondent sought to rely on the following authorities in support of his claim for libel:

a. **Blackshaw –v- Lord**[10]
b. **Edwardo Lynch –v- Ralph Gonsalves**[11]

[10] [1983] 3 WLR 283 at 316 para D

c. **BDS Ltd –v- Ralph Gonsalves**[12]

d. **Kenny Anthony –v- Vaughn Lewis**[13]

[26] A defamatory statement is a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to disparage him in his office, profession, calling, trade or business. At the heart of a claim for defamation is the publication of a statement by the defendant about the claimant which is untrue.

[27] In the case at bar, the claim brought by the first named applicant against the respondent was for breach of themortgage agreement. The fact of the matter as has been found by and adjudicated by this court was that the failure to make the mortgage payments amounted to breach of the mortgage agreement for which the respondent was liable and judgment entered against the respondent.

[28] Therefore it is clear to this court that the respondent's claim for damages for libel will fail absolutely as the claim lacks the essential element that there was a false statement made by the fist named respondent. There is absolutely no likelihood of this aspect of the respondent's claim succeeding.

[29] Further it is to be noted that the issues which the respondent seeks to rely on have been dealt with by this court and affirmed by the court of appeal and there is no need to rehash those matters more than to say that the claimant's claim is misconstrued in its entirety and there is no likelihood of it succeeding and will be dismissed.

[30] The respondent is seeking to rehash and re-litigate issues which have already been dealt with and ruled on by this court and affirmed by the Court of Appeal. He is seeking to re-litigate those issues under a different heading which is an abuse of process.

[31] The question which also arises in this case as to whether a real and substantial tort has been committed by the applicants against the respondent. Do these proceedings serve a legitimate purpose of protecting the respondent's reputation? (Re: Kaidowski)[14]

[32] Does the respondent have any prospect of establishing that there was libel or defamation against him as he alleges? I have held earlier in this judgment that the likelihood of him succeeding on establishing

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[11] HCVAP2009/002 (St Vincent & The Grenadines) unreported
[12] HCVAP 2009/004 (St Vincent & The Grenadines) unreported
[13] SLUHCV2000/0411
[14] [2011] All E R (D) 177 October,[2011] EWHC 2667 QB

a tort has been committed against him is very unlikely. In the case of **Schellemberg –v- BBC**[15] as applied in **Dow Jones & Co –v- Jameel**[16]**.** The words of Eady J were applied when he said *"the overriding objective's requirement for proportionality meant that he (the judge) was bound to ask whether the "game was worth the candle" or whether "there is any realistic prospect of the trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expenses and the wider public in terms of court resources"'.*

[33] It is been held in the case of **Ames and another –v- Spainhaus Project Ltd and another**[17] that "*if a libel claimanthas a real prospect of establishing a tort which is real and substantial, the court should be very reluctant to conclude that it is unable to fashion any procedure by which the claim can be adjudicated in a proportionate way, and that the only remaining way of justly dealing with the case is to dismiss it".*

[34] A review of the allegations made by the respondent in the case at bar shows that there is no real or substantive tort pleaded by him. The tort that he is seeking to claim based on the facts of the case and the law not only amounts to an abuse of process for reasons stated above but his action has no realistic prospect of success and will accordingly be dismissed.

Conclusion

[28] In my view, the respondent's case raises no issue that can be properly determined in a trial of this matter. I also find that the case as set out by the respondent in his claim is not only untenable but they issue that he seeks to re-litigate have in fact been ruled on by both the court of first instance and the court of appeal.

[29] The Court's concern at this stage is to determine whether the claim as pleaded, discloses any reasonable ground for bringing the action and whether the claim discloses a reasonable ground for bringing a case against the applicants, in order that the case may be tried on its merits and also whether claims made have any real prospect of succeeding.

[30] I have done this and I am of the considered view that both the claim discloses no reasonable ground for prosecuting the claim and accordingly it is ordered that the claim be struck out and this court so order.

Costs

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[15] [2000] EMLR 296
[16] [2005] EWCA Civ. 75 at para 57
[17] [2015] 1 W L R 3409 at paragraph 36

[31] Pursuant to part 65.11(2), it is hereby ordered that the respondent pays the applicants' costs in the sum to be assessed if not agreed.

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M E Birnie Stephenson

High Court Judge