THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

ANGUILLA

CLAIM No: AXAHCV2018/0009

BETWEEN

(1) PARAGON HOLDINGS LIMITED
(2) JOHN ERATO

Claimants/Applicants

And

(1) **TURTLE'S NEST (CONDOMINIUM) CO. LTD**
(2) BRAD HUFFMAN
(3) WESLEY FUHRMAN

Defendants/Respondents

APPEARANCES:

Ms. Tara Carter for the Claimants/Applicants
Ms. Paulette Harrigan for the 2nd and 3rd Defendants/Respondents

ON WRITTEN REPRESENTATIONS

2018: September 7th;

October 23rd.

RULING

[1] MATHURIN, J.: These applications are yet another clear indication that the parties to these proceedings need to cooperate if there is to be any chance of meaningful resolution of outstanding issues. The parties have hitherto expended a substantial amount of the court's resources, as well

as their own, through their inability or unwillingness to work with each other to benefit their mutual interests in Turtle's Nest Beach Resort.

[2] A chronology of these current proceedings is of assistance in the determination of the applications before the court. A claim form and statement of claim was filed by Paragon Holdings Limited and John Erato (the claimants) on 14th March 2018. It was served on Benjamine Company Services, the registered office for the 1st defendant on 16th March 2018. It was served on the 2nd defendant (Mr. Huffman) on 16th March 2018 and on the 3rd defendant (Mr. Fuhrman) on 27th March 2018. This is evidenced by the affidavits of Davida Carter and Michael Fleming filed on 14th May 2018.

[3] On 27th and 29th March 2018, acknowledgments of service were filed by Mr. Huffman and Mr. Fuhrman respectively. Accordingly, the deadline for the filing of defences by Mr. Huffman and Mr. Fuhrman would have been 13th and 24th April 2018 respectively. No acknowledgement of service was filed for the 1st defendant, its deadline having been 30th March 2018.

[4] On the 12th of April 2018, Mr. Huffman and Mr. Fuhrman filed an application for an order striking out several aspects of the claim as being collateral attacks on the findings of the court in similarly named proceedings Claim No AXAHCV2013/0012. That application was served on the chambers of counsel for the claimants on 16th April 2018. It was set down for consideration before the master on 29th May 2018. At the hearing before the master, which took place on 1st June 2018, it was ordered that the matter continue as a Fixed Date Claim as ought to be done in matters requiring an accounting.

[5] On 14th May 2018, the claimants filed requests for judgment in default of acknowledgment against the 1st defendant and in default of defence against Mr. Huffman and Mr. Fuhrman. The claimants also filed at the same time an application to determine the terms of judgment. This, it is to be noted, was done after the filing and service of the application to strike out.

[6] In this regard, I think it necessary to repeat the relevant proposition as stated by Master Lanns (as she then was) in **Ivan O'Neal v St. Vincent Electricity Services Limited (VINLEC)**. Master Lanns considered and applied Civil Appeal 6 of 2002 in St Kitts Nevis Anguilla National Bank Limited v Caribbean 6/49 Limited in arriving at her conclusion,

"Where an application has been made to strike out a statement of claim, the application stops time from running in relation to the period within which a defence should have been filed provided that the application is filed before the time to file the defence expires. Once the application has been filed before the time to file the defence expires, the defendant would be entitled to a hearing of its application before the requirement for filing of a defence could arise, and certainly before a judgment could be entered for failure to file a defence."

I am in full agreement with this statement of the law.

[7] I have considered the claimants' authorities and none of them address the specific issue as to whether the court office will enter default judgment against parties who have filed an application to strike out parts of the claim in advance of the date by which their defences were to be filed. In Nazim Burke v Ian Edwards Grenada GDAHCV2013/0431 the application for extension of time was filed after the time for filing a defence had elapsed and after the request for default judgment. Similarly, The Privy Council in Attorney General v Matthews [2011] UKPC 38 upheld the request for default judgment in circumstances where the application for an extension of time to file the defence was filed after the time for filing of the defence had elapsed.

[8] It follows, that as it concerns the 2nd and 3rd defendants, the application for default judgment appears to be premature. With respect to the 1st defendant, I note that the 1st defendant in this matter neither acknowledged service nor filed a defence. Having been served on 16th March 2018, the deadline for acknowledgement would have been on 30th March 2018. In perusing the claim form and statement of claim, it is however abundantly clear that the claim against the 1st defendant cannot be dealt with separately from the claim against the other defendants. The basis of liability sought against the 1st defendant is contingent substantially upon the liability of Mr. Huffman and Mr. Fuhrman as directors of the strata lot corporation with responsibility for the management of Turtle's Nest. In the circumstances the court will first consider the application to strike out various parts of the statement of claim.

The strike out application

[9] I am mindful of the caution that the court has to exercise in strike out applications. It was succinctly put by Mitchell JA (Ag) in Tawney Assets Limited v East Pine Management et al HCVAP2012/0007 BVI:

> *"the striking out of a party's statement of case, or most of it, is a drastic step which 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 court. The court must therefore 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."*

[10] The gamut of this application is that several of the pleadings in the statement of claim ought to be struck out as collateral attacks on the findings of a court of competent jurisdiction and are res judicata. The application references AXAHCV2013/0012 which was a matter allegedly involving the same parties as the claim herein.

[11] The 2nd and 3rd defendants (Mr. Huffman and Mr. Fuhrman) have also raised an issue stated in paragraph 5 of the affidavit of Mr. Fuhrman filed in support of the strike out application. Therein he asserts that the entity bearing the name Turtle's Nest (Condominium) Co. Ltd that was served with the statement of claim at Hannah Waver House, is not the strata lot corporation (hereafter "Strata Corp) of which they are the directors:

> *"5. The 1st defendant is a company which the 2nd respondent (claimants herein) incorporated on the 27th October 2006 under the provisions of the Companies Act 2000 (hereinafter referred to as the "2006 Co"). The respondents incorporated the 2006 Co with the same name as TNCCL (Strata Corp. my emphasis). The registered office of the 2006 Co is Hannah Waver House, The Valley in the Island of Anguilla (as evidenced by a certified copy of the Articles of Incorporation annexed hereto and marked "WF2")* **"**

[12] It is an issue that needs consideration as it was a question of fact that was specifically considered by the Referee at paragraphs 8 and 9 of his report in AXAHCV2013/0012. That report and its

findings were adopted pursuant to CPR2000 Rule 40.6(3) in the order of this court. In that report the referee stated as follows;

> *"8. I accept that evidence and explanation, but it does not mean that 2006 Co (the Company with the same name as Strata Corp)(my emphasis) became the strata corporation upon its incorporation in 2006.*
>
> *9. I do not accept the submissions made by Ms Carter at paragraph E-36 that the Strata Corp continued under the Companies Act as a consequence of the incorporation of 2006 Co. Ms Carter attempts to rely upon a letter dated 1 March 2013 from Ms Harrigan in which Ms. Harrigan appears to accept that the Strata Corp was established under the Act and subsequently incorporated under the Companies Act. Notwithstanding the letter from Ms Harrigan, 2006 Co is an entirely different legal entity to the Strata Corp. The Strata Corp remained the strata corporation for the purposes of the Declaration, and the Act, notwithstanding the incorporation of 2006."*

[13] Additionally, on 22nd February 2018, the court in its order dated 22nd February 2018 at paragraph 4 bullet point 2 stated;

> *"That the responsibility for management of Turtle's Nest Beach Resort is vested in the directors of the Strata Lot Corporation namely Turtle's Nest (Condominium) Co. Ltd (hereafter "Strata Corp"). The current directors of the Strata Corp are the 2nd and 3rd defendants, Mr. Huffman and Mr. Fuhrman."*

The report of the referee identifies in paragraph 5 how Strata Corp came into existence on 24th September 2004 when the claimants lodged with the Registrar of Lands a declaration pursuant to the Condominium Act 2000.

[14] If it was as alleged, that the 2006 Co in AXAHCV2013/0012 was served with the claim herein as opposed to the Strata Corp, the court can conclude;

1. That the 1st defendant is not the Strata Corp as determined by AXAHCV2013/0012;

2. That the 2nd and 3rd defendants are not directors of the 1st defendant for the purposes of these proceedings as the 1st defendant is not the Strata Corp; and

3. That the breaches as alleged in the claim would be breaches of the strata lot corporation and directors pursuant to their powers under the Condominium Act, Declaration and by-laws

Counsel for the claimants has not addressed this point in submissions.

[15] The issue was however considered, determined and adopted pursuant to the powers of the referee and the court under Part 40 in AXAHCV2013/0012. It does not assist, in my view, that these concerns are not addressed by the claimants save and except fleetingly by Mr. Erato. He states in paragraph 4 of his affidavit filed on 26th July 2018:

> *"Subsequently I formed the 1st Defendant Company. At the time the 1st Defendant was formed, I was of the view, having been advised by my attorney at the time, that the strata corporation was to be registered to ensure the proper operation of the strata corporation and Turtle's Nest Beach Resort. Therefore, the 1st Defendant was formed and as unit owners purchased and became registered owners, their unit entitlement was registered with the company registry.*
>
> *In relation to 1(b) the words "He is also a Director of the 1st Defendant, having been appointed on the 2nd May 2011 and re-elected on 13th April 2013" in paragraphs 4 and 5 of the Statement of Claim dated March 14th 2018 be struck – we oppose this because since the formation of the 1st Defendant, all the functions of the strata lot corporation, including the appointment of directions in the strata lot corporation were in relation to the 1st Defendant. All directors and unit owners accepted and treated the 1st Defendant as the strata corporation."*

The general rule is laid down in Mills v Cooper (1967) 2 QB 459 where Diplock LJ stated the doctrine of issue estoppel in relation to civil proceedings as follows;

> *"A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an*

element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceeding has since become available to him"

[16] It is a trite rule of law that an order of the Court remains valid unless set aside or varied. This applies to the present matters notwithstanding Counsel repeatedly referring to matters outstanding and yet to be adjudicated on in the AXAHCV2013/0012. In AXAHCV2013/0012, the claim and all reliefs sought, both by the claimants and defendants therein were refused and the claims dismissed in a ruling of the court on 22nd February 2018. It follows therefore that as of the date of the court's ruling on 22nd February 2018, the claimants were aware and bound by the decision of the court that 2006 Co is not the strata lot corporation.

[17] It is also trite that the findings of the court can only be displaced upon appeal. The court notes paragraph 15 of the affidavit in opposition to the strike out of Mr. Erato (claimant) wherein he states that there is an appeal pending against the decision of the court in AXAHCV2013/0012. Mr. Fuhrman, on the other hand has stated at paragraph 16 of his affidavit in support of the application to strike out:

"The Respondents did not appeal the Order of Mathurin J dated the 22nd day of February 2018 but instead instituted these new proceedings within days of the order (hereinafter referred to as Claim No. 2018/0009).'

[18] Mr. Erato is however, correct. A notice of appeal in AXAHCV2013/0012 was filed by the claimants on 4th April 2018. Paragraph 7 of the Notice of Appeal states that the Respondents were served at Paulette Harrigan's Chambers, Stoney Ground, Anguilla. This is in compliance with CPR2000 Rules 62.4 and 62.5. If this is the case Mr. Fuhrman ought to have been aware that there was an appeal against the judgment of 22nd February 2018.

[19] The notice of appeal in AXAHCV2013/0012 clearly seeks to challenge the court's adoption of the referee's report, the finding that the management of Turtle's Nest Beach Resort vests in the directors of Strata Corp and the decision of the judge to accept the recommendations made by the

referee. The notice asserts that despite the dismissal of the claims that all issues were unresolved and seeks that the decision of the judge be set aside. There is no automatic right to a stay of proceedings pending appeal and a successful litigant should not normally be denied the fruits of its success pending appeal except for in exceptional circumstances.

[20] It is an abuse of the court to ask the court to determine an application premised on findings in a judgment which is on appeal. It only serves to potentially embarrass and undermine the court's process. The claimant having filed an appeal which would directly impact on that determination, it is an abuse of the process of the court and likely to obstruct the just disposal of matters, to institute new proceedings asserting as fact, the subject matter of that pending appeal.

[21] In the event that I am wrong in respect of the foregoing, the court reiterates that the claimant has not satisfied the court that the entity served i.e. the 1st Defendant is the strata lot corporation. This is an essential ingredient as it underpins the entire claim. In other words, the court is not satisfied that the 1st defendant is a proper party to the claim herein. That has consequential implications for the other two defendants whose liability in the application is contingent on them being directors of the Strata Corp. This, having not been established, renders the claim incurably bad in my view.

[22] While I agree that striking out is a draconian step in that the party whose statement of claim is struck out is thereby deprived of a right to trial, if there is no viable claim or it cannot be cured, the trial cannot occur in any event. As such, the court must strike it out at this early stage and hopefully abort further expensive and time consuming proceedings. It is not a decision on the merits and I can decipher no prejudice in the claimant ensuring that the proper parties are the ones before the court. Further, the court is of the view that continuation of the claim is likely to obstruct the fair disposal of the matter and hereby orders that the same be struck out. This renders otiose the hearing of the additional matters raised in the strike out application.

[23] It follows, ipso facto, that the applications for default judgment and to determine the terms of judgment must fail and are accordingly dismissed.

Costs

[24] CPR2000 Rule 65.11 states;

"(1) On determining any application except at a case management conference, pre-trial review, or the trial, the court must-

(a) decide which party, if any should pay the costs of that application

(b) assess the amount of such costs; and

(c) direct when such costs are to be paid"

(4) In assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing –

(a) any counsel's fees incurred

(b) how that party's legal representative's costs are calculated; and

(c) the disbursements incurred."

[25] The court also considered Rule 64.6(6) and considered the circumstances to be taken into account when the court is assessing costs.

[26] In compliance with Rule 65.11, the applicant in the strike out application sought assessed costs in accordance with exhibit WF9 attached to the affidavit of Mr. Fuhrman dated 12th April 2018. The respondent has neither challenged nor addressed the costs sought. I have considered the statement filed by the applicant and taking into account the CPR2000 and all other factors, I consider that appropriate costs on the strike out application are assessed in the sum of US$2,500.00 to be paid to the 2nd and 3rd defendants within 21 days hereof. Costs for the application for default judgment and to settle the terms of judgment are assessed in the sum of US$500.00 to be paid to the 2nd and 3rd defendants within 21 days.

[27] In conclusion, the Order of the court is that;

(a) The claim herein be struck out.

(b) The applications for default judgment and to determine the terms of the judgment are dismissed.

(c) The assessed costs in the aggregate sum of US$3,000.00 to be paid to the 2nd and 3rd Defendants within 21 days.

Cheryl Mathurin
High Court Judge

By the Court

Registrar