BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1153 of 2012

BETWEEN:

DESLYN McCLAREN McKENZIE	**CLAIMANT**
AND	
A BUNDLE OF JOY	**FIRST DEFENDANT**
ROBERT BARNWELL	**SECOND DEFENDANT**
OSLYN BARNWELL	**THIRD DEFENDANT**

BEFORE: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

2013: May 02
May 28

Mr. Marlon Markland Gordon, Attorney-at-Law for the Claimant
Dr. Waldo E. Waldron-Ramsay QC, for the First and Second Defendant
Mrs. Dawn M. Shields-Searle and Ms. Nicole Roachford, Attorneys-at-Law for the Third Defendant

DECISION

Introduction

[1] The Application for determination is one filed in this proceeding on the 29th January 2013 by the Third Defendant Oslyn Barnwell seeking the following orders:

(i) That the claim be struck out for want of cause of action.

(ii) Alternatively, an order of Summary Judgment in favor of the Third Defendant.

The Issue of the First Defendant

[2] At the hearing of this application, this court refused to enter an appearance for the First Defendant on a fundamental ground, that is, that "A Bundle Of Joy' (as shown in the affidavit evidence), was not a company, but was in fact a registered business name duly registered under the Registration Of Business Names Act Cap. 317 as an unincorporated association without separate legal personality. As a consequence, it cannot sue or be sued in its name, unlike a company which has the rights, privileges and powers of an individual: see sec 17(1) of the Companies Act Cap. 308. In essence, the Act provides that the individual registering the business name is the 'personality' carrying on business under a particular business name or style.

[3] Thus, the First Defendant cannot in law be a party to this action; it has no legal personality and for this reason is struck out as a party hereto. The Second and Third Defendants are the only parties properly before the court in this action.

Chronology of Relevant Facts

[4] The substantive action herein was commenced by Claim in July 2012 for damages arising as a result of a breach of contract between the First Defendant and the Claimant in her employment as a caregiver with "A Bundle of Joy" (as distinct from the separately and improperly registered "Bundle of Joy"). The contract of employment was a written contract dated April 29th 2011 purporting to backdate the said contract of employment to a commencement date of January 2010 through to January 2015. This contract was purportedly signed by the Second Defendant as Managing Director/Owner of the First Defendant. The sum of $67,000 was claimed.

[5] The Third Defendant responded by way of Defence on July 25th 2012 alleging that the signature on the Claimant's contract of employment with "A Bundle of Joy" appeared to be a forgery; that the Claimant was not an employee of the business "Bundle of Joy" as opposed to "A Bundle of Joy" with which the Claimant purported to be employed; and, that the Third Defendant had no knowledge of the contract of employment between the First and Second Defendant and the Claimant.

[6] The Second Defendant's Defence filed August 2012 was an admission that he entered into the stated contract with the Claimant from whence her claim for breach and consequential damages arose. It alleged that he was the sole owner of the business. All other aspects of the claim were denied or not admitted.

[7] In an amended Defence filed by a new attorney-at-law in October 2012 he made further admissions, the most telling of which is an admission of his liability for the damages alleged. His admission arises from the contents of paragraph 7 where it is stated that the 'breach of contract' arose from the "ultra vires actions taken by the Third Defendant, an employee only of the First Defendant, purporting to ascribe to herself powers to hire and fire on behalf of the First and Second Defendants". Significantly, he takes the position that the Claimant was not lawfully dismissed and was still a care giver and employee in accordance with the terms of her contract. As the purported owner of the business, he expressed his intention (and that of the business "A Bundle of Joy") to satisfy the claim for any losses or damages suffered by the Claimant for any 'ultra vires' actions taken by the Third Defendant.

[8] By Affidavit of November 2012 the Claimant, contrary to the pleading of breach of contract in the Statement of Case, now admits the contract, essentially submitting that a contract of service between herself and the Second Defendant still exists.

[9] Counsel for the Third Defendant argues that the effect of this document is that the Second Defendant is saying that there is no breach of contract, and in effect, no cause of action.

[10] In a Reply to Defence filed August 2012, counsel for the Third Defendant further argues, that the effect of paragraph 5 of this document is contradictory of the Claim, in that the Claimant therein states that the contract which she previously stated had been breached, she now states has been affirmed. This she states is, in essence, contradictory.

[11] This argument is buttressed by the Claimant's filing on February 19th 2013 of the document titled Request for Entry of Judgment by Admissions, in which she applies for "entry of Judgment against the Second Defendant on his admission of the whole debt by virtue of the Amended Defence dated the 24th September 2012 and filed herein on the 17th October 2012".

The Case for the Applicant (Third Defendant)

1. No cause of Action

[12] The case for the Applicant is that the effect of the Defence filed August 2012 and the Amended Defence filed October 17th 2012 by the Second Defendant, is that there is no cause of action against the Third Defendant.

2. The case for Summary Judgment

[13] In the alternative, the Third Defendant is seeking Summary Judgment under Part 15.2(a)(1) of the CPR which states as follows:

> "The court may give summary judgment against a party on the whole of a claim or on a particular issue if
>
> (a) It considers that
>
> (i) The claimant has no real prospect of succeeding on the claim or issue;…"

[14] In essence, counsel is arguing that there is no case for the Third Defendant to answer since the Second Defendant has effectively affirmed the contract and accepted liability for the consequential loss claimed. Thus, it is her submission that the court should strike out for want of cause of action or alternatively, because the Claimant has no prospect of succeeding against the Third Defendant.

The Case in Reply by the Respondents (Claimant and Second Defendant)

[15] Counsel for the Claimant argues when queried by the Court on this point, that there is a case to answer by the Third Defendant and refers in support thereof to the matters pleaded by the Third Defendant in her Defence of July 2012 (specifically paragraph 4(a) of the same), and her Affidavit of August 2012. It is his submission that there is a cause of action and a case to answer revealed by these documents.

[16] In response to counsel for the Third Defendant's application for Summary Judgment he relied on the case of **Three Rivers District Council v Governor and Company of the Bank of England [2001] 2 AER 513**, in support of his answering submission that there is no basis on which the court can or should, make such an order.

[17] This case involved an examination of the powers of the Court under Rule 24.2(a)(i), which is "in pari materia" with our Part 15.2(a)(i) referred to above. In his submission, counsel stated that this case was the 'locus classicus' on this issue. Counsel referred to paragraphs 90 and 91 which I repeat hereunder as they examine the powers (and extent

thereof), of the court under these provisions and adumbrates the test for summary judgment under CPR rule 24.2 . See below:

> "90. … that critical issue was now whether in terms of CPR rule 24.2(a)(i) the claimants had a real prospect of succeeding on the claim. As to what these words mean, in **Swain v Hillman [2001]1All ER 91,92, Lord Woolf MR** said:
>
> > "Under r 24.2, the court now has a very salutary power both to be exercised in a claimant's favour or where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words ' no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, … they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.
>
> 91. The difference between a test which asks the question "is the claim bound to fail?" and one which asks "does the claim have a real prospect of success?" is not easy to determine. In **Swain v Hillman at p.4 Lord Woolf** explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under 3.4, unlike 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In **Monsanto plc v Tilly, The Times…** Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In **Taylor v Midland Bank Trust Co Ltd** he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred."

[18] And more relevantly at paragraph 92:

> "92. The overriding objective of the CPR is to enable the court to deal with cases justly: rule 1.1. … While the difference between the two tests is elusive, in many cases the practical effect will be the same. In more difficult and complex

cases such as this one, attention to the overriding objective of dealing with cases justly is likely to be more important than a search for the precise meaning of the rule."

[19] Counsel for the Second Defendant argues that there is a cause of action in damages for wrongful dismissal against the Second and Third Defendants. He argues that there must be a trial of this matter because the Third Defendant postulates herself as a manager and operator of this business having the power to dismiss, when in fact she is an employee of the Second Defendant without any such power. He too points to paragraph 4 of the Third Defendant's Defence in support of his submission.

[20] This argument is easily addressed as the case before the court is one for damages for breach of contract; no claim (or counter-claim for that matter) has been made otherwise.

Ruling

[21] The Application of the Third Defendant in this matter is successful for the following reasons:

[21.1] This Court is of the opinion that the conjoint effect of the Defence and Reply to Defence is to vitiate the cause of action of breach of contract in damages against the Third Defendant. There is no counterclaim by the Second Defendant against the Third Defendant (counsel for the Second Defendant alleged in his submission that the Third Defendant was the agent of the Second Defendant and acted outside the scope of her authority) and the acceptance of liability by the Second Defendant effectively brings this claim to an end. In my opinion, it is more apposite to summarize these circumstances in this way: that there is no case to answer to the Statement of Case by the Third Defendant, rather than to state that there is no cause of action (even though the Second Defendent's Defence does appear to eliminate the cause of action per se).

[21.2] A distillation of the facts and circumstances of this matter shows that the real issue is whether the business operating at Lot 30 Clarke's Land Paradise Road Spooner's Hill Saint Michael is owned by Robert Barnwell in its entirety or by Robert Barnwell and Oslyn Barnwell as a matrimonial asset in shares to be determined (the separate registrations of "A Bundle of Joy" and "Bundle of Joy" notwithstanding). The parties are agreed that this very issue is before Justice

Olson Alleyne for his determination in a family proceeding between the parties (that is, the Second and Third Defendants who are husband and wife). It is not a matter which arises under this claim, it is in fact a matter which is already before another judge, and therefore should form no part of the determination before this court. It also is indeed significant that the Claimant is the sister of the Second Defendant and there is a real possibility that this entire scenario may invoke the powers of the judge in the family proceeding, under section 64 of the Family Law Act. The Second Defendant has in fact alleged that her sister, the Claimant, and her husband, the Second Defendant have joined forces with a view to ousting her from the business. Credence is given to this argument when one takes into account the execution and back-dating of the contract of employment unknown to the Third Defendant, the Power of Attorney given by the Second Defendant to the Claimant since the filing of this action (also unknown to the Third Defendant), which provocatively puts the sister in charge of his wife, the Third Defendant, when he is out of the jurisdiction. Significantly, this is for most of the year, as he is a seaman.

[21.3] This court has considered and rejected the consideration of a stay of these proceedings pending the outcome of the family proceeding for dissolution of marriage and determination of property interests, after taking into account Part 1.1(c) of The Overriding Objective which states:

> "(c) dealing with the case in ways which are proportionate to
>
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot the resources to other cases."

[22] It is appropriate that this matter be disposed of summarily. It would in my opinion be giving effect to the Overriding Objective of dealing with this case justly, to summarily

strike out the claim against the Third Defendant Oslyn Barnwell. It would be oppressive, and in addition thereto would be allocating to a small, but bitter, issue between a husband and wife and the wife's sister, an unwarranted share of the court's resources, were this Court to allow the action against the wife to continue. The issues to be explored in this scenario can, and, no doubt, will be explored in the family proceeding by Justice Alleyne.

[23] **Lord Woolf in Swain v Hillman** succinctly expresses the critical reasons why a court generally, and this court specifically, should strike out this action against the Third Defendant when he states:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. 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 interest of justice…"

[24] Part 14 of the CPR provides for the entry of Judgment where a litigant admits the truth of the whole or part of a claim. Part 14.5 sets out the procedure to follow where the admission relates to the whole of a claim for a specified amount of money. In view of 21.2 above, this Court is of the opinion that nothing can be served by the entry of a Judgment on Admissions and declines to do so.

Disposal

[25] For the reasons set out above, the order of the court is that the action against the Third Defendant is struck out pursuant to the powers vested in this court by Part 15.2, and in giving effect to the Overriding Objective.

[26] The "Request for Entry of Judgment" is refused.

[27] Costs of the action and of this Application are awarded to the Third Defendant as against the Claimant to be agreed or assessed.

Margaret A. Reifer

Judge of the High Court