

**BARBADOS**

**No. 578 of 2008**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**BETWEEN:**

**OTHA BLACKETT  
GLENDAINE BLACKETT**

**FIRST CLAIMANT  
SECOND CLAIMANT**

**AND**

**CURTIS ALEXANDER  
ANGELA ALEXANDER**

**FIRST DEFENDANT  
SECOND DEFENDANT**

**Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High  
Court**

**2011: March 8**

**2013: March 1**

**Mr. Joseph H. Serrant for the First Defendant (Applicant)**

**Mr. Leslie Roberts for the Claimants (Respondents)**

## **DECISION**

### **THE APPLICATION**

- [1] By application filed on 5 November 2010 (the application) the first defendant (Mr. Alexander) seeks an order that the second claimant (Mrs. Blackett) and the second defendant (Mrs. Alexander) “be struck off.”

### **PROCEDURAL DEFECTS**

- [2] Part 19.3(1) of the **Supreme Court (Civil Procedure) Rules, 2008 (CPR)** empowers this court to add, substitute or remove a party on or without an application. CPR Part 19.3 (2)(a) allows an existing party to make an application for permission to add, substitute or remove a party.
- [3] CPR Part 26.3(3)(b) provides that the court may strike out a statement of case, or part of a statement of case, if it appears to the court that the statement of case, or the part to be struck out, discloses no reasonable ground for bringing or defending a claim.
- [4] The application contains no reference to any provision of CPR indicative of the rule or rules pursuant to which it is made. Nonetheless, I understood the application to be one for the removal of the parties mentioned pursuant to CPR Part 19.
- [5] This understanding was not displaced after consideration of the written and oral submissions of Counsel for the applicant, Mr. Joseph Serrant which

contained copious references to authorities relating to “striking off” parties, albeit derived from sources that pre-dated the application of CPR. However, in his oral submissions, Counsel also made some general references to the court’s power under CPR 26.3(3)(b).

- [6] I wish to endorse the comment of Michel J (Ag) (as he then was) in *Choo Loi Poi et al v Donald Frederick* (Claim No. GDAHCV2008/0556, Eastern Caribbean Supreme Court) as to the desirability of displaying the provision on which an application is grounded prominently on the face of the notice of application. This comment is found at paragraph [19] of that decision.
- [7] Such a practice has at least two principal benefits. It forces the applicant to consider whether there is a basis on which he or she can approach the court for the orders sought. Additionally, it directs the court and the opposing party immediately to the rule that the applicant considers to be most relevant to the application.
- [8] Mr. Leslie Roberts who appeared for the defendants took an even more fundamental objection to the application. It is that the application does not disclose the ground on which the order is being sought, an omission which amounts to a failure to comply with **CPR Part 11.6 (1)(b)**. This rule requires an applicant to state briefly in the application the grounds on which

he or she seeks the order. Mr. Roberts urged that this omission should lead to a dismissal of the application.

- [9] The requirement imposed by CPR Part 11.6 (1)(b) is not to be taken lightly. A failure to comply may have catastrophic consequences. In *Beach Properties Barbuda Ltd et al v. Laurus Master Fund Ltd. et al* (Civ App. No. 2 of 2007, Eastern Caribbean Court of Appeal), at paragraph [19], Barrow JA (as he then was), described the failure to disclose grounds, as “completely unacceptable” and “an abuse of the process of the court that should attract condign consequences.” Stating that it matters not whether the failure is inadvertent or otherwise, he advanced the following rationale for the requirement:

“One objective of requiring that the application must state its grounds is to focus the thinking of lawyers. By being required to identify the grounds for making an application, before making it, lawyers are required to consider the merits of the application. A lawyer who has difficulty in formulating grounds for making an application has reason for thinking that perhaps it is because there are no grounds. The requirement of stating grounds also serves to clarify for the judge and the opposing party the basis on which the applicant claims to be entitled to the order sought. When an application states no grounds, it raises a suspicion that the application may be groundless, not just in form, but also in substance.”

- [10] This court deprecates the failure on the part of an applicant to set out the grounds on which he or she intends to move the court for an order. The applicant who fails to meet this requirement risks having the application

dismissed, or being penalised in costs, if a delay is occasioned by a successful application to amend or, the hearing of the application becomes unnecessarily protracted as a consequence.

- [11] In this case, the diligence of Mr. Roberts resulted in a readiness by the claimants to respond to all the substantive arguments advanced by Mr. Serrant. Nonetheless, the case illustrates the dangers that may result from a failure to refer in the application to the particular rule under which an application is brought and, more fundamentally, the grounds on which an order is sought. The force of Mr. Roberts' submission cannot be ignored.

### **THE MERITS**

- [12] In any event, having had the benefit of written submissions filed by Mr. Serrant and the oral submissions of Counsel on both sides, I am satisfied that the application was doomed to fail. I will set out my reasons for so stating.

### **BACKGROUND**

- [13] The claimants are Mr. and Mrs. Blackett. Their case against the defendants, Mr. and Mrs. Alexander is set out in an amended statement of claim filed on 4 May 2010. At paragraph 3, they assert as follows:

On the 8<sup>th</sup> January 2003 the Plaintiffs entered into a partnership business relationship with the Defendants to facilitate:-

- (a) the sale of jewelry under the name 'Jewel in De Crown' at 50 Tudor Street and 40 Swan Street. The operation to be carried on by the Plaintiffs in

conjunction with an (sic) in association with the Defendants and their business known as 'Start De Town', and

- (b) certain renovation, improvements and maintenance to shops owned by the Defendants at the said 50 Tudor Street and #40 Swan Street in the City of Bridgetown, and
- (c) supervise the construction of the Defendants' property at No. 6 Pleasant View Heights, Cave Hill, St. Michael.

[14] The bulk of the remaining paragraphs of the amended statement of claim contain averments as to (i) things done by the claimants and the defendants in furtherance of the above objects; (ii) the verbal notification to the claimants by the defendants of the defendants' withdrawal from the partnership; (iii) the failure of the defendants to provide an account to the plaintiffs; and (iv) the failure of the defendants to pay a sum of money allegedly agreed upon by the parties as a settlement for money due to the plaintiffs with respect to the jewelry business.

[15] At paragraphs 19 and 20, the claimants claim entitlement to the sum of \$89,250.00 for building works allegedly done, or supervised, by them for the defendants. There are instances in those paragraphs and the prayer for relief where there is a reference to 'plaintiff' and 'defendant'. However, nothing was made by either party of these likely typographical errors and the arguments proceeded on the assumption that the claim is in all respects one by the plaintiffs against the defendants.

[16] Along with a claim for damages, interest and costs, the claimants seek payment of certain sums of money; accounts with respect to the jewelry business and the assets purchased during the partnership; and a one-half share of the properties purchased during the partnership or the equivalent value.

[17] The defendants filed amended defences on 6 August 2010. They deny any involvement by Mrs. Blackett or Mrs. Alexander in any of the acts mentioned in the amended statement of claim. They claim that these ladies were not parties to the partnership agreement or arrangement referred to. Mr. Alexander also asserts that any agreement or arrangement that existed was between himself and Mr. Blackett.

### **THE SUBMISSIONS**

[18] These latter assertions formed the basis of the application for the removal of Mrs. Blackett and Mrs. Alexander. Mr. Serrant submits that, contrary to the plaintiffs' claim, Mrs. Blackett and Mrs. Alexander were in no way involved in any agreement, arrangement or activity referred to in the amended statement of claim.

[19] Counsel referred me to two passages found at paragraph 15/6/12 of the Supreme Court Practice, 1995 Vol. 1. Essentially, they state (1) that the court may strike out a defendant who has been improperly joined; and (2)

that any delay by such a defendant in moving to be struck may render him, or her, liable for costs. He also referred me to some of the cases referred to in those passages. I have considered these passages and cases but do not find them helpful.

[20] Mr. Serrant also referred to the court's power under CPR Part 26.3 (3)(b) to strike out a statement of case if it appears to the court that it discloses no reasonable ground for bringing or defending a claim. However, significantly, he makes no submission that the amended statement of claim does not disclose a reasonable ground for the bringing of a claim by Mr. Blackett or Mrs. Blackett against Mrs. Alexander.

[21] The applicant seeks to rely on two documents in support of the application. Both were filed on even date with the application. Both are headed "affidavit in support". The opening sentence of each suggests that the documents are made under oath, one by Mrs. Alexander, the other by Mr. Alexander. However, neither document contains a jurat. Both display signed certificates of truth at the end. As for their content, they repeat what is contained in the defences filed by the defendants.

[22] Mr. Serrant submits that the court must accept the contents of these documents since no rebuttal has been filed by the claimants. He referred me to a passage found at paragraph 15/6/14 of the Supreme Court Practice 1995

Vol. 1 which deals with applications to add, substitute or strike out parties under the Rules of the Supreme Court 1965 (UK). That passage reads that “[i]f the facts are in dispute, the application should be supported, as a rule, by affidavit, which should be served on all parties to the action.”

[23] Mr. Roberts submits that the amended statement of claim contains a clear assertion, at paragraph 3, that the plaintiffs had entered into a partnership agreement with the defendants and that a case has been pleaded against both defendants. He urges that the issues have been joined on the pleadings and could only be determined after a trial, during which a court would have had the benefit of seeing the witnesses and assessing their credibility. He submits further that the court could not conduct a mini trial at this stage and make findings of fact.

[24] Counsel referred to the case of *Attorney General of Antigua and Barbuda v Lester Bryant Bird et al* (CV0091/2006, High Court, Antigua) and certain passages relating to the striking out of a statement of case found at p. 545 *et. Seq.* in O’Hare and Hill, *Civil Litigation* 14<sup>th</sup> ed. In reliance on these, he submits that in considering such applications the following process was to be adopted: (i) one must examine the statement of claim and, in doing so, one must presume that the facts pleaded are true; (ii) one must next consider whether the presumed facts give rise to a legal and factual case and (iii), if

they do, then the application to strike out should not succeed unless there is a document filed or disclosed supplementary to or supportive of the statement of claim which, on its face, discloses that there is no reasonable ground on which the claimant's case is brought. These principles are not in doubt.

[25] Mr. Roberts submits further that a legal and factual case arises from the amended statement of claim and that nothing has been adduced that provides any reason for striking out the statement of claim.

### **DISCUSSION**

[26] The submissions advanced by Counsel in this matter raise a question as to the relationship, if any, between applications pursuant to CPR Part 19.3 to remove a party and applications under CPR Part 26.3 (3)(b) to strike out a case for failure to disclose a reasonable ground for bringing or defending a claim.

[27] Mr. Roberts referred me to paragraph [29] of the *Lester Bird* case in which it is noted that counsel for the ninth-named defendant, Antigua Barbuda Investments Bank (ABIB), had submitted that the application by ABIB to be removed as a party was akin to an application to strike out the entire statement of claim against that party.

[28] In that case, the application filed by ABIB was that the amended claim of the Attorney General be struck out against it and, alternatively, that it be

removed as a party to the amended claim. However, nothing in the case suggests or requires that an application for the removal of a party is to proceed on the same considerations as an application to strike out a statement of case against that party.

[29] I will attempt no exhaustive analysis of the relationship between the two procedures. However, one thing is clear. It is that if an application to strike out a statement of case for failure to disclose a reasonable ground as against a particular party must fail, it is difficult to see how an argument to remove either that party or the party relying on the statement of case from the proceedings could be sustained. Equally, in some circumstances where a court exercises its power to strike out a statement of case, it may effectively remove a party.

[30] Thus, the test as to whether a statement of case discloses a reasonable ground for bringing the claim may be of assistance in determining whether a party should or should not be removed. However, whilst this is so, they are two distinct types of applications, each governed by its own rules.

[31] The application before me is one for Mrs. Blackett and Mrs. Alexander to be removed as parties to these proceedings. No alternative order is sought for the striking out of any of the statements of case. Apart from a vague reference by Mr. Serrant to CPR Part 26.3(3)(b), nothing was advanced by

the applicant to suggest that the amended statement of claim fails to disclose reasonable grounds for the bringing of the claim by Mr. Blackett and Mrs. Blackett against Mrs. Alexander. I will add, though, that I was entirely persuaded by Mr. Roberts' submissions in this regard.

- [32] Returning to what is germane, at paragraph [2] above I have mentioned some of the provisions of CPR Part 19 relating to the removal of parties. CPR Part 19.2(4) stipulates that:

“The court may order that any person shall cease to be a party where the court considers that the inclusion of that person is not conducive to the resolution of the issues in the proceedings.”

- [33] A relevant consideration that should be taken into account in determining whether or not the inclusion of a person is conducive to the resolution of issues in proceedings is whether that person is a necessary or proper party to the proceedings. It can hardly be supposed that a court would hold that the inclusion of a party whom it considers to be a necessary and proper one is not conducive to the resolution of the issues in the proceedings. General support for this view is to be found in the cases of *United Film Distribution Limited et al v Chabbria et al* [2001] EWCA Civ 416 and *Dookeran v Dookeran CV No 2008-00287 (High Court, Trinidad and Tobago)*.

- [34] In considering the matter, I have disregarded entirely the documents on which the applicant seeks to rely and to which I have referred at paragraph [21] above. I have done so for two reasons.
- [35] Firstly, these unsworn documents do not constitute evidence. CPR Part 11.4 (5) prescribes that where evidence is required in support of an application, it must be adduced in an affidavit unless a rule, practice direction or court order provides otherwise.
- [36] CPR Part 30.5 (1) requires that an affidavit must (i) be signed by the deponent; (ii) be sworn or affirmed by the deponent; (iii) be completed and signed by the person before whom it was sworn or affirmed; and (iv) contain the full name, address and qualification of the person before whom it was sworn or affirmed. The failure of the defendants to swear or affirm the documents that they seek to rely on robs them of the essential characteristic of an affidavit. The signing of certificates of truth does not give them that status.
- [37] Furthermore, I reject Mr. Serrant's submission that it is open to me to make findings of fact that would be determinative of issues that have been joined between the parties to the substantive claim, on the strength of affidavit evidence adduced by a party on an application to remove a party. Nothing in the passage to which he referred supports such a conclusion. The rules

relating to the addition, substitution and removal of parties were not designed for any such purpose. Their objective is to limit appearances at trials to parties whose presence is desirable for or conducive to the resolution of the issues in dispute.

[38] Mrs. Blackett and Mrs. Alexander are necessary and proper parties to these proceedings. Disputes of fact arise on the pleadings as to (1) whether they were parties to any agreement or arrangement referred to in the amended statement of claim; (2) whether Mrs. Blackett engaged in any activity as alleged in the statement of claim; and (3) whether Mrs. Alexander did or failed to do all or any of the things alleged in the amended statement of claim. Mr. and Mrs. Blackett have made assertions against both defendants. It is an inescapable conclusion that the presence of Mrs. Blackett and Mrs. Alexander are conducive to the resolution of the issues in dispute.

[39] For all the foregoing reasons, the application is refused. I shall hear the parties as to costs.

**Olson DeC Alleyne**  
**Judge of the High Court**