

BARBADOS

[Unreported]

Suit No: CV 166 of 2006

**IN THE HIGH COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

BETWEEN

**CHARLEEN INVESTMENTS HOLDINGS LTD - 1st PLAINTIFF
CHARLES HEARD - 2nd PLAINTIFF**

AND

WILLIAM RAMDEHOLL - DEFENDANT

**Before the Honourable Madam Justice Maureen Crane-Scott, Q.C.
Judge of the High Court
(*In Chambers*)**

2008: December 10

**Mr. Ernest Jackman for the Defendant/Applicant
Mr. Ivan Alert in association with Ms. Caroline Herbert for the
Plaintiffs/Respondents**

DECISION

- [1] **Crane-Scott J:** On 2nd May 2006 the Plaintiff obtained judgment against the Defendant in default of defence. Some 11 months later, the Defendant applied by Summons filed on 2nd April 2007 to have the default judgment set aside on the ground that the action is frivolous and vexatious and an abuse of the process of the Court. The Defendant also sought an order that the judgment be set aside and that the Defendant be granted leave to defend. The Summons was supported by an affidavit sworn to by William O. Ramdeholl (“the Defendant”) and also filed herein on April 2, 2007.
- [2] At the start of the hearing, Counsel for the Plaintiffs, Mr. Ivan Alert sought clarification regarding the precise Rule(s) of the Supreme Court under which the application had been made.
- [3] Counsel for the Defendant, Mr. Ernest Jackman stated that the Defendant’s application had been brought (i) under the inherent jurisdiction of the Court on the ground that the action was an abuse of process and frivolous and vexatious; and (ii) pursuant to **O.19 r.9 RSC** on the ground that the Defendant had a defence to the action.
- [4] Mr. Jackman accordingly sought, and was granted leave to amend the wording of the Summons to clarify the exact orders which the Defendant was seeking. Paragraph 1 of the Defendant’s Summons filed on April 2, 2007 was accordingly amended to read as follows:
- “1. That the Judgment entered in this suit be set aside and/or this action be struck out under the inherent jurisdiction of the Court on the grounds that the action is frivolous and vexatious and an abuse of the process of the Court;

2. That the Judgment be set aside and the Defendant granted leave to defend;
3. That there be a stay of execution;
4. Costs.”

[5] **The Evidence:** The only evidence before the Court was the affidavit of the Defendant, William Ramdeholl filed on April 2, 2007 in support of the Summons.

[6] In his affidavit, the Defendant deposes, *inter alia*, to the following facts, namely that:

- 1) he is the owner of the fishing vessel “*Sabrina*”.
- 2) he operated the boat with little success and accumulated debts to various creditors;
- 3) he approached the 2nd Plaintiff for a loan of US \$20,000.00 to repair the boat and to make it seaworthy;
- 4) the 2nd Plaintiff made all the arrangements for the boat to be repaired and later prepared various documents to secure the money which he and/or the 1st Plaintiff had expended for repairs;
- 5) he was never given an opportunity by the 2nd Plaintiff to seek independent legal advice on the document and at the time he signed the agreement on 29th January, 2004 he had not been told how much money the 2nd Plaintiff and/or the 1st Plaintiff had spent on repairing the boat;
- 6) he subsequently heard that the boat had been advertised for sale;
- 7) that on September 27, 2004 the 1st Plaintiff obtained an interim injunction against him preventing him from entering the said fishing

vessel or from removing or selling the fishing gear or equipment until trial;

8) by Writ of Summons entitled No: 1817 of 2004 the 1st Plaintiff and a Keith Mc Donald Skinner instituted High Court proceedings against the Defendant claiming, *inter alia*, an injunction, a declaration of ownership of the said fishing vessel and damages;

9) without seeking consolidation or discontinuing the first suit, the 1st and 2nd Plaintiffs subsequently filed new proceedings in the present action claiming damages for breach of contract and other relief;

10) the 1st and 2nd Plaintiffs entered judgment in default of defence in the present proceedings on 8th June, 2006 for \$223,300.00 with interest and costs and proceeded on 31st August, 2006 to file a writ of execution to the Chief Marshal for the sale of the said boat to satisfy the judgment debt.

[7] The Defendant also states that by reason of the several facts outlined in his affidavit, the Plaintiffs' action in instructing the Chief Marshal to sell the vessel is an abuse of the process of the Court, is frivolous and vexatious and that he has a good defence to the action.

[8] **The Submissions:**

(i) Are the proceedings an Abuse of process? etc - Counsel for the Defendant submitted that the action was an abuse of process and frivolous and vexatious and should be struck out under the inherent jurisdiction of the Court.

[9] Mr. Jackman referred to paragraphs 45 and 46 of the Defendant's affidavit in support of the application. He informed the Court that in 2004, the First-named Plaintiff in conjunction with its agent, Keith MacDonald Skinner had commenced an action entitled Suit No: 1817

of 2004 against the Defendant. According to Mr. Jackman, the 2004 Suit involved the same facts and subject matter and the same monies as have been claimed in the current proceedings.

- [10] Counsel for the Defendant submitted that it was an abuse of process for the Plaintiff to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings. He cited the case of *Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd (1975) A.C. 581* and page 356 of Volume I of **The Supreme Court Annual Practice** 1982 edition and submitted that a Plaintiff is not entitled to litigate in a second action, an issue which was open to him to have determined in the first action.
- [11] He asked the Court to take judicial notice of the first action and stated that the plaintiffs should not be permitted to have a multiplicity of actions in the same Court relating to the same subject matter. He urged the Court to strike out the current proceedings as an abuse of process, adding that there were matters which arose in the first action which are not apparent or known in the second proceedings.
- [12] For his part, Counsel for the 1st and 2nd Plaintiffs, Mr. Alert submitted that while it was clear that it would be an abuse of the process of the courts for a plaintiff to bring a second action against a defendant for the same cause of action, the Defendant in these proceedings had failed to establish whether the Plaintiffs in both actions were the same and further, whether the causes of action in both proceeding were the same.
- [13] He conceded that it was open to the Court to look at the official records of both actions and to determine whether the cause of action in the earlier suit is identical to that in the present proceedings. Mr.

- Alert submitted that where the parties in the two actions are not the same, the Plaintiff is not estopped from pursuing his claim against the same defendant. He also cited an extract from the text “**A Practical Approach to Civil Procedure**”, 7th Edition p. 230-231 regarding the manner in which the Court should approach the issue of alleged abuse of process.
- [15] Citing an extract from **Halsbury’s Laws of England 4th Ed Volume 37** on striking out of pleadings which are an abuse of process, Mr. Alert submitted that there was nothing before the Court which suggested any harassment of the Defendant by the Plaintiffs, or any ulterior motive amounting to abuse of process. He invited the court to make a merits-based judgment on the matter taking account of all the interests involved, and all the facts, focusing on the critical question whether, in all the circumstances, the claimant is misusing or abusing the process of the court.
- [16] (ii) Does the Defendant have a serious defence on the merits? - Counsel for the Defendant stated that while the Defendant was not denying that he owes money to the Plaintiffs, he was disputing the amount which the Plaintiffs alleged was owed. He submitted that the Defendant had requested and was still requesting a proper accounting to be done so that the correct amount due could be ascertained.
- [17] In response, Mr. Alert stressed that where a regular judgment was entered, it was incumbent on the Defendant seeking to set it aside to file an affidavit on the merits and to state facts which disclosed a defence on the merits and explained how the judgment came to be entered against him.

- [18] Mr. Alert submitted that in this case, the Plaintiffs' cause of action against the Defendant is for breach of contract. He contended that there was nothing in the Defendant's affidavit of April 2, 2007 which amounted to a defence on the merits to the Plaintiffs' cause of action. In particular, there was no denial of the breach, no excuse offered for the breach and no denial of the existence of an agreement between the Plaintiffs and the Defendant.
- [19] Counsel for the Plaintiffs submitted that the submission which had been made on the Defendant's behalf amount to a request for an account. He stated that if the Defendant wanted an account or if the particulars provided in the Statement of Claim were insufficient, the Defendant could have requested the Plaintiffs to provide Further and Better Particulars. Instead, he noted, the Defendant chose to do nothing.
- [20] Mr. Alert also submitted that the Defendant had provided not a single iota of evidence to explain his default in filing a defence in the action or to explain the delay in applying to set aside the judgment. He asked the Court to take note of the fact that the Plaintiffs would suffer prejudice if the judgment were set aside and the matter left to proceed to a full trial since the boat is continually deteriorating and the Plaintiffs would ultimately be left with an empty judgment.
- [21] **Findings of mixed fact and law:** After giving due consideration a) to the Defendant's application herein together with his affidavit in support; b) to the submissions of Counsel for and against the application; c) to the official record of the proceedings filed in High Court Civil Suit No: 1817 of 2004 and d) to the several matters which

the Defendant is required by law to establish to sustain his application herein, the Court is satisfied as to the following matters:

- i) With respect to the Defendant's application to set aside the Judgment and/or strike out the current proceedings on the grounds that the action is frivolous and vexatious and an abuse of the process of the Court, the Court is satisfied that there has been no abuse of the Court's process;
- ii) The causes of action, issues and relief sought in the earlier High Court Suit No: 1817 of 2004, though connected to the same subject matter (the fishing vessel "*Sabrina*") are different from those in the current proceedings;
- iii) The Plaintiffs in the earlier suit are not identical to the Plaintiffs in the current proceedings although one Plaintiff is the same;
- iv) In the earlier suit, the Plaintiffs seek an injunction and a declaration of ownership of the said fishing vessel, while the cause of action in the current proceedings relates to a breach of contract and the recovery of a debt due under an agreement dated January 12, 2004;
- v) The current proceedings are not frivolous nor vexatious and the Defendant has failed to establish that this is a proper case for the exercise of the Court's discretion to strike out the action under its inherent jurisdiction;
- vi) With respect to the Defendant's application to set aside the default Judgment under **O. 19 r. 9** on the ground that

the Defendant has a good defence on the merits, the Court is satisfied that the application before the court is woefully deficient;

- vii) It is well settled in this jurisdiction that where a defendant seeks to have a regularly obtained judgment in default set aside, he must show a good defence on the merits, he must explain the reason for any delay and the prejudice to both parties has to be fairly balanced. (***Bank of Nova Scotia v Emile Elias & Co Ltd (1995) 46 WIR 33*** and ***Cheryl Diana Patricia Clarke v Ivan Hinds, Civil Appeal No 20 of 2003***).
- viii) At no point in his affidavit of April 2, 2007 has the Defendant established that he has a serious defence on the merits to which this Court should pay heed. In particular, there has been no denial of the sum of \$223,300.01 which is claimed by the Plaintiffs as the outstanding balance due at November, 2005 under the said agreement and for which judgment was entered;
- ix) Furthermore, the Defendant has provided no explanation for his delay in filing a defence, nor has he satisfactorily explained the period of delay of approximately 11 months which elapsed between entry of the default judgment and the date of his application;
- x) In short, the Defendant has failed to give this Court any basis for exercising its discretion in his favour.

[22] **Disposal:** In the result, the Defendant's application filed April 2, 2007 is dismissed with costs to the Plaintiffs for one attorney-at-law to be agreed or taxed.

**Maureen Crane-Scott
Judge of the High Court**