[2014]JMSC Civ. 156

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006 HCV 03030

BETWEEN	**CAROL VASSAL**	**CLAIMANT**
A N D	GSB CO-OPERATIVE CREDIT UNION	**DEFENDANT**

IN CHAMBERS

Paul A. Beswick instructed by Ballantyne, Beswick & Company for the Claimant

William D. Panton, Emile G. Leiba and Ms. Gillian C. Pottinger instructed by Dunn Cox for the Defendant

Heard: March 21 & 22, 2012

APPLICATION TO STRIKE OUT STATEMENT OF CASE UNDER Sec. 26.3 (1) (b) CPR 2002 – INTERPRETATION OF SECTION 50 OF THE COOPERATIVE SOCIETIES ACT, OUSTER CLAUSE – MEANING OF ABUSE OF PROCESS

Daye J.

Background

[1] The claimant is an attorney-at-law who has a dispute with the defendant credit union to which she is a member.

[2] On the 24th August 2007, she commenced proceedings against the credit union seeking damages for publishing defamatory statement she allege they published against her.

[3] The circumstances under which this arose are that the credit union published the claimant's name in a list of persons who were delinquent in their loan accounts with the credit union for a period of six to nine months as at September 31, 1999. This list was circulated and distributed to its members on August 26, 2001 at its Annual General Meeting. The credit union admitted that the claimant was 2-5 months in arrears as her loan account indicated and not 6 (six) months as the publication had stated. However the credit union contend that the publication of the statement was not maliciously published.

[4] The case has proceeded through the stages of case management, pre-trial review and a trial date was fixed for May 10 and 11, 2011 before a special jury. The first trial date was rescheduled due to illness of the claimant.

[5] It is against these set of facts that the credit union filed an application to strike out the claimant's statement of case under Part 26.3 (1) (b) of the Civil Procedure Rules (CPR) 2002 as amended. The specific section reads as follows:

> R 26. 3 (1)
>
> "the court may strike out a statement of case or part of a statement of case if it appears to the court
>
> (a) .....
> (b) ..... the statement of case .... is an abuse of process of the court"

Issues

[6] There are three (3) issues for consideration:

(a) The power to strike out claims

(b) The requirement of abuse of power; and

(c) The interpretation of Section 50 of the Co-operative Societies Act

Submissions

[7] Mr. Emile Leiba submits:

The Act states such dispute shall be referred to the Registrar if it involves a dispute about the business of the society. Under Section 50 (2), the Registrar shall on receipt of a reference under Section 50 (1), refer it for disposal to an arbitrator or arbitrators. There is a further provision that any question of law should be referred for the opinion of the Supreme Court.

[8] He further submits that the Fixed Date Claim Form was filed August 24, 2006 where the claimant claimed damages for libel. The particulars of claim were as follows:

> "damages for libel by publication in a publication circulated nationally by the defendant in that on the 26th August, 2001 the defendant caused the publication in the Annual Report of the GSB Co-operative Credit Union Ltd. of the claimant named in a list of members with a delinquent account six (6) months or more in arrears as of the 31st December 1999."

[9] He contends the claimant accepts that she is a member of the defendant's Credit Union. She denies she owes the sum set out in the publication. The root of this claim is that the publication of the sums allegedly owed was incorrect. The claimant contends that she did not owe this money and her account was not in arrears.

[10] Continuing his submission he says one of the issues joined between the parties is the amount of arrears and the length of time of the arrears. This issue is identified in paragraphs 3 and 10 of the defence filed on October 18, 2007.

[11] And again, he argues when you look at the pleadings which set out the issues between the parties, it is clear that the case before the court is a dispute which touches the business of the Society and which touches a member and the Society. This dispute should have been properly referred to the Registrar under Section 50 of the Co-operative Societies Act.

[12] If a party is aggrieved by an award of the arbitrator or arbitrators, the party may appeal to the Registrar. The decision of the Registrar on appeal shall be final and shall not be called into question in any court.

[13] Counsel submits that Section 50 sets out a complete procedure for determining and deciding disputes between a member and his or her Society. This section, he says, is mandatory and not discretionary.

[14] In addition, he claims that it is an abuse of process in terms of Rule 26 for a procedure set out in legislation to be circumvented and the matter commence in the Supreme Court.

[15] Section 51 addresses any claim. This is a claim for libel. It could not be addressed to the Registrar because it could not be adequately addressed by him. For example, the question as to whether a libel occurred or whether there is justification, are questions that cannot be addressed under the Registrar's power. The Registrar can refer or may refer any question of law for the opinion of the Supreme Court.

[16] Again, Counsel submits that once a dispute arises under this Act, then it is a complete bar to any other action in the Court. The sole question is to refer the matter to the Registrar.

[17] Mr. Paul Beswick submits on behalf of the Respondent. He submits as follows:

(a) The application is unsupported by any authority. He who alleges must prove

(b) Nothing in Section 50 creates an absolute bar to commence litigation in the court. There is no express language in the provisions of the Act that disclose an intention to bar a claimant's right. The language does not say who shall refer the matter to the Registrar. It suggests that the Society should refer the dispute to the Registrar. It is not the claimant's duty to make this referral.

(c) The decision of an arbitrator and the appeal to the Registrar is not conclusive and cannot be so in relation to any separate litigation which a claimant has commenced in court.

(d) Section 50 can be contrasted with Section 46 and Section 48. Section 46 provides for cancellation of the registration of a Society. Then Section 48 uses express language to curtail the right of a member to go to court in relation to liquidation. When you compare Section 50 with these sections, the respondent submits that Section 50 was not intended to decide the right of any member to an action in court. On the face of it, it provides an alternative dispute resolution. If this alternative was set in motion, it would be appropriate for the court to stay the proceedings while the dispute machinery is in motion.

(e) Section 4 of the Act deals with the object of a Registered Society. This is the first sign post of the meaning of the word 'business' of a Society. It speaks of the promotion of economic interest. This is a far cry from any issue which concerns a Registered Society and its member concerning defamation.

(f) A claim for libel is a fundamental claim, which is dealt with by statute, viz. Defamation Act 1963. This sets out numerous claims for slander and libel. Nowhere in the Co-operative Act is there any reference to the Defamation Act.

(g) This application should not be permitted at this stage because it is simply too late. This point should have been taken from 2006 when the action was filed. This should not be used as a basis for getting out of the trial.

(h) If the Court is minded to acceded to the claimant's application, there should be an order for costs to the claimant having regarding the lapse of five (5) years to make this application.

Analysis

(a) The Power to Strike Out

[18] The provision relating to the power to strike out confers a discretion. The language used by the court is "may" strike out a statement of case. The discretion should be exercised judicially. It is a far reaching power and brings to an end the claim of the party against whom the order is made. In view of the fact, that the consequence of this order is far reaching, then the court should approach the exercise of this discretion with restraint.

[19] It is settled law that a party who bring an action in court has, prima facie, the right to have the matter heard by presenting relevant evidence to establish the claim, and in order to remove this right there must be good grounds to do so.

[20] If there is legislation that purports to take away this right which is fundamental, then it should be construed strictly. There must be clear language or words used to indicate that Parliament, in passing that Act intended the removal of this right.

[21] There are some cases that repeat the principle that is applicable to an application to strike out a claim, for example, ***Jackson v British Medical Association et al 1970 1 All ER 1094 @ 1101***.

[22] Pearson LJ said:

> "The power should only be used in plain and obvious cases."

[23] Then in ***Dyson v Attorney General 1911 1 KB 410 @ 419,*** Fletcher-Moulton CJ referred to the summary process to strike out a claim in these terms:

> "Our judicial system would never permit a plaintiff to be 'driven from the mercy seat' in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad".

[24] I accept that these cases were based on applications to strike out on the grounds that the claimant's case discloses no reasonable grounds for cause of action. I recognize that these cases are pre the CPR rules of 2002. However, I find the principle they embody provides useful guidance as to how to treat applications to strike out.

[25] The English Court of Appeal did look at the power to strike out under the equivalent CPR Rules of 1998.

[26] Lord Woolf, in ***Swain v Hillman & another (1999) ECWA 225, (2001) 1 All ER 91,*** considered the power to make a summary order under Part 24.2 of the CPR and the power to strike out under Rule 3.4 of the CPR. He accepted the relationship between Rule 3.4 and Part 24.2 (summary judgment) and pointed out that the power under Part 24 is wider than under Rule 3.4 because Rule 3.4 only dealt with striking out a statement of case of the claimant whereas Part 24 dealt with both the claimant and defendant.

[27] The **ratio** of the case is that if either the plaintiff or the defendant has no real prospect of succeeding, then summary judgment should be granted.

[28] In the same case Judge L J pointed out that:

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interest of justice overall did sometimes so require. Hence the discretion in the court to give summary judgment against a claimant, but limited to those cases where, on the evidence, the claimant has no real prospect of succeeding."

[29] In my view, this authority demonstrates that the power to dismiss by way of summary judgment is an exceptional power or remedy. By parity of reasoning, if the power to order summary judgement under Part 24 is wider than rule 3.4 (to strike out) it means that the power to strike out is narrower. **A fortiori**, it would be also exceptional.

[30] So this is the position that the applicant GSB Co-operative Credit Union Limited faces in this application to strike out. It has the burden to show that the cause of action of the claimant is incontestably bad and the claimant has no real prospect of succeeding in it.

(b) The Interpretation of Section 50 of the Co-operative Societies Act

[31] 50. – (1) If any dispute touching the business of a registered society arises –

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past members, or persons claiming through a member, past members or deceased members

and the society, its committee, or any officer of the society; or

(c) between the society or its committee and any officer of the society; or

(d) between the society and any other registered society;

Such dispute shall be referred to the Registrar. A claim by a registered society for any debt on demand due to it from a member, past member or the nominee, heir or legal representatives of a deceased member, shall be deemed to be a dispute touching the business of the society within the meaning of this sub-section.

(2) The Registrar shall, on receipt of a reference under subsection (1) refer it for disposal to an arbitrator or arbitrators.

(3) Any person aggrieved by the award of the arbitrator or arbitrators may appeal to the Registrar within such period and in such manner as may be prescribed.

(4) A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called in question in any civil Court.

(5) The award of the arbitrator or arbitrators under subsection (2) shall, if no appeal is preferred to the Registrar under subsection (3) or if any such appeal is abandoned or withdrawn, be final and shall not be called into question in any civil court and shall be enforced in the same manner in all respects and if the award had been a judgment of a Resident Magistrate.

51. - (1) Notwithstanding anything contained in Section 50, the Registrar at any time when proceeding to a decision under this Act, or the tribunal at any time, when an appeal has been referred to it against any decision of the Registrar under this Act, may refer any question of law arising out of such decision for the opinion of the Supreme Court.

[32] The applicant attempts to establish this very course by submitting that the claimant did not comply with the mandatory requirement of Section 50 of the Co-operative Societies Act. They contend that this statutory provision was an absolute bar to the claimant's action in court.

[33] In essence, the applicant contends that the claimant was obliged to submit her dispute to the Registrar of Co-operative Societies and not to the courts. In other words, they contend the provisions of section 50 were mandatory in reliance on the word of a dispute of a member of a Society 'shall' be referred to the Registrar.

The applicant contends further that since the claimant filed an action in the court in place of the statutory provision of the Co-operative Societies Act, this was an abuse of the process of the court that warranted her claim to be struck out. So the foundation of the application to strike out is that the claimant's claim in court is incurably bad in law because the legislation did not permit an immediate right of recourse to the court process. (See grounds (a) and (b) of Notice of Application to strike out, dated 25th January, 2011 and paragraphs 4 and 5 of Applicant's application).

[34] The issue therefore arises then: is the claimant's action before the court incurably bad or has no prospect of succeeding because it is an abuse of the process of the court?

[35] The answer to this question involves an interpretation of section 50 of the Co-operative Societies Act and subsection 50 (4) which create a regime for the determination of disputes between a Co-operative Society Credit Union and its members.

No certiorari clause or ouster clause

[36] Counsel for the applicant argues additionally that section 50 (4) provides:

> "A decision of the Registrar in an appeal under subsection (3) shall be final and shall not be called into question in any civil court."

[37] The Jamaican Court of Appeal had to consider section 50 of the Co-operative Societies Act in a dispute between a member and her Co-operative Credit Union in ***Yvette Reid v City of Kingston Co-operative Credit Union Limited*** *SC Civ. App. 32 of 2007 decided on 31/7/2008.* In delivering the judgment of the Court, Smith JA identified the issues as follows:

> "I ..... turn to the question of whether or not section (50) (4) of the Act oust the jurisdiction of the Supreme Court to review the decision of the Registrar of Co-operative Societies by way of certiorari?"

[38] He answered that question in the following terms:

> "It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly. The cases show that an ouster clause does not protect a nullity."

[39] The learned judge then examined Lord Reid's test of "a nullity" in ***Anisminic*** *969 2AC 147 at 171 B-D.* He found that Lord Reid's illustration of nullity indicates that:

> "The courts would be inclined to interpret a provision making the decision of an administrative tribunal or authority "final and conclusive" as intending to protect a decision of the tribunal which is not a nullity in the ***Anisiminic*** sense."

[40] Smith J A concluded:

> "That section 51 of the Co-operative Societies Act did not intend that the Registrar or Arbitrator should

determine difficult and intricate questions of law, but should seek the opinion of the court."

[41] He took the view that the Registrar should have referred the question of causation and remoteness of damages in respect of the indirect loss in the circumstances of the case to the Supreme Court, pursuant to section 51.

[42] Having regard to the authority of ***Yvette Reid v. City of Kingston Co-operative Society Credit Union Limited***, it is my view that the regime established under section 50 of the Act is not mandatory but directory.

[43] I also hold, based on the same reasoning in the ***City of Kingston Co-operative Society*** (supra.) case that the words "such disputes shall be referred to the Registrar" under the provision of section 50 (1) is not mandatory but directory.

[44] I accept that there is a distinction between the facts of the ***City of Kingston Co-operative Credit Union*** case and the instant case of **GSB Co-operative Credit Union**, on the grounds that no decision was taken or made by the Registrar so that the essential issue of the finality clause has not yet arisen.

[45] If the section 50 regime is not mandatory as I find, then I am constrained to hold the claimant's action would not be incurably bad or without a prospect of success and therefore should not be struck out.

(c) **Abuse of Process**

[46] The provision of Rule 26 (3) of the **CPR** 2002 refers to abuse of process as a condition for striking out a statement of case. The phrase is not defined. The main authorities dealing with abuse of process arises from cases in the criminal law.

[47] The Full Court of Jamaica in: ***Melanie Tapper and Winston McKenzie v DPP and the Attorney General***, *Suit Nos. M103 and M113 of 1998 delivered on 8/2/99* considered the meaning of abuse of process.

Smith J said at p. 26:

> "Abuse of process has been developed by the courts from common law principles". It has been defined by the Privy Council in ***Hui Chi-Ming v The Queen [1992] AC 34 (P.C.)*** *as:*
>
> "Something so wrong that the court should not allow a prosecutor to proceed with what is in all other respects is a regular proceeding."

[48] It was recognized in this case that misuse of procedure is a ground for setting aside proceedings. Further, it was held that it is an abuse of process if the prosecutor has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality (***R v Dery Crown Court ex parte Brooks*** *80 CAR 164 at 168 and* ***DPP v Brooks*** *[1994] 2 All ER 231 (P.C.)*

Public Interest

[49] Smith J. also pointed out that the principle of abuse of process is based upon the policy of public interest; that is to say, the court is not only concerned with the interest of the accused in having a fair trial but also the public interest in a fair and just trial process and the proper administration of justice.

[50] The public interest consideration finds resonance, in my view, with the principle of fairness and equality enshrined in the overriding objective in dealing with a civil case justly under Rule 1 (1) of the CPR 2002.

[51] Therefore, applying these two considerations to the application of the applicant GSB Co-operative Credit Union, I am unable to hold that the filing of the action by the claimant five (5) years ago instead of submitting to the regime of section 50 of the Act was a manipulation of the court's process or a means of securing some advantage at the expense of the defendant. I do not find that it is something so wrong so as to prevent the claimant to proceed in what in all other respect is a regular proceeding. Neither do I find that it violates the public interest in expecting a fair trial. The claimant did not seek to change from one jurisdiction. She simply pursued her claim within the jurisdiction of the court.

[52] The issues raised on the pleadings are mixed questions of fact and law. The question of a debt and the amount of the debt are questions of fact. They are relevant to the fact in issue, which is, whether or not GSB has libelled the claimant. These are matters for a tribunal of fact and law and it is quite proper for the claimant to submit them to the court.

[53] The essence of the claimant's action is one of defamation. This is an action that could involve difficult and complex directions on the law. The proper forum to treat with such issues in its entirety would be the court and not an Arbitrator or the Registrar of Co-operative Societies Credit Union.

[54] The highest I would put the matter of the jurisdiction of the Registrar in relation to the jurisdiction of the court is that there is concurrent jurisdiction for dealing with a dispute between a Credit Union and its members. However this does not take away the choice of a member to file his or her claim in the courts.

[55] If the member chooses to use the court, he or she should not be prejudiced or punished by an action to strike out his or her statement of case.

Conclusion

(e) Inherent Jurisdiction of the court in concurrent proceedings in David Panton, Tamil Panton et al v FLU

[56] Application to strike out claim refused.

To be agreed and taxed

Cost to the Applicant

Leave for Appeal granted