[2021] JMCC Comm 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00281

| | | |
|---|---|---|
| BETWEEN | WEST INDIES PETROLEUM LTD | CLAIMANT |
| AND | SCANBOX LIMITED | 1ST DEFENDANT |
| | WINSTON HENRY | 2NDDEFENDANT |
| | COURTNEY WILKINSON | 3RDDEFENDANT |
| | JOHN LEVY | 4THDEFENDANT |

Civil Procedure – Application to strike out claim-Whether second action an abuse of process-Whether same issue being relitigated- Whether second action amounts to "harassment".

M. Georgia Gibson- Henlin, QC and Peta-Shea Dawkins and Shavaniese Arnold instructed by Henlin Gibson Henlin for the Claimant.

Lemar Neale instructed by Nea|Lex for the 1st and 2nd Defendants.

Symone Mayhew QC and Ashley Mair instructed by Mayhewlaw for the 3rd and 4th Defendants

Heard: 29th October and 23rd November 2021.

In Chambers: By Zoom

**COR: BATTS J.**

**[1]** There were three applications before the court. An application filed on the 5th October 2021 to strike out the claim, an application filed on the 23rd June 2021 for an injunction and, an application filed on 1st October 2021 for preservation and production of evidence. It was agreed, by all parties, that the application to strike out the claim would be heard first. Submissions on that application were completed on the 29th October 2021, at which time, I reserved my decision until the 23rd November 2021.

**[2]** This claim is the second filed, against the 3rd and 4th Defendants, in the month of June 2021. They argue that it is oppressive, and an abuse of process, because it concerns the same facts, the same allegations and, the same causes of action as the previously filed one. They will therefore unnecessarily have to incur duplicated costs. The Claimant asserts that this claim is different from the other one and that there are very good reasons to have each adjudicated separately.

**[3]** The parties are not in serious dispute on the law in this area as it is well settled. They have each articulated the legal position in their respective written submissions. The Civil Procedure Rules (2002), as revised on the 3rd August 2020, state the court's power (on which the 3rd and 4th Defendants rely) thus:

> *"26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court-*
>
> *(a)……...*
>
> *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of proceedings.*
>
> *(c) ……...*
>
> *(d)……..."*

**[4]** The decision to strike out a claim, or part of a claim, is a severe measure. It amounts to the denial of an opportunity for a trial on the merits. It is reserved for

plain and obvious cases, **S&T Distributors Ltd et al v CIBC Jamaica Ltd et al SCCA No. 112/04 (unreported judgment 31st July 2007).** Although stated in the context of an application, made on the basis of no reasonable cause of action, the principle is generally applicable.

**[5]** Mr. Justice P.Jamador , in the High Court of Trinidad and Tobago, has accurately summarised the law, see **Danny Balkissoon v Roopnarine Persuad and J.S.P. Holdings Limited Claim No. CV 2006-00639 (judgment delivered on the 6th July 2007)** pages 8 and 9:

> *"While the categories of abuse of the process of the court are many and depend on the particular circumstances of any case, it is established that they include: litigating issues which have been investigated and decided in a prior case; inordinate and inexcusable delay, and oppressive litigation conducted with no real intention to bring it to a conclusion.....*
>
> *A fourth category of the abuse of the process of the court is where a party commences two or more sets of proceedings in respect of the same subject matter, and which amount to a harassment of a defendant, because of the attendant multiplication of costs, time and stress".*

**[6]** The Court of Appeal of St. Christopher and Nevis considered *en passant* a situation, in which the second claim was filed while the other was still extant, in **St. Kitts Nevis Anguilla National Bank Ltd v Caribbean 6149 Limited Civil Appeal No. 6 of 2002 (31st March 2003).**

Per The Hon. Denys Barrow, SC J.A.(Ag):

> *"[35].The text book examples given of abuse of process include issuing a claim after the expiry of the limitation period, bringing a private law action instead of proceedings for judicial review, starting a case with no intention of pursuing it further, bringing a case which is known to be incapable of proof, re- litigating a matter that has been decided and bringing a second action based on the same cause of action as forms the basis for proceedings in existence at the time of filing the second action....."*

**[7]** In **Moorjani et al v Durban Estates Limited et al [2019] EWHC 1229 (TCC), judgment delivered on the 15th May 2019,** Mr. Justice Pepperall demonstrated one approach to the determination of the question whether, by filing a second

action, a party is abusing the process of the court. I agree with and will adopt his method. The learned judge stated at paragraph 17 of his judgment:

> *" 17 . Accordingly, the proper approach to this case is as follows:*
>
> *17.1 The starting point is to consider whether the second claim is brought upon the same cause of action as the first*
>
> *17.2 The focus. is upon comparing the causes of action relied upon in each case and not the particulars of breach or loss and damage. New particulars are not particulars of a new cause of action if they seek to plead further particulars of breach of the same promise or tort or further particulars of loss and damage.*
>
> *17.3 Both cause of action estoppel and merger operate to prevent a second action based on the same cause of action. Such bar is absolute and applies even if the claimant was not aware of the grounds for seeking further relief, unless the judgment in the first case can be set aside.*
>
> *17.4 Even if the cause of action is different, the second action may nevertheless be struck out as abuse under the rule in* ***Henderson v Henderson****[(1843) 3 Hare 100] where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application:*
>
> *(a)The onus is upon the applicant to establish abuse.*
> *(b) The mere fact that the Claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.*
> *(c ) The court is required to undertake a broad, merits – based assessment taking account of the public and private interests involved and all of the facts of the case.*
> *(d)The court's focus must be on whether, in all the circumstances, the Claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.*
> *(e ) The court will rarely find abuse unless the second action involves "unjust harassment" of the Defendant ."*

Justice Pepperell thereupon embarked on a careful comparison of both claims before coming to his decision. In the case at bar counsel for the 3rd and 4th Defendants have, in written submissions filed on the 25 October 2021, helpfully created a comparative table. This demonstrates that the first claim has all the causes of action mentioned in the second claim save for malicious false hood, defamation and, breach of the constitutional right to privacy. It is asserted that these "new

causes of action" are supported by the same facts relied on, in the first claim, and hence the rule in Henderson's case ought to be applied.

**[8]** The statements of case relevant for comparison before me are firstly, the Second Further Amended Particulars of Claim in SU2021 CD 00268(the first action) and secondly, the Amended Particulars of Claim in SU2021 CD 00281(the second action).

**[9]** My first observation is that, whereas West Indies Petroleum Limited is a Claimant in both actions, the 1st and 2nd Defendants in the second action are not parties in the first action. The second noteworthy distinction is that the second action concerns an alleged breach, by the 1st and 2nd Defendants, of "Non – Disclosure Agreements" dated 21st January 2019 and 1st February 2020 (see paragraphs 9,10,11,12, and 13 of the second action). The 3rd and 4th Defendants are, in the second action, alleged to have participated in the breach of the said non-disclosure agreements (paragraphs 15,16, 17,18, 19, 20,21, 23, 24, 25 and 26 of second action). Neither the alleged non-disclosure agreements nor, allegations pertaining to their breach, are mentioned in the first action.

**[10]** However, the similarity between the first and second actions are otherwise striking. So that paragraphs 27,28 and, 29 of the second action allege breaches of fiduciary duty by the 3rd and 4th Defendants. This is the same cause of action, supported by much of the same particulars, such as letters of November 2020 and the formation of Eco Petroleum Ltd, as are found in the first action, see paragraphs 19-20, 23-24, 25-27, 30-33 and 35-41 of the first action. The "new" causes of action contained in the second action are malicious false hood, defamation and, breach of constitutional rights, see paragraphs 32-36 and, 37 of the second action. However, the facts relied upon to support those particulars are not connected to the 1st and 2nd Defendants in the second action. Those facts are all, it seems, also pleaded in the first action, see paragraphs 36 (c), 36(h), 36 (j), 33, 37, 38 and 40.

**[11]** It is apparent that these "new" causes of action ought to have been made a part of the first action. In the first place not to do so risks inconsistent findings of fact on the same evidence by different courts. A potential embarrassment which should be avoided. In the second place it is unfair to put a Defendant to the expense of responding, to the same allegations, more than once. Indeed, if necessary, I find that tacking these claims onto the second action is tantamount to "harassment" within the meaning of the authorities.

**[12]** In these circumstances, and for all the reasons outlined above, I have decided to strike out those portions of the second action which do not relate to the alleged breach of Non-Disclosure agreements. It is therefore ordered as follows:

(1) Paragraphs 27, 29,30,31,32,33,34,35,36,37 and 39 (1) and the words "*and Constitutional Damage*" in paragraph 39(9), of the Amended Particulars of Claim in SU2021 CD00281 are struck out.

(2) The Claimant is, on or about the 30th November 2021, to file and serve a Further Amended Particulars of Claim reflecting the effect of this order.

(3) Permission is granted for the Defendants to, on or about the 17th December 2021, file amendments to their respective defences if so advised.

I will hear submissions on costs prior to making an order for costs.