In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 377

BETWEEN:

EAST BANK CONSULTANTS

Plaintiff

-v-

LIVIO FERIGO

Defendant

EX TEMPORE JUDGMENT

(in Chambers)

Strike-out application-capacity to sue-legal personality-validity of assignment agreement-notice to debtor requirement-Supreme Court Act 1905 section 19(d)

Date of Judgment: October 31, 2016

Mr Llewellyn Peniston in person
Mr. Steven White, Cox Hallett Wilkinson Limited, for the Respondents

Introductory

1. The Defendant in this case applies by Summons dated the 20th November 2015 to Strike-Out the Plaintiff's claim:

"*in its entirety pursuant to Order 18, rule 19 of the Rules of the Supreme Court 1985 and or under the inherent jurisdiction of the Court on the following grounds:*

1. *the claim against the Defendant discloses no reasonable cause of action; further or in the alternative*
2. *the claim against the Defendant is scandalous frivolous and or vexatious; further or in the alternative*
3. *the claim against the Defendant is an abuse of the process of the Court*".

2. The case in support of strike-out had a number of strings to its bow. The first complaint was that the Plaintive lacked the legal personality to sue. The second broad complaint was that the assignment (a Deed of Assignment between M & M Construction Ltd. and East Bank Consultants dated 5th January 2015-"the Assignment") was a nullity.

Lack of legal personality/capacity to sue

3. The legal personality ground was straightforward in that it is accepted by the Defendant that the original Plaintiff East Bank Consultant is an unincorporated association which lacks the legal capacity to sue.

4. The Defendant sought to meet this objection following a directions hearing and filed, without obtaining formal leave of the Court, a purported Amended Specially Endorsed Writ of Summons substituting James A L Peniston trading as East Bank Consultants for the original Plaintiff.

5. Mr White invited the Court to decline to grant leave to amend at this stage but, having regard to the fact that the Plaintiff clearly attempted to cure this defect, I would not be minded to grant this application on the lack of capacity to sue ground alone. It is true, for the reasons argued by Mr. White and set out in the Defendant's skeleton argument, that the Plaintiff would have to meet the requirements of Order 20 Rule 5(3) of the Rules of this Court and demonstrate that the misnomer of the Plaintiff was "*a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intended to sue*"[1]: *Katzenstein Adler Industries (1975) Limited- v- Borchard Lines Ltd (The "Joanna Borchard')* [1988] 2 Lloyds LR 274 at 277 (Hirst J).

6. And so I make no formal ruling on the legal personality to sue ground of strike-out.

The assignment is a nullity

7. The 'assignment is a nullity' argument was advanced with considerable technical skill by Mr. White, and again this argument had many layers to it. The most significant

[1] Order 20 rule 5 provides as follows:
"*An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.*"

critique on the Assignment was that the requirements of section 19(d) of the Supreme Court Act 1905 were not met. Section 19(d) provides as follows:

> "*(d) any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action,* <u>*of which express notice in writing has been given to the debtor,*</u> *trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action,* <u>*shall be, and be deemed to have been, effectual in law*</u> *(subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed),* <u>*to pass and transfer the legal right to such debt or chose in action from the date of such notice,*</u> *and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor…*" [Emphasis added]

8. The one fact which is clear beyond argument in this case is that express notice in writing of the Assignment was only given after the Writ in the present action was issued on or about the 14th September 2015. It was admitted by the Defendant that he was in fact given notice of the Assignment when he was served on or about the 2nd October 2015.

9. The only answer to this point which Mr Peniston could muster was to seek to persuade the Court that, by implication, notice of the Assignment had been given via a letter sent by East Bank Consultants dated 29 June 2015 to the Defendant, which letter attached a draft Summons. That draft Summons was on its face notice of proceedings to be brought by East Bank Consultants against the Defendant, in terms which did not explicitly refer to the Deed of Assignment at all. When one looks at the letter of 29th June 2015 itself, it is clear that there is no reference to an assignment of the debt from the original creditor, M&M Construction Limited, to East Bank Consultants.

10. I accept entirely that one could perhaps glean from the terms of the letter and the draft Summons that it was intended for East Bank Consultants to take an assignment of the debt from M&M Construction Limited, but section 19(d) in my judgment is a provision which clearly requires express notice to be given of an assignment and clearly specifies that, until that notice has been given, the assignment does not take effect.

11. It follows that the Plaintiff, assuming that the capacity issue could be cured by way of a subsequent amendment application, did not possess the standing to bring these proceedings when the Writ was issued and that is a fatal flaw for the validity of the claim.

Merits of strike-out application

12. Whether one views this as a claim which discloses no reasonable cause of action, because on the face of the pleadings (which included the Deed of Assignment itself) the cause of action was unsustainable, or whether one views it in evidential terms as a claim that is bound to fail, it is clear that this is a claim that should be struck-out. Because it is plain and obvious that the Plaintiff, however named, lacked the standing to sue when the proceedings were issued. I prefer the view that the claim is liable to be struck-out as an abuse of process because it is bound to fail as it seems to me that the Court is really relying on the evidence not just on the pleadings in this case, which attach the Deed of Assignment, but also the evidence of the Defendant himself that he was only served with notice of the Assignment after these proceedings had been issued.

13. In those circumstances it is not necessary for me to consider the interesting and more complicated issue as to whether or not the Assignment is a nullity because the Plaintiff lacks the capacity to enter into the agreement. That general principle is clearly sound. Mr. White referred the Court to '*Ashton & Reid on Clubs and Associations*', 2nd edition.

14. It seems to me to be potentially arguable that it was clear that M&M Construction Limited were in fact contracting with Mr Peniston himself because, having entered into a Deed of Assignment with an entity that was clearly not an entity with the capacity to contract, it is arguable that they must be deemed to have contracted with Mr. Peniston himself. He was clearly was the signatory to the deed and whose named appears as the e-mail address for East Bank Consultants.

15. The additional argument was that the Deed does not meet the requirements of certainty that were acknowledged by the English Court of Appeal in *W.F. Harrison & Co. Ltd-v-Burke* [1956] 1 W.L.R. 419 (per Denning LJ at 421). It is not necessary for me to consider that point, even though it must be said that it is very seriously and strongly arguable that:

    (a) on the face of the Deed of Assignment it was entered into between a limited company and an entity which lacks the capacity to contract; and

    (b) on that basis the Deed of Assignment must be held to be invalid.

Conclusion

16. For all of these reasons, the final result is that the Defendant's strike-out application succeeds and the Plaintiff's action is struck-out. As I indicated in the course of argument in response to Mr Peniston's last ditch pleas for vague notions of justice to be deployed in his favour, this type of objection alleging that a party lacks the capacity to sue is not the sort of technical point which, if made out, can be cured by the Court on a discretionary basis.

17. I will hear parties as to costs.

[After hearing the parties]

18. Costs of the application to the Defendant to be taxed if not agreed.

Dated this 31st day of October, 2016 ______________________

IAN RC KAWALEY CJ