In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 105

BETWEEN:-

CORY HILL

Plaintiff

-and-

(1) JOE DaCOSTA
(2) MICHAEL DaCOSTA
(trading as Bermuda Slaters)

Defendants

EX TEMPORE JUDGMENT

(In Court)

Date of hearing: 24th June 2014

Mr Jaymo Durham, Amicus Law Chambers Limited, for the Plaintiff
Mr Paul Harshaw, Canterbury Law Limited, for the Defendants

Introduction

1. By a summons dated 4th December 2013, the Defendants apply to strike out the statement of claim indorsed on the writ of summons and/or the writ of summons, and for an order dismissing this action, pursuant to Order 18, rule

19 of the Rules of the Supreme Court 1985 ("the 1985 Rules") and/or under the inherent jurisdiction of the Court, on the grounds that the claim against the Defendants:

(1) discloses no reasonable cause of action; and/or

(2) is scandalous, frivolous and/or vexatious; and/or

(3) is an abuse of process.

2. The Defendants' application is based on three heads:

(1) they are not parties to the relevant lease; and/or

(2) the claim is statute barred as it is based on a promise allegedly made by the Defendants or either of them more than 10 years ago; and/or

(3) the contract allegedly made between the Plaintiff and the Defendants or either of them is unenforceable as it falls foul of the principle *ex turpi causa non oritur actio*.

Alleged facts

3. The facts pleaded in the statement of claim were as follows:

> 1. The Defendant was at all material times a quarry operator in the business of trading slate.
>
> 2. The Plaintiff was at all material times an employee of the Bermuda Government in the Department of Planning.
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> 3. By an agreement dated on or about late 2002/beginning of 2003, the parties agreed that in consideration for the Plaintiff's assistance in processing the Defendant's application for the re-opening of the government quarry site located at 29 – 31 Ferry Road, St. George's, the Defendant would pay the Plaintiff 20 cents per slate produced from the commencement of operations.

> 4. Pursuant to the terms of the agreement, the Plaintiff provided assistance in the processing of the application by directing the Defendant to the services of Compu-Cad in order to provide the site plan and photographs of the proposed site. In addition, the Plaintiff liaised with the Minister of Works and Engineering and provided requested information on behalf of the Defendant in order to facilitate the re-opening of the quarry.
>
> 5. In or around October 2003, the Defendant's application for permission to reopen the quarry site was granted. Shortly thereafter, in honor of the agreement, the Defendant provided the Plaintiff with approximately 1,500 pieces of slate in assistance with the building of the Plaintiff's house at [address], which the Plaintiff accepted in lieu of payment.
>
> 6. In breach of the said agreement, the Defendant failed to make any further payments, despite repeated requests from the Plaintiff.

4. The Plaintiff claimed that he had suffered loss in the amount of 1,944,000 slates at 20 cents per slate over six years, for which he claimed damages in the sum of $388,800.

5. The Plaintiff provided further particulars of his case in an amended answer to a request for further and better particulars of the statement of claim:

> Under paragraph 4
>
> Request: Please state all of the material terms of the alleged agreement.
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> Answer: The agreement was oral as per the terms stipulated in the writ of summons. By virtue of the oral agreement to the parties and further based on the actions of the parties, it was agreed that the Plaintiff would assist the Defendant's (sic) in their application to the Ministry of Works, Engineering and Housing for the Defendant to commence quarrying at the Prison Farm site located at 29 – 31 Ferry Road, St. George's. The parties further agreed that in consideration of the Plaintiff assisting the Defendant with the application that the Defendant would pay the Plaintiff $0.20 per slate produced by the quarry site from the commencement of operations.

Under paragraph 4

Request a: Please state the date or dates and times at which it is alleged that the Plaintiff liaised with the Minister of Works and Engineering

Answer: The Plaintiff did not meet with the Minister as he could not as a civil servant. The agent Compu Cad met with the minister.

Request c: Please state in respect of each such liaison what information was requested by the Minister of Works and Engineering.

Answer: The Plaintiff did not meet directly with any party with respect to the application. The Plaintiff, as a civil servant could not be involved with the Defendant's application and as such directed them (sic) to use Compu-Cad as their agent to liaise with the Ministry on their behalf. The Ministry requested that the Defendant's (sic) provide a formal application to open the quarry as well as site plans of the quarry.

Request d: Please state in respect of each such liaison, what information was provided by the Plaintiff to the Minister of Works and Engineering.

Answer: The Plaintiff through the agent Compu Cad provided site plans and a formal planning application.

6. The Plaintiff has sworn an affidavit in which he provides further details of his claim:

> 1. I have been employed as an Assistant planner in the Forward Planning Section of the Bermuda Government for the last 19 years and I make this Affidavit in relation to the Defendant's application to strikeout the Writ of Claim in the matter herein.
>
> . . . . .
>
> 3. At the time that I was contacted by Mr. Joe DaCosta in relation to assisting him with applying for a quarrying license. I began to research the availability of various quarrying sites, as Mr. Da Costa identified various areas of possibility, including an area near #1 Gate in St. David's. As a result I asked the senior planning officer Mr. Brian Rowlinson about the said area and I was advised that it was not a possibility.

> 4. Shortly after my discussions with Mr Rowlinson, I mentioned to Mr. DaCosta that I was aware of the old quarry site near the Prison Farm in Ferry Reach. After communicating the same to Mr DaCosta, he advised me that he had previously operated that site prior to its closure. As a consequence, I enquired of Mr. Rowlinson whether or not the site was available and he advised me that it was and that I should arrange an agent on behalf of Mr DaCosta to assist him with the necessary application. Consequently, I advised Mr. DaCosta to instruct the company Compu-Cad in the making of his application. …
>
> 5. At the time of Mr. DaCosta's application there where (sic) no other applicants seeking to obtain a license to operate a quarry. Furthermore, as an Assistant Planner I had no influence over the Ministers (sic) decision to grant or refuse permission for quarrying licenses, as this remains the discretion of the Minister. In addition, as a Civil Servant I am aware of the guidelines in relation to the code of conduct to be adhered to and as such, I made sure that I distanced myself from the possibility of any direct influence in the processing of Mr. DaCosta's Application. In this regard I am certain that my action in no way was in breach of the Civil Service Code of Conduct. …

7. The Defendants admit at paragraph 9 of the Statement of Claim:

> … that in or about late 2003 or early 2004 E&M Construction/Bermuda Slaters Ltd. made a gift of 1,500 pieces of slate to the Plaintiff. …

General principles

8. The principles applicable to a strike out application were summarized by Kawaley J (as he then was) in Global Construction Ltd v Hamiltonian Hotel & Island Club Ltd [2005] Bda LR 81 at para 14:

> The jurisdiction to strike-out under order 18 rule 19 and/or under the Court's inherent jurisdiction must be "*sparingly exercised*". It is also well settled that:
>
> > "The jurisdiction must be sparingly exercised, as its exercise deprives a party of the normal procedure by way

> of trial with discovery and oral evidence tested by cross-examination. It should only be used in plain and obvious cases. I have only to decide whether the case is so plainly unarguable that there is no point in having a trial at all." [Re a Company [1991] BCLC 154 at 155.]

9. As Kawaley J stated at paras 16 – 17, the Court can also strike out a claim which is obviously time-barred.

First head: the Defendants are not parties to the relevant lease

10. The Second Defendant has filed an affidavit in which he explains that: (i) at all material times the quarry has been operated by his company E&M Construction/Bermuda Slaters Ltd ("the Company"); (ii) by reference to two written contracts which he exhibits, the quarry was leased first to him and subsequently to the Company; and (iii) the First Defendant has therefore not at any material time operated the quarry or leased it from the Government.

11. I was, however, shown a copy of an Annual Return of Shareholdings for the Company dated 24th March 2008 and filed with the Registrar of Companies showing one "*J De Costa*" as a director.

12. Be that as it may, any defect in the statement of claim as to the parties to the lease could be cured by amendment, either by alleging that the First Defendant was at all material times acting as the agent of the Second Defendant and/or the Company, or *vice versa*.

Second head: the claim is statute barred

13. The contract pleaded by the Plaintiff was allegedly concluded in or about late 2002/early 2003. However section 7 of the Limitation Act 1984 ("the 1984 Act") provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. Part II of the 1984 Act provides for the extension or

exclusion of ordinary time limits, but none of the circumstances covered by Part II applies to the instant case.

14. However, on the Plaintiff's case there is a continuing obligation to pay 20 cents per slate produced for as long as either Defendant remains concerned in the operation of the quarry. I was referred to para 28-035 of Chitty on Contracts, Thirty First Edition:

> There may also be a series of breaches of a single covenant. Examples are failure to pay instalments of interest or rent. … In such a case the claimant will succeed in so much of the series of breaches … as occurred within the six .. years before action brought.

15. On the Plaintiff's case there has been an ongoing series of breaches. The limitation period defence does not cover the breaches occurring within the six years immediately prior to the commencement of proceedings.

Third head: *ex turpi causa non oritur actio*

16. A contract will be unenforceable if it is unlawful, and, if lawful, may be unenforceable on grounds of public policy or morality. This principle is expressed in the maxim *ex turpi causa non oritur actio* ("no cause of action can be founded on an immoral or illegal act").

17. The House of Lords considered the maxim in the context of an illegal contract in Stone & Rolls Ltd v Moore Stephens [2009] 1 AC 1391. Lord Phillips stated at para 26:

> The policy underlying *ex turpi causa* was explained by Lord Mansfield CJ in 1775 in Holman v Johnson 1 Cowp 341 , 343:
>
> > "The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the

> defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior est conditio defendentis.*"
>
> The policy can be subdivided into two principles in relation to contractual obligations. (i) The court will not enforce a contract which is expressly or impliedly forbidden by statute or that is entered into with the intention of committing an illegal act. (ii) The court will not assist a claimant to recover a benefit from his own wrongdoing.

18. Lord Walker added at para 128 that illegal conduct includes criminally illegal conduct and noted that the *ex turpi* principle:

> … has been described by McLachlin J in the Supreme Court of Canada, writing for the majority, as based on the need to preserve the integrity of the legal system: Hall v Hebert (1993) 101 DLR (4th) 129 , 160, 165.

19. A pertinent example of a contract which was held to be both illegal and void as contrary to public policy is to be found in Montefiore v Menday Motor Components Company [1918] 2 KB 241, KBD, in which, during World War I, the Plaintiff used his public position and the value of his good word to assist the defendants in getting government assistance in the form of money or contracts. Sherman J stated at 245 – 246:

> A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment

> it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government. … It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest. In my judgment a contract of the kind has a most pernicious tendency. At a time when public money is being advanced, to private firms for objects of national safety it would tend to corrupt the public service and to bring into existence a class of persons somewhat like those who in ancient times of corrupt polities were described as "*carryers*," men who undertook for money to get titles and honours for those who agreed to pay them for their influence: see the remarks of Lord St. Leonards in Egerton v. Earl Brownlow (1853) 4 H.L.C. 1, 234.

20. Montefiore was among the cases reviewed by Phillips J (as he then was) in Lemenda Ltd v African Middle East Co [1988] 1 QB 448, QBD. The learned judge stated at 457 H – 458 A:

> From this somewhat sparse authority it is possible to deduce the following principles underlying this head of public policy: (i) it is generally undesirable that a person in a position to use personal influence to obtain a benefit for another should make a financial charge for using such influence, particularly if his pecuniary interest will not be apparent. (ii) It is undesirable for intermediaries to charge for using influence to obtain contracts or other benefits from persons in a public position.

21. Phillips J added at 458 C:

> It has certainly been a feature of the decided cases that the contract has involved influencing a decision to be taken by someone in a public position, though whether this feature is an essential element in the application of the doctrine has yet to be decided.

In my judgment it need not do so, at least not directly. Eg the contract might involve the supply of information which would be of use to someone vying for the award of a government contract or other favourable decision from a person in public office.

22. Assuming that the facts pleaded by the Plaintiff and stated by him in his affidavit are true, he was a civil servant who accepted payment for helping the First Defendant, in whatever capacity the First Defendant was acting, to obtain a government contract. Specifically, he obtained information from a more senior member of his Department that a particular site was available for quarrying and passed this on to the First Defendant.

23. I am satisfied that, at the very least, the Plaintiff's position as a civil servant would have facilitated his access to the more senior member. Moreover, I draw the reasonable inference that, assuming the Plaintiff's pleaded case to be true, a material factor in the First Defendant's decision to approach him would have been the position that the Plaintiff held.

24. I therefore reject the Plaintiff's submission that the Court could reasonably conclude that the Plaintiff's position was or may have been irrelevant to the services which he contracted to provide.

25. It is not clear from the Plaintiff's pleaded case whether he was acting in the discharge of his office (ie charging the First Defendant to do what the Plaintiff was paid by the Government to do) or alternatively, as appears more likely, he was using his office to perform what might be described as private consultancy work. Either way, he was using his public office for private gain. The value of that gain, on the Plaintiff's case, ran to several hundred thousand dollars.

26. Paragraph 7.2.8 of the Civil Service Code of Conduct ("the Code") provides:

> You should not engage in outside employment or in the conduct of business, trade or profession without written authority from your Head of Department. Consideration of a request to engage in outside employment is made with regard to whether the outside employment would interfere with the proper performance of official duties and whether it could give rise to a conflict of interest.

27. Here, the question of conflict was particularly acute because the Plaintiff had a personal interest in the contract which, through the provision of information, he was helping the First Defendant to procure.

28. The Code has at all material times formed part of the Public Service Commission Regulations 2001: see regulation 2(2). It therefore has the force of law, although breach of the Code is not an offence.

29. The Plaintiff did not, as he should have done, obtain written authorisation from his Head of Department before entering into the contract which he now seeks to enforce.

30. If he had sought written authorisation, I doubt whether he would have obtained it. Enabling a civil servant to use his public office for private gain would tend to interfere with the impartial discharge of his duties and to undermine public confidence in the Civil Service.

31. In the premises, I am satisfied that, on the Plaintiff's case, the contract was both unlawful and contrary to public policy. I decline to enforce it. I need not go on to consider whether, on the face of it, the Plaintiff has committed the offence of misconduct in public office or any other offence.

32. The application to strike out the statement of claim and dismiss the action therefore succeeds.

33. I shall hear the parties as to costs.

34. [Having heard from both parties, and on the principle that costs should normally follow the event, the Court ordered that the Plaintiff should pay the Defendants' costs on the standard basis, to be taxed if not agreed.]

DATED this 24th day of June, 2014

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Hellman J