REPUBLIC OF TRINIDAD AND TOBAGO

C.V.2009-4203

IN THE HIGH COURT OF JUSTICE

BETWEEN

DAVID WALCOTT

CLAIMANT

AND

SCOTIABANK LIMITED OF TRINIDAD AND TOBAGO

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. David Walcott, in Person

For the Defendant: Mr. Kirk Bengochea

REASONS

[1] By Notice of Application dated 17th December 2009 the Defendant sought an Order pursuant to part 26.2 of the C.P.R. as amended and under the inherent jurisdiction of the Court that:

i. The Claimant's Claim Form and Statement of Case filed herein on the 12th November 2009 be struck out and

judgement entered for the Defendant on the ground that the Statement of Case is frivolous, vexatious and an abuse of the process of the Court in that the claim is premised on facts which had arisen and were known to the Claimant at the time of filing of a previous action (**HCA CV2009-02819 David Walcott v Scotiabank Limited of Trinidad and Tobago**) and the reliefs claimed in this action should properly have been claimed in the previous action.

ii. Alternatively, the proceedings in this action be stayed until the determination of the previous action (CV2009-02819).

iii. Or alternatively, should the application to strike out the Claim Form and Statement of Case be unsuccessful that the Defendant be granted an extension of twenty one (21) days after the determination of the application within which to file its defence.

(a) In support of its application the Defendant filed an affidavit deposed to by one Belinda James on 17th December 2009.

(b) The Claimant filed an affidavit in opposition to this application on 26th March 2010.

BACKGROUND

[2] The background to this application also formed the grounds of the application herein.

[3] HCA CV2009-02819 (hereinafter described as 'the first action') brought by the Claimant against the Defendant was based upon the following facts.

[4] The Claimant has held a chequing account at one of the Defendant's branches since August 16th 2001. On opening said account, he signed a copy of the Defendant's Agreement for the operation of an account ('the agreement'). By clause three (3) thereof the Claimant consented to give the Defendant the right to debit his account in respect of any outstanding monies due and owing to the Defendant by the Claimant.

[5] On October 24th 2008 the Claimant applied for and was granted an unsecured loan in the sum of $36,000.00 by the Defendant. By the terms of said loan the interest rate was 23.75% per annum which the Claimant agreed to repay over a twelve month period by monthly instalments of $3,399.79 due on the 11th day of each month. Further, that if an instalment payment was more than five (5) days overdue, the Defendant would charge the Claimant a late fee of 2% of the amount of the overdue payment ('the late fee'). It was agreed between the parties that this monthly instalment would be paid over the counter by the Claimant.

[6] On 11th December 2008 the Claimant duly paid the said monthly instalment but the Defendant also deducted an equivalent sum from the Claimant's chequing account as a result of an automatic debit set up by the Defendant's computer. The sum was returned to the Claimant's chequing account on the same day when the error was brought to the Defendant's attention.

[7] The Defendant defaulted on his monthly instalments for the months of February, March and April 2009. On the 16th day of each these months the Defendant in the exercise of its rights under the Agreement debited the monthly instalment and late fee from the Claimant's chequing account. In July 31st 2009 the Claimant was overdue in the sum of $6,799.58. His chequing account was debited in the sum of $4,300.00.

[8] As a result of the Defendant's debit of the Claimant's chequing account to meet monthly instalments due under his loan, cheques drawn on the said account were not honoured by the Defendant on the ground of insufficient funds.

[9] In the First Action brought by the Claimant against the Defendant his claim was based on the Defendant's debiting his chequing account for the monthly instalments and dishonouring cheques drawn on the said account on the ground of insufficient funds. He claimed damages for breach of contract, detinue, defamation, breach of express agreement, breach of court process, special damages and a mandatory injunction.

[10] The Claimant's application for a mandatory injunction was heard by the Honourable Justice A. des Vignes on 13th August 2009 during court vacation. The Claimant applied for Prohibitory Injunctions against the Defendant to restrain it from:

i. making any deductions from the Claimant's chequing account;
ii. placing any holds on the Claimant's chequing account.

[11] Mr. Bengochea, on behalf of the Defendant, submitted that facts which form the basis of this claim were well known to the Claimant at the time of the filing of the First Action. In support of his contention Mr. Bengochea referred the court to paragraph 4 of the Statement of Case in the First Action where the Claimant pleaded: '*The Defendant admitted to an internal error on his computer system which set up an automatic debit from the Claimant's chequing account to service the payment of loan instalments. The Claimant paid the monthly instalment on December 11th 2008 as required under the loan but an equivalent monthly instalment was also deducted from the Claimant's chequing account on that same date. The error was brought to the Defendant's attention and an automatic debit feature was cancelled from the Claimant's chequing account. The deducted sum of $3,399.00 was immediately credited to the Claimant's chequing account on the said 11th December 2008.*'

[12] Counsel then referred the court to several cases which illustrate this principle, beginning with **Henderson v Henderson PC 1843-**

60 ALL E.R. 378. Sir James Wigram, delivering the decision of the Board opined, '*In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement but to every point which properly belonged to subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.*"

[13] He also relied upon the case of **Teddy Mohammed V Gold and Gold Limited HCA No S447 of 2002** and **Danny Balkissoon v Roopnarine Persad and JSP Holding Limited CV2006-00639** as illustrative of the above principle.

[14] In **Teddy Mohammed**, *supra*, the Defendant Company Gold and Gold Limited obtained judgment against the Plaintiff in the United States in the sum of $170,000.00 US with costs. The company then instituted HCA No 2165 of 1990 in Trinidad and Tobago against Teddy Mohammed based on this judgment and

filed and obtained summary judgment against the Defendant. Teddy Mohammed appealed this Order for summary judgment but the said appeal was dismissed. Gold and Gold then filed two enforcement application in HCA 2165 of 1990 – one to cross-examine the Defendant as to his means and the other a judgement summons. While these two applications were pending, the Plaintiff filed a summons before the court seeking an injunction to stop the enforcement of the default judgement and a stay of proceedings in HCA No 2165 of 1990 on the ground of illegality and fraud on the part of Gold and Gold in obtaining the judgment against him the United States.

[15] The Defendant, on the other hand, filed an application to have this Writ and Statement of Claim struck out under Order 18 rule 19 of the Rules of the Supreme Court on the ground that those proceedings were frivolous, vexatious and an abuse of the process of the court. The court, applying **Henderson v Henderson**, above, held that the issue now sought to be raised by the Plaintiff in the second proceedings ought properly to have been raised by him the earlier claim brought by Gold and Gold. The court looked at the explanation given by the Plaintiff for his failure so to do – that he 'did not have the relevant evidence or documents to substantiate the particulars of fraud' and found it to be unsatisfactory. At paragraph 17 of the judgment Smith J (as he then was) stated, '*The issue which now falls for decision can properly be stated to be whether Teddy Mohammed is estopped from raising these issues of fraud, illegality, immortality since he could and*

should have raised them in earlier proceedings before Razack J. In the affidavits sworn by Teddy Mohammed in these proceedings, he stated that he did not disclose the alleged fraud earlier when Gold and Gold was seeking to enforce the judgement against him because he did not have the relevant evidence or requisite documents to substantiate the particulars of fraud of the said contract.

Counsel for Gold and Gold submitted that this bald statement was inadequate to show that these issues could not have been raised earlier; it was also a very vague statement and when taken in conjunction with the other facts of this case and Teddy Mohammed's overall conduct of litigation it was far from being satisfactory explanation as to why the issues were not raised earlier.

I agreed with Counsel for Gold and Gold on this point. The statement above when read only indicated that Teddy Mohammed did not have the evidence and the document to substantiate the particulars of fraud. It does not state that he did not know of the fraud, illegality, immortality or that he did not or could not have found out about it before the proceedings brought before Razack J. It merely indicates that he could not prove the fraud to a great degree of particularity. Neither does it indicate how much knowledge of fraud, illegality, immortality he had at the time. It gives no real explanation as to why he could not have raised the issues of fraud, immortality or illegality before Razack J and perhaps indicated that he would get particulars at a later date.

In all circumstances, I was not satisfied that Teddy Mohammed produced any credible support for his bald allegation that he only became aware of the alleged fraud after the proceedings before Razack J; in fact the evidence now produced was inconsistent with his assertions and there was no reasonable explanation coming forward for these inconsistencies. Teddy Mohammed failed to clear the first hurdle of showing that the fraud was only discovered since the judgment so that his case must be considered as frivolous and vexatious. Alternatively, this was a case where the rule of public policy insisting that all matters be brought forward at the same time ought to prevail in the wider interests of the administration of justice so that Teddy Mohammed's attempt to litigate the issues of fraud, illegality and immortality in the present action when there is no proof that they could not have been raised in the proceedings before Razack J was an abuse of the process of the Court.

Accordingly, I dismiss Teddy Mohammed's Writ and Statement of Claim on the ground that his claim was frivolous and vexatious and an abuse of the process of court.'

[16] Counsel submitted that the facts of this case was on all fours with the Teddy Mohammed case in that not only was the Claimant aware of the facts forming the basis of this claim at the time of filing the First Action as outlined above; the explanation given by the Claimant herein for failing to raise the issue should not be accepted by the Court. He referred the Court to paragraph 5 of the Claimant's affidavit filed on 26th March 2011 in response to

the Defendant's application to strike out his Statement of Case. By paragraph 5 of his affidavit the Claimant explained that he only became aware of the fact that he could pursue a claim for the Defendant's debit of his chequing account before his loan was in arrears after the ruling delivered by the Honourable Justice des Vignes. Counsel submitted that ignorance of the law is no excuse even for an unrepresented party and the principle in **Henderson v Henderson** still applies.

[17] Mr. Walcott submitted that the Defendant ought not to be heard on this application since he has filed no defence to the action and has admitted debiting his account on 11th November 2008 in breach of the Agreement between them. He argued that this amounted to a judgment on admission and that he should be given judgment against the Defendant on his application filed on the 21st December 2009 pursuant to CPR 14.1

[18] He also submitted that the Defendant adduced no evidence in support of it's contention that his claim is frivolous and vexatious and an abuse of process; that it cannot do so in light of the fact that it has filed no defence before the Court and has admitted to the Claimant's claim.

[19] Mr. Walcott argued further that it is a matter for the court in the exercise of it discretion to determine whether his claim amounts to an abuse of process on the ground that he had not pursued it in the First Action. He relied upon CPR 26.1 (h) to submit that a

court, under it powers of Case Management, may direct a separate trial of any issue; if the court were to do so here, his claim would not amount to an abuse of process. He urged the court to exercise its discretion in his favour and order that this issue be tried separately under CPR 26.1 (h) or under CPR 26.1 (j) as an ancillary claim. The Claimant, in support of his submission that to strike out his Statement of Case amounts to a denial of his right to access the Court and a breach of his constitutional rights, referred the court to the case of **Danny Balkissoon v Roopnarine Parsad and JSP Holdings Limited CV2006-00639** and to dicta of Lord Millet in the case of **Johnson v Gore Wood & Co 2002 AC 1 at 59 D,** *'It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law…'*

[20] Mr. Walcott also submitted that CPR 14.1 (3) permitted him to file an application for judgement so soon as the Defendant made an admission as he did. He submitted further that the Defendant's admission gave priority to his application for judgment ahead of the Defendant's.

[21] The Claimant also contended that the issue of whether the Honourable Justice des Vignes was right in determining that the Defendant could debit his account in the absence of expressed

authorization from him was not finally determined since the matter was before the Court of Appeal. He argued that the Court should not conclude in the circumstances that the matter was at an end and take this into account in determining this matter.

CONCLUSION

[22] I had regard to the submissions both written and oral and the legal authorities cited before me.

[23] I came to the conclusion, applying the test laid down in **Henderson v Henderson supra** that the facts upon which this action was based were well known to the Claimant at the time of the filing of his First Action. I also had regard to the explanation proffered by the Claimant for not including this ground of relief in his original application; that he did not know that he could do so.

[24] It should be noted at this point that this Claimant made a deliberate choice to appear unrepresented. His ignorance of the law or legal procedure cannot be a matter that I can properly take into account in determining the issue of whether his claim amounts to an abuse of process and should be dismissed. In my view he must be treated as any other litigant whether represented or not in determining this issue.

[25] In the case of **Danny Balkissioon v Roopnarine Persad and JSP Holding Limited supra**, Jamadar J. (as he then was) opined that a court, when considering an application to strike out proceedings under CPR 26.2 (1)(b) as an abuse of process of the court must do so 'in light of the overriding objective and the function of the court to deal with cases firstly'.

[26] He went on to state that, "*…even where there may be an abuse of the process that does not mean that the only correct response is to strike out a claim or Statement of Case…Third, the jurisdiction or power of the court to strike out proceedings as an abuse of the process of the court is discretionary, given the status of the constitutional rights of access to the court it would appear that striking out a claim should be the last option…*"

[27] However, Jamadar J also cited obiter dicta of Kangaloo J.A. in the case of **D. Mahabir v Courtney Phillips Civil Appeal No 30 of 2002** at paragraphs 16, 20, 22:

> "***16.*** *Assuming for the time being, that the filing of these writs of summons over a period of time in respect of the same cause of action can be a category of 'abuse of process' one has to look at the explanations offered by the Appellant for so doing to determine whether the action should be allowed to proceed.*
>
> ***20.*** *The appellant has not offered even a plausible explanation why he has had to file three writs for the same use of action so on the face of it his conduct should*

> *amount to an abuse of process of the Court and he should not be allowed to proceed with the instant action.*
> **22.** *All these authorities now speak with one voice and it is that unless there is a real prospect of a miscarriage of justice occurring from the court's denial of a litigant to proceed further with a matter, when the reason for delay is solely a matter dealing with the competence, negligence, inadvertence or otherwise of his legal representatives, the matter will not be allowed to proceed."*

[28] In the case before me, the claim in the First Action has not been adjudicated upon. des Vignes J dismissed the Claimant's application for interlocutory injunction reliefs but the substantive claim subsists at Case Management stage. No application has been made by the Claimant to amend his Statement of Case to include this limb of his claim and no reason has been given for his failure to do so. Unlike the **Danny Balkissoon v Persad and JSP Holdings Limited** case there's no issue of the limitation period running out and the need to preserve his claim. The Claimant still has ample time in which make an application to amend his Statement of Case in the First Action to include this claim. I therefore held that the Claimant filing this claim before the determination of the First Action and during its subsistence amounted to an abuse of process and was frivolous and vexatious.

[29] I am also of the view that the Claimant's appeal from the decision of des Vignes J has no impact on the issue for the following reasons:

i. It was wrongly filed as a procedural appeal which the Claimant has since withdrawn. Up to the time of the hearing of the application some eight (8) months later, no application to extend the time for the filing of an appeal against the judgment, settling the record or stay of execution of the Order of des Vignes J had been made;
ii. The ruling had no bearing on the issue of whether the Claimant could amend the Statement of Case in the First Action to include this claim.

[30] I held further that the explanation given by the Claimant for his failure to include this claim in the First Action was not satisfactory in the following circumstances:

i. The basis of his claim in the First Action was the Defendant's wrongful debit of his chequing account and he included the debit of 11th December 2008 but made no claim in respect of it.
ii. His explanation that he did not realize that he could do so until after des Vignes J's decision amount the excuse of ignorance of the law which does not amount reasonable explanation since that is not a matter that I can take into account in determining the issue.

[31] As was stated by Sir James Wigram in **Henderson supra**, p. 7, whether the explanation for the failure to include the claim in the First Action amounts to 'negligence, inadvertence, accident' a court will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward in earlier proceedings.

[32] In my view striking out the Claim Form and Statement of Case meets the requirements of the overriding objective in that:

i. The sum debited from the Claimant's account was small, just over three thousand dollars;
ii. The money was returned to his account the same day;
iii. This claim can be justly and expeditiously dealt with if included in the First Action; it would be an improper use of the Court's time and resources to deal with this matter as a separate claim.

[33] Finally, the Claimant is not being denied access to the Courts since, as noted above he still has the option of making an application to amend his Statement of Case of the First Action at a Case Management Conference.

[34] I therefore order that:

i. The Claimant's Claim Form and Statement of Case be struck out

ii. The Claimant pay the Defendant's costs in the sum of $10,150.00

iii. Stay of Execution: 28 days.

JOAN CHARLES
JUDGE