

REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE

Claim No. CV2018-03315

BETWEEN

PORT AUTHORITY OF TRINIDAD AND TOBAGO

1ST Claimant

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

2ND Claimant

AND

NYREE ALFONSO

1ST Defendant

INTERCONTINENTAL SHIPPING LIMITED

2ND Defendant

JOHN POWELL

3RD Defendant

BEFORE THE HON. JUSTICE JOAN CHARLES

Appearances:

For the Claimants: Dr. Claude Denbow led by Shiva Maraj
Instructed by Mrs. Donna Denbow

For the First Defendant: Mr. Ramesh Lawrence Maharaj S.C.
Instructed by Ms. Vahini Iseunath

For the Second and Third
Defendants: Mr. Rishi Dass
Instructed by Ms. Theresa Hadad

Date of Delivery: 20th November 2019

JUDGEMENT

[1] By Notice of Application dated 23rd September 2019 the Second and Third Defendants sought inter alia, an Order that the Claimant's Claim Form and Statement of Case be struck out against the Second and Third Defendants or either of them on the ground that the Claim Form and Statement of Case filed herein disclose no and/or no reasonable claim or against them. The grounds relied upon in support of this application are:

- (i) There is no case pleaded against the Third Defendant in his personal capacity and there is no allegation made against him or facts pleaded by the Claimants which are capable of rendering the Third Defendant liable in his personal capacity. This position was conceded by the Claimants' Attorneys-at-Law on the 6th June, 2019 in the course of oral arguments made in relation to the Claimants' Notice of Application for Summary Judgment which was subsequently dismissed.
- (ii) The claim, as pleaded, is barred by limitation and specifically by S. 66(2) of the Trustees Ordinance.
- (iii) The Claimants' claim ought also to be struck out on the basis that it discloses no cause of action against the Second and Third Defendants on the basis that its initiation and continuation constitute an abuse of process.

[2] The Defendants submitted that an ancillary claim against the alleged recipient of a breach of fiduciary duty is subject to a statutory limitation period of four years; as a result this claim is statutorily barred since the claim is for breach of fiduciary duties arising out of the award of the contract which was made in April 2014.

[3] The species of trust relief sought by the Claimants against the Second Defendant is governed by S 66(2) of the Trustee Ordinance Chapter 8 No.

3 which provides for a four year limitation period. It was also submitted that S. 66(1) does not include strangers, such as the Second Defendant, who have assumed no prior fiduciary responsibility. The case against the Second and Third Defendants are not premised on the ground that they are fiduciaries. ICSL was in a contractual commercial relationship with the Claimants and could not be a fiduciary as it enjoyed a necessarily competing interest.

- [4] The Defendants contended, that the exclusion of limitations under the Trustee Ordinance does not extend to those upon whom an equitable obligation to account as a constructive trustee is imposed as a result of their wrongful conduct toward the beneficiaries.
- [5] Relying on **Peconic Industrial Development Limited v Lau Kwok Tai**¹ these Defendants argued that at best they can be considered strangers to a trust who dishonestly assist in its breach – constructive trustees in that they have not assumed any prior fiduciary liability but make themselves liable by dishonest acts of interference.
- [6] They contended further, that while they are called constructive trustees this title is nothing more than a formula for equitable relief. They are not constructive trustees within the meaning of the law of limitation. At its highest, the liability of these Defendants is best described as an ancillary liability in respect of which the limitation period applies. S. 66 of the Trustee Ordinance only applies to express and de facto trustees and not to persons liable only by virtue of their dishonest assistance in a breach of trust or knowing receipt of the asset of a company.

¹ (2009) 11 ITELR 844

- [7] Since there is no claim that the Defendants are fiduciaries they are entitled to the benefit of the four year limitation period provided for by Section 66(2) of the Limitation Ordinance.
- [8] The Claimants on the other hand submitted that the Defendants have not met the required threshold to have this claim struck out. They submitted that a Court should only strike out a case in circumstances where:
- (i) it is unwinnable and sustainable as a matter of law based on the pleadings;
 - (ii) there are no serious live issues of fact to be determined by the hearing of evidence at trial;
 - (iii) the case for striking out the claim should be plain and obvious on the pleadings – no recourse to the evidence should be had.
- [9] The Claimants also argued that summary disposal is inappropriate in complex cases such as the one at bar which involves novel and complex issues.
- [10] The Claimants submitted that the present application relies upon affidavit evidence of Theresa Hadad in which the alleged concession by counsel for the Claimant is contained – however this is not permissible.
- [11] The Claimants submitted further, that a third party who receives the proceeds of a breach of fiduciary duty is liable to account. The Second Defendant was the human instrument through which the benefit of the breach of fiduciary duty was realized. There is a case pleaded against Mr.

Powell for facilitating a breach of fiduciary duty and arranging receipt of the proceeds.

[12] It was submitted further that limitation bars the remedy not the right and therefore cannot be raised in support of an argument that the Claimants have no cause of action against these Defendants.

[13] Dr. Denbow, on behalf of the Claimants submitted that the Defendants have mischaracterized the Claimant's' case which has nothing to do with a breach of trust and does not fall within the parameters of Section 66 of the Trustee Ordinance. He asserted that the Claimants' case is founded on a breach of fiduciary duty and the consequential claim is for an account and a disgorging of profits from that breach. The remedy for breach of fiduciary duty is an equitable remedy and not a claim for breach of trust by a trustee.

[14] The Claimants submitted that there is no limitation period under the Law of Trinidad and Tobago where parties are seeking an equitable remedy.

[15] In response to the Defendant's submissions that the Claim Form and Statement of Case disclose no/no reasonable claim against them, the Claimants relied upon paragraphs 21,23,24,26,32,34,35 of the Statement of Case outlined below:

21. *A third tender was also received from an entity which was not invited to tender, namely the Second Defendant on the 26th February, 2014 which was the date on which the tender process closed. The Second Defendant became involved in the tender process as a result of its appointment as agent for the First Defendant in the manner set out hereunder.*

23. *The Second Defendant had never been invited to tender and had been deliberately inserted into the tender process by the First Defendant to act on her behalf. Further, at all material times the First Defendant was kept abreast of the process for the award of the contract and its implementation*

by being copied on all the correspondence passing between the First Claimant and the Second and Third Defendants.

- 24.** *Although the First Defendant accepted that she did not satisfy the tender criteria inter alia of “industry experience” nonetheless she elected to appoint the Second Defendant as her agent in order remain within the tendering exercise.*

Accordingly, the commercial opportunity presented to the First Defendant whilst acting as an attorney for the First Claimant was deliberately diverted by her to the Second Defendant to be exploited on her behalf and for her benefit. As a consequence, the ship brokers for the preferred vessel, MVSG, namely Astralship Corporation Limited of Gibraltar were excluded from the tender process.

- 26.** *The ship broker Astralship, was the obvious person to tender and the only reason that Astralship was excluded from the tender process was to permit the First Defendant acting in concert with the Second and Third Defendants to tender for the provision of the MVSG which was the preferred vessel from the inception. As a consequence, the First Defendant used the opportunity to arrange for a profit to be earned by her agent on her behalf.*

- 32.** *Page 6 of the Tender Evaluation Report dated 5th March, 2014 affirmed that the Second Defendant tendered as agent of the First Defendant.*

In that regard, under the heading “International Shipping Limited, Port of Spain, Trinidad” it is stated: “This firm which was appointed as agent for ND Alfonso & Co. (refer to Appendix v). However, despite requests by the First Claimant’s attorneys for a copy of Appendix v that document disappeared from the Evaluation Report and is unable to be exhibited.

- 34.** *By letter dated 7th March, 2014 then Acting Secretary of the First Claimant Pamela Ford wrote to the Third Defendant advising that the First Claimant had selected the Second Defendant as the preferred tenderer at its Special Meeting on the 6th March, 2014. That letter was copied to the First Defendant confirming her involvement and continued participation in the tendering process for the eventual award of the tender for the provision of the MVSG.*

- 35.** *On 10th March, 2014 there was a meeting between TTTT personnel and the Third Defendant regarding the intended charter of the MVSG. By letter dated 10th March, 2014 then Acting Port Secretary Pamela Ford wrote to the Third Defendant as Managing Director for the Second Defendant advising inter alia that:*

Subsequent to a meeting of even date held with Mr. John Powell, and further consideration of mobilization and demobilization costs for the initial short time frame of the charter hire (6 months), a decision has now been taken to revise the term of the charter hire to twelve months, subject to the items to be negotiated...

This letter was once again copied to the First Defendant confirming her continuing involvement in the procurement and hiring of the MVSG.

ANALYSIS

[16] I agree with the Claimant's submissions that the Second and Third Defendant's application to have the claim against them struck out must be dismissed.

[17] Firstly, this is a complex case involving novel points of law which must be determined on actual findings of fact. I must determine, firstly, whether or not the Second Defendant was the duly appointed agent of the First Defendant, who had a fiduciary duty to the Claimants, with respect to the tender and award of contract for the provision of the MVSG. I also have to determine whether the Second and Third Defendants can be made liable, as agents of a fiduciary, acting in concert with that fiduciary for breach of fiduciary duty of the First defendant, or whether the Second Defendant's liability is limited to that of dishonest assistance in a breach of trust or knowing receipt of trust funds. These findings are fact/evidence driven, and cannot be determined on the pleadings.² I do not consider on the basis of the Claimants' pleaded case, that the claim is 'unwinnable' or

² In *Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.* 2016 89 WIR February 10; June 6.

‘unsustainable’ against the Second and Third Defendants. This is not a clear case where it can be said that the claim is bound to fail.³

[18] The Claimants’ claim against the Second and Third Defendants is for an account of monies received from the First Defendant, the fiduciary, over the three year period of hire of the MVSG, monies disbursed to the owners of the MSG during that period, as well as profits after such receipt and disbursements. The claim for an account of monies received consequent upon a breach of fiduciary duty is a claim for equitable relief. The legal issue of whether the claim for equitable relief is not subject to limitation must also be considered by the Court and is best dealt with at trial.

[19] The issue as to whether these Defendants are liable to disgorge profits received as a result of the alleged breach of fiduciary duty by the First Defendant is also a matter to be determined upon a trial of the facts, since I must first determine the issue of agency between the First, Second and Third Defendants, referred to above, and the legal consequence of such agency if proved. The argument relating to the applicability of the limitation period of four years pursuant to S. 66(2) of the Trustee

³ In *Partco Group Ltd. and another V. Wragg And Scott*. Potter LJ stated as follows:

45. The test for striking out under O.3.4 (2) (a) is, in other words of the rule itself, that the statement of case discloses “no reasonable grounds for bringing or defending the claim.”

46. The notes to CPR 3.4 Civil Procedure, Vol. 1 Autumn, 2001 indicated that this ground applies amongst others to (i) statements of case “which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides... (ii) a claim or defence which is not “a valid claim or defence as a matter of law” ...

47. Case (i) refers to a case which is unwinnable on the merits whereas case (ii) refers to the failure of a claim which is misconceived or, upon the facts or matters pleaded is bound to fail as a matter of law...

48. However, both are methods by which a claim or part of a claim may be disposed of summarily, and without regard to all available evidence as to the matters of contest, and are therefore broadly subject to the considerations which I have earlier summarized at pars. 27-28 above. It is no doubt because of those considerations that the notes to CPR 3.4 advert to the principle that it is not appropriate to strike out a claim in an area of developing jurisprudence, in which a decision as to a novel point of law should be based on actual findings of fact, and that a statement of case is not suitable for striking out if it raises a serious live issue of fact which can only properly be determined by hearing oral evidence.”

Ordinance can only be determined at trial and not at this stage for the same reason.

[20] In the circumstances, the Application is dismissed with costs.

Joan Charles

Judge