REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011- 02646

BETWEEN

MOHANLAL RAMCHARAN

Claimant

AND

CARLYLE AMBROSE SERRANO

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Ms. C. Mohan for the Claimant.

Mr. K. Hogan for the Defendant.

RULING

1. By way of three notices of application the Defendant seeks an order that this action be dismissed or stayed on the ground that (i) it discloses no cause of action; (ii) is an abuse of process and alternatively that (iii) the time for filing the defence be extended to 13th March 2012; (iv) that the time for serving the defence be extended to 27th July 2012 and (v) he be granted leave to amend his defence filed on 13th March 2011.

The orders sought with respect to the Defendant's defence

2. On the 13th March 2012 the Defendant filed a defence in this action. This defence was never served on the Claimant. In accordance with the Rules the first case management conference was fixed for 8th May 2012. On that date just prior to the first case management conference the Claimant, as he was entitled to do, amended his claim form and statement of case. The first case management conference was in the circumstances adjourned to 12th June 2012 to allow the Defendant to consider whether he needed to amend his defence and to allow him to serve the defence filed and/or any amended defence on the Claimant.

3. By 12th June 2012 neither the defence nor an amended defence had been served. On that date Attorney holding for Attorney on record for the Defendant indicated that in the light of the amendments made to the statement of case there was no need to amend the defence. Accordingly I ordered that the defence filed on 13th March 2012 stand; that it be served on Attorneys for the Claimant by 18th June 2012 and in default the defence be dismissed. The defence was not served in accordance with my order.

4. By his application dated 19th October 2012, by way of alternative relief, the Defendant seeks leave to amend this defence. This application does not state why the Defendant is seeking the order nor does it specify the amendment sought. More importantly neither the affidavit in support nor the Defendant's submissions made on 24th October 2012 deal with this relief. The consequence of this is that the Defendant has not complied with Part 20.1 of the Rules and this order is refused.

5. Insofar as the Defendant seeks an order to extend the time for filing the defence to the 13th March this order is also refused. The effect of my order that the defence filed on the 13th March stand was to accept the defence filed by that date.

6. By way of his application to extend the time for serving the defence the Defendant's Attorney deposes that:

(i) with respect to the hearing of 8th May 2012; no original order of the Court was ever received by his office but that he had a letter from the Defendant outlining my instructions;

(ii) with respect to the hearing of 12th June 2012: attempts by way of telephone calls to the San Fernando sub-registry, and to my JSO to obtain a copy of the order met with no success. According to the Attorney the calls went unanswered;

(iii) at the time the order for service of the defence was made his office was short staffed and it was difficult to have a staff member make the journey to San Fernando to serve the defence within the specified time. In the circumstances the Defendant offered to have his law clerk serve the document at the San Fernando offices of the Claimant's Attorneys;

(iv) the Defendant's law clerk was unable to serve the document until 20th June 2012 because on 18th June 2012 there was a traffic accident on the road resulting in her being unable to reach the Claimant's Attorney's offices until after 4:00 p.m. on that date. The 19th June 2012 was a public holiday so she was unable to serve the document until 20th June 2012.

7. Also filed was an affidavit of the law clerk employed by the Defendant. According to that affidavit she was told by the Defendant on Friday, 15th June 2012 that she would have to go to San Fernando to serve the defence in this action. She says she was also informed that there was an application to be filed and served in the same matter which was being prepared that she was also to take with her. She says she was given other tasks to perform and left to carry out those tasks. On returning to the Defendant's office the Defendant informed her that the application was not ready and she was instructed to wait on it.

8. She says, shortly after lunch on Monday, 18th June, she went to the Defendant's offices to collect both the defence and the application to travel to San Fernando by taxi. The application was still not ready and the Defendant told her to leave for San Fernando without it. According to her there was an unusual amount of traffic on the way to San Fernando caused by roadwork. As a result she says she did not get to San Fernando until about 4:30 p.m., could not serve the defence and returned to Port of Spain. She was subsequently driven to San Fernando by the Defendant on Wednesday, 20th June, where she filed the application and went to serve the defence. She says the Attorney for the Claimant's secretary accepted the application but refused to accept the defence as it was out of time.

9. Basically therefore the real excuse proffered by the Defendant for the failure to serve the defence within the time limited is that there was traffic on the road on 18th June 2012. The order imposed a sanction, the dismissal of the defence, with respect to the failure to serve by the appointed date. Insofar as the Defendant seeks relief from his failure to serve the defence by

18th June 2012 therefore his application must be for relief from the sanction imposed by my order. In this regard the Defendant must first satisfy me that the failure to comply was not intentional; that there is a good explanation for the breach and that the Defendant has generally complied with all other relevant rules, practice, practice directions, orders and directions.

10. On the evidence before me I am satisfied that the failure to comply was not intentional nor is there any dispute that, save with respect to the settled practice of serving a defence, the Defendant has generally complied with all other relevant rules, directions and orders. The question here is whether there is a good explanation for the breach.

11. It is clear that the Defendant's Attorneys were at least by 13th June 2012 aware that the defence was required by my order to be served by 18th June 2012. A good explanation therefore must include: (i) a reason for not serving the defence between the period 13th to 15th June 2012; (ii) some evidence from which I can come to the conclusion that the law clerk left Port of Spain in sufficient time so that under normal circumstances she would have been able to travel to San Fernando by taxi and serve the defence before 4:00 p.m.; and (iii) a reason why the Defendant did not employ an alternative method of service as envisaged by Part 6.2 of the Rules. The explanation given by the Defendant does not deal with any of these issues.

12. Further, I am not satisfied that the reason given for not serving the defence on the 15th as she was originally instructed to do was reasonable. There was no requirement that the application filed by a particular date or that the defence be served only after the application was filed. In fact as it transpired the application was not filed on the same day as the attempt at

service. I am not convinced that the attempts made to serve the defence within the time limited by my order were adequate in the circumstances. Accordingly I am not satisfied that the Defendant has adduced a good explanation for his failure to comply with my order. That being the case the Defendant has not attained the threshold necessary for me to consider Part 26.7(4) of the Rules.

The Defendant's Applications to stay or strike out the action

(a) Abuse of the process

13. The basis of this submission is that there exists two actions seeking identical relief. In his affidavit filed on 20th June 2012 the Defendant deposes that there is in existence before the Disciplinary Committee of the Law Association a complaint brought against him by the Claimant. According to the Defendant this complaint is currently engaging the attention of the Disciplinary Committee and the Claimant is in the process of being cross-examined. In that complaint the Claimant is seeking to be reimbursed for the taxed legal costs which he had to pay on the appeal to the Privy Council.

14. According to the submission, since this Court and the Disciplinary Committee are tribunals of equal competence, to allow the Claimant to proceed with this action in the light of his complaint before the Disciplinary Committee is an abuse of the process of the Court since the two actions seek identical relief. The Defendant submits that the proceedings before the Disciplinary Committee is the first in time and the matter has made significant process and that in the circumstances those proceedings should be allowed to proceed.

15. I do not accept the Defendant's submission. In the first place the Disciplinary Committee is not a court of record, nor is it a tribunal equal in competence to the Supreme Court of Judicature. The Disciplinary Committee is a tribunal established by section 36 of the **Legal Profession Act Chap 90:03** ("the Act") for the purpose of determining allegations concerning (a) any professional misconduct or (b) any criminal offence as may be for the purposes of section 37 of the Act prescribed by the Council of the Law Association with the approval of the Chief Justice. Insofar as the Disciplinary Committee has the powers of the High Court it is only with respect to the power to summon witnesses, call for the production of books and documents and examine witnesses and parties on concerned on oath[1].

16. In the second place, while the facts upon which both the Court and the Disciplinary Committee are asked to adjudicate are the same, and, while I accept that the Claimant will be unable to recover the sum payable as the taxed cost twice, the relief sought is different. Before the Disciplinary Committee the Claimant seeks a determination of professional misconduct. This Court does not have the power to determine professional misconduct. What the Claimant seeks before this court is a declaration that the Defendant did not have the authority to file and pursue the appeal to the Privy Council on the Claimant's behalf and the payment into Court of the sum of $50,000.00. I accept the Claimant's submission that even if the facts and relief sought were the same the standard of proof in the proceedings before the Disciplinary Committee is not the same as the civil standard of proof before this Court.

17. In the circumstances I am not satisfied that the Defendant has satisfied me that the case before me ought to be struck out or stayed merely on the basis that there are similar

[1] section 38 (2) of the Legal Profession Act Chap. 90:03.

proceedings before the Disciplinary Committee. In any event even if I was of such a view, in my opinion, the more appropriate order would be to stay the Disciplinary Proceedings pending the determination of this action.

(b) No cause of action disclosed

18. By his claim form and statement of case the Claimant seeks a declaration that the Defendant acted without authority in pursuing an appeal to the Privy Council in a matter in which he was the appellant; an order for the payment into court of the sum of $50,000 being the amount paid in full and final settlement of a judgement registered against him and alternatively, damages for negligence. The Claimant has abandoned his claim in negligence. He therefore seeks only the declaration and an order for the payment of the money.

19. Insofar as it is relevant the statement of case pleads that:

(i) the Defendant's firm had been retained in Civil Appeal number 69 of 2005 to defend an appeal from the Disciplinary Committee to the Court of Appeal;

(ii) the Defendant's firm's authority to act came to an end when the appeal was allowed and decision given;

(iii) after the decision the Claimant attended the Defendant's office and was advised on pursuing an appeal to the Privy Council against the decision. The Claimant told the Defendant that he was not interested in pursuing the appeal;

(iv) on 5th January 2007, the Defendant filed an affidavit alleging that he had conduct of the proceedings to exercise the right to appeal to the House of Lords on the Claimant's behalf;

(v) this appeal was subsequently dismissed with costs on the 18th day of July 2007 which costs were thereafter certified in the sum of $43,172.25 which sum the Claimant is liable to pay;

(vi) the Claimant contends that he had never authorised the appeal and had no knowledge of the proceedings until the 24th day of January 2009.

20. The Defendant submits that the statement of case does not disclose a basis for which want of authority can be established as no relationship has been established in the statement of case and in the circumstances no cause of action is disclosed. I do not accept the Defendant's submissions in this regard the very basis of the declaration sought is that there is no relationship from which it can be inferred that the Defendant had the Claimant's authority to act on his behalf. From the pleading it is clear that the Claimant is alleging that he told the Defendant that he was not interested in pursuing the appeal.

21. Although not canvassed by the Defendant the real question seems to me to be whether "want of authority" is in itself a cause of action. In other words is the absence of the authority to sue on the Claimant's behalf "a statement of alleged facts which if true give rise as a matter of law to an obligation"[2] or whether as pleaded it is merely a stepping stone from which a court may come to a conclusion of professional negligence. If it is the latter then in my opinion the statement of case discloses no cause of action since professional misconduct is not a cause of

[2] Buckley LJ in Guaranty Trust Company of New York v Hannay &Co (1915) 2KB 536 at page 548

action and by section 22 of the Act an attorney is immune from suit in negligence with respect to litigation.

22. The Claimant submits that even if there is no surviving cause of action the case can still proceed because a court has jurisdiction to make a declaration even though there is no complete and subsisting cause of action. In support of this submission the Claimant relies on the case of **Guaranty Trust Company of New York v Hannay & Co**.[3] In that case by way of a majority judgement the Court of Appeal held that Order XXV Rule 5 extended the provisions of section 50 of the Chancery Procedure Act 1852 and therefore was not confined to cases where the plaintiff had a cause of action against the defendant. In the opinion of the majority the rule permitted a court to make declarations even where the plaintiff had no cause of action against the defendant.

23. There is no equivalent to Order XXV Rule 5 in our Rules. Insofar as the Guaranty Trust Co of New York case turns on the effect of the UK rule it does not apply. Section 22 of our Supreme Court of Judicature Act provides that no action is open to objection on the ground that a merely declaratory decree or order is sought. In this regard it is on similar terms to section 50 of the UK Chancery Procedure Act 1852**.** In my opinion the fact that a claimant can bring an action merely seeking declaratory and no other relief does not obviate the requirement for a claimant to show a cause of action. In my view the Claimant must establish a basis in law which would entitle him to the relief sought. In my opinion the reasoning of Buckley LJ, in his dissenting judgement in the Guaranty and Trust Co. of New York case is more on point and relevant to our

[3] Guaranty Trust Company of New York v Hannay & Co (1915) 2KB 536.

situation. In the circumstances I am of the view that to seek a declaration in the absence of a cause of action is impermissible.

24. In any event, even if section 22 of the Supreme Court of Judicature Act permitted a claimant to bring an action seeking a declaration in circumstances where no cause of action was disclosed, a declaration is a discretionary remedy. A claimant is not entitled to a declaration but must satisfy the court that such a decree is appropriate in the circumstances. These circumstances include, in my opinion, a consideration of the purpose for which the declaration is sought. Further there is no power to make a declaration for relief which it is beyond the power of the Court to grant. [4]

25. In the instant case the Claimant is not in fact seeking a declaration of right but rather is asking the Court to make a finding of fact in the form of a declaration. It is clear that the both the declaration and the order for the payment into Court of the sum of $50,000 is sought by the Claimant merely as an aid to the disciplinary proceedings. In other words the Claimant is, by way of declaratory relief, seeking the assistance of this Court to further the purposes of his claim in professional misconduct or professional negligence in the conduct of litigation against the Defendant.

26. That this is the position is confirmed by the answer to two questions: (a) why does the Claimant seek an order for the payment of the sum of $50,000 into court and not to him? This could only be for the purpose of ensuring that the sum is available should an order for such payment to him or someone else be made by the Disciplinary Committee; (b) what benefit is it to

[4] Halsbury's Laws of England Fourth Edition Vol.1 paragraphs 185 and 186.

the Claimant to obtain the declaration sought? The only benefit in my opinion could be the effect of such a declaration on the disciplinary proceedings.

27. By making an Attorney at Law immune from suit with respect to negligence in the conduct of litigation a finding of professional negligence is one which is beyond the power of the Court to grant. Similarly, absent an appeal from a finding of the Disciplinary Committee under the Act, a Court has no jurisdiction in professional misconduct. In the case of **Cox v Green** [5] a dispute over whether the plaintiff's conduct was contrary to the British Medical Association's ethical rules was held to be non-justiciable. In that case the plaintiff had brought an action seeking in effect a declaration that he had not been acting contrary to the ethics of his profession as set out in the Association's rules. The action was struck out.

28. It would seem to me that in a similar vein this action is merely for the purpose of establishing a finding of fact for use in the disciplinary proceedings and for an order ensuring the availability to the Claimant of the sum claimed in those disciplinary proceedings. To my mind therefore the action before the court is merely to facilitate the Claimant's remedies before the Disciplinary Committee. In my opinion this is an improper use of the Court's process and amounts to an abuse of the process of the Court.

29. At the end of the day therefore I agree with the Defendant that the statement of case does not in the circumstances reveal a cause of action against him and is an abuse of the Court's process although not on the grounds canvassed by him. The statement of case is

[5] [1966] 1 All E.R. 268.

therefore struck out and the action dismissed.

Dated this 6th day of December, 2012.

Judith Jones
Judge