

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2009-04689

BETWEEN

WENDELL STEELE

Claimant

And

LENNOX PETROLEUM SERVICES LIMITED

Defendants

Appearances:

Claimant: Mr. Earle Martin James

Defendant: Mr. Ronnie Persad instructed by Ms. Clair M. Sinanan

Before the Honourable Mr. Justice Devindra Rampersad

JUDGMENT

1. On 4th March 2010, the defendant filed an amended defence in which he contended that the claimant was debarred or estopped from pursuing this action and/or that the claim herein ought to be struck out for the reasons that this action was an abuse of the court process; and/or that the issues encompassed by this action are res judicata and/or are subject to the principles of issue estoppel.
2. The premise for these contentions was that the claimant had, on 19th November, 2009, filed and served a notice of discontinuance in relation to a previous action between the very same parties on the very same issue and cause of action in claim number CV2008-01579 which had by then reached the pretrial review stage after several case management conferences. By that stage also, directions for lists and bundles of documents and witness statements had already been given, with which the defendant had duly complied and with which the claimant had substantially complied save for witness statements in relation to the quantum of damages. The crux of the collapse and withdrawal of the previous proceedings was the failure by the claimant to file and serve witness statements in relation to the quantum aspect of the claimant's case in those previous proceedings. Having read the written submissions from the parties, it is clear that the issue of liability was dealt with by both sides in their respective witness statements.
3. The question which arises now for this court's determination is whether in the circumstances, the filing of this second action constitutes an abuse of process?

The defendant's submissions

4. The defendant relied upon the following authorities in support of the submission in relation to the doctrine of estoppel and res judicata:
 - 4.1. *Yat Tung Investment Company Limited – v – Dao Heng Bank Ltd* [1975] AC 581;

- 4.2. Toronto (City) –v – Canadian Union of Public Employees, Local 79 (C.U.P.E)[2003] CJ No.64;
 - 4.3. Barrow –v-Bankside Agency Limited [1996] 1 WLR 257;
5. Essentially, the defendant is saying that the claimant ought to have brought his entire claim before the court in the previous proceedings and that to commence these proceedings after failing to comply with an order in the first set of proceedings for the filing of witness statements is an abuse of the process of the court.

The claimant's submission

6. The claimant says that the previous action was not judicially determined and that the claimant's right of access to the courts ought not to be taken away in the circumstances of this matter.

The Law

7. Part 38.2 of the Civil Proceedings Rules 1998, as amended, allows the claimant to discontinue all or part of the claim without the permission of the court. This is what was purportedly done on 19th November, 2009 in relation to claim number CV2008 – 01579.
8. At the heart of the present matter is the claimant's obvious attempt to bypass an order/direction of the court by withdrawing the earlier set of proceedings to get around the failure to file witness statements within the time frame as directed by the court. The reason for the withdrawal of the first matter is obviously of relevance as it sets the rationale for the claimant's rebound through the later set of proceedings. In considering whether or not this matter amounts to an abuse of the process of the court, the court must look at the overriding objective which is

to enable the court to deal with cases justly. As outlined in the CPR 1998, as amended, at Part 1 Rule 1.1, that includes:

- 8.1. Ensuring, so far as is practicable, that the parties are on an equal footing – the claimant's attempt to introduce these proceedings to allow the filing of witness statements in relation to the issue of quantum does not, to my mind, affect the balance suggested by this sub rule since the dispute between the parties was primarily on liability and the defendant did not file any evidence to contest the history of quantum insofar as the medical evidence is concerned;
- 8.2. Saving expense – in this regard, costs based upon a stipulated value of One Hundred Thousand dollars (\$100,000.00) and assessed in the sum of Fourteen Thousand dollars (\$14,400.00) were ordered in the previous proceedings against the claimant as a result of the discontinuance of those proceedings. It is possible that the order for costs made against the claimant may not have compensated the defendant in those proceedings being the same defendant in these proceedings for 100% of the fees that it may have paid. To now place upon the defendant the burden of a second set of proceedings for the same issue would mean that it may need to go through the process again, albeit with some discounts for work done in the previous proceedings;
- 8.3. Dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party;
- 8.4. Ensuring that it is dealt with expeditiously; and
- 8.5. Allotting to it an appropriate share of the court resources, while taking into account the need to allot resources to other cases.

9. The court has looked at the cases of:
- 9.1. ***Glaser International SA v Khan (t/a Khan Design Consultants)***[2002] EWCA Civ 368- where a decision to strike out a substantial claim on the basis that the claimants had failed to meet a deadline for amendment of the particulars of claim so as to properly plead causation and quantum had been disproportionate and wrong; and
- 9.2. ***Cranway Limited (a company incorporated in the Isle of Man) v Playtech Limited (a company incorporated in the BVI), Playtech Cyprus Limited (a company incorporated in Israel), Playtech Software Limited (a company incorporated in the British Virgin Islands), Techplay Marketing Limited (a company incorporated in Israel) trading as Playtech Marketing Division, PTVB Limited (a company incorporated in the Isle of Man), Tote Credit Limited, Totesport NV (a company incorporated in Curacao)***[2008] EWHC 550 (Pat); 2008 WL 678155 where later actions were allowed in circumstances wherein the earlier action was removed from the court at a very early stage in the proceedings – before the filing of a defence.
10. In *Securum Finance Ltd v Ashton and another* [2000] 3 W.L.R. 1400 [2001] Ch. 291, it was held that:
- “It was no longer open to a litigant whose action was struck out for delay to rely on the principle that a second action commenced within the limitation period would not be struck out save in exceptional circumstances; that in actively managing litigation, and in deciding whether to strike out a claim under CPR r 3.4, the court had to consider the overriding objective in [rule 1.1\(1\)](#) of doing justice and decide whether the claimant's wish to pursue a second case against the same opponent outweighed the need to allot the court's limited resources to other cases;...”*
11. In *D C (A Child Suing by Her Father and Litigation Friend) v CPS Fuels Ltd*: [2001] EWCA Civ 1597; 2001 WL 1251773, a prior matter was struck out after the failure of the claimant in those proceedings to comply with directions of the court. In an

application to strike out in a second set of proceedings brought with respect to the same claim, the Court of Appeal agreed with the judge at first instance that:

“It is an abuse of the process for the Claimant to seek to litigate in the present action the same issues as were raised, but not adjudicated upon, in the First Action which was struck out as a result of inexcusable failures to comply with the rules and court orders.

*In order to exercise my discretion so as not to strike out the present action, **some special reason** needs to be identified which, having regard to the overriding objective, would mean that it was just to allow the present action to proceed.”* [Emphasis mine].

12. Consequently, even though the first action was not struck out but was in fact discontinued, there seems to be no real difference between the two as, without the witness statement of the doctor, the claimant would have had an empty judgment arising out of a failure to comply with directions of the court. Realizing this, and failing to provide any reason whatsoever for the noncompliance with the directions in respect of the witness statements by bringing a relief from sanctions application, it seems as though the claimant felt that he had no alternative but to withdraw the case and bring it afresh. To my mind, however, too much time and effort were expended in the previous proceedings and the matter had reached too far to compare it with the foregoing cases of ***Gluser*** and ***Cranway***. As difficult as it may seem, the time has come and gone for claimants to pursue their case vigorously and with intent. A good compromise, in light of the failure to produce the witness statement in relation to the doctor in the previous proceedings, may probably have been to agree to a trial on liability only and leave the issue of quantum to be dealt with after. However, this was not done and seems to not have been considered by the claimant. Instead, the matter was discontinued without exploring this possibility.
13. It is noteworthy that the Court of Appeal in England has stressed the necessity to balance the rights of the individual as against the resources available to the court

to conduct litigation. The cases the court has mentioned above have endorsed this approach to the extent that it is generally well established that the court resources is an important factor – important enough to be specifically named as one of the factors which the court must consider in considering the overriding objective. Here, in Trinidad and Tobago, it may very well be true that the resources of the court are even more limited than those that are available in the United Kingdom.

14. Also, of great concern to this court is the question of the type of message that would be sent if this court were to sanction a second set of proceedings based on the same facts, case and issues as a previous proceeding- which was already far advanced and which was withdrawn or dismissed for want of compliance, no special reason therefor having been advanced or identified. Would it be saying that it is acceptable for the court to close its eyes to the fact of the deliberate noncompliance in previous proceedings? Would that not be encouraging the laissez-faire approach to litigation so often denounced by our court of appeal?
15. Against this, I must balance the claimant's claim for personal injuries suffered to his spine which are sure to have serious consequences for his future - as it must already have had since the injuries were occasioned in December, 2005.
16. I must confess that it has not been an easy decision to contemplate dismissing a claimant's case in the circumstances where it may have not arisen through any fault of his own and where he has suffered personal injury which would affect him for the rest of his life. However, the weight of the authorities seems to suggest to me that to do otherwise would be to swim against the current of the CPR and to place greater importance on the Claimant's right to a trial than on other factors such as court resources and compliance with the rules by which litigation must be conducted to provide the greater good for all. There must be, to my mind, certainty and uniformity for the wheels of justice to flow smoothly.

17. The need for a special reason for the relitigation of the same point with the same parties is quite understandable in the circumstances. Litigation should never be undertaken lightly and, in any event, should not be undertaken unless the party is willing to pursue it in the manner and with the attention and seriousness prescribed by the rules of court. To do otherwise would be to drag down an already beleaguered system which is straining to contain a mass of litigation with a serious resource handicap. It would probably be ideal for a party who has not gotten it right the first time to try again once he/she is within the time limit prescribed. Maybe even with alternate counsel if the poor litigant realizes deficiencies in hindsight – deficiencies which he/she could not have expected in reliance upon the expertise of another. That may even have been proffered as the special reason ... maybe. Yet to allow this course of relitigation without restriction would be to signal a return to the haphazard approaches and inefficiencies which the CPR has strived, and continues to strive, to curtail. It seems harsh. It may well be harsh. But, as a whole, the system must provide strict parameters – a firm and definite bank, if you will - to allow it to flow as smoothly as its limited resources will allow. That, of course is no comfort to the litigant at hand but, it may not necessarily be the end of the road for him. Regrettably, the claimant in this matter had an opportunity to pursue a remedy in the previous proceedings but opted not to, choosing to begin with a clean slate as it were. To my mind, the matter was too far gone to wipe the slate clean and start over. The court would have been willing to consider a special reason for the filing of the new proceedings – something to grasp on to say: *“Aha, this litigant had no choice but to act in this manner.”* None was offered.
18. As a result, the court struck out the Claimant’s claim as an abuse of the process of the court with prescribed costs assessed pursuant to part 67.5 of the CPR in the sum of Thirteen Thousand, Two Hundred dollars (\$13,200.00) based on a stipulated value of One Hundred Thousand dollars (\$100,000.00).

/s/ D. Rampersad J.

Judge