

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)

Claim No. SKBHCV2011/0144

Between:-

ANGUILLA BUSINESS SERVICES LTD.
(on it's own behalf as creditor and member of the First Defendant) in it's derivative
capacity against the Second and Third Defendants
Claimant/Respondent

AND

ST. KITTS SCENIC RAILWAY LIMITED
First-named Defendant/Applicant

STEVEN G. HITES
Second-named Defendant/Applicant

JEFFERY D. HAMILTON
Third-named Defendant/Applicant

Appearances:

Mr. Charles Wilkin and Mr. Garth Wilkin for the Claimant/Respondent
Mr. Terrance Byron for First Defendant/Applicant; Mr. Steven Hites, Second
Defendant/Applicant; Mr. Jeffrey Hamilton, Third Defendant/Applicant

2011: December 22

2012: March 27

Reissued: April 5, 2012 pursuant to Rule 42.10 of CPR 2000

DECISION

[1] **THOMAS J:** Before the Court there are two applications, one filed on 15th July 2011 by the St. Kitts Scenic Railway Limited, Steven G. Hites and Jeffrey D. Hamilton the Applicants/Defendants.

The other was filed on 19th October, 2011 by the Claimant/Applicant, Anguilla Business Services Ltd.

- [2] The reality of these two applications is that the Claimant's application is seeking to have the Defendants' application struck out as being void *ab initio*. However, for the time being the two applications will be set out but the Applicant's application will be considered first in order to determine its merit or otherwise.

The Defendants/Applicants' application

- [3] In their application the Applicants seek the following Orders pursuant to Rules 9.7 (1) (b) and 9.7 (6) of the Civil Procedure Rules 2000:

- "1. An Order declaring that this Honourable Court should not exercise its jurisdiction in the proceedings herein.
2. An Order discharging the *ex parte* Order made on 6th June 2011 before the claim was commenced ordering that
 - a. Permission be granted to serve a Claim Form and Statement of Claim in the captioned matter upon the Second Defendant and Third Defendant in the United States of America, out of this jurisdiction.
 - b. The time for acknowledging service of the Claim Form to be served on the Second Defendant and Third Defendant is hereby extended to 35 days in accordance with Part 7.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR 2000") and Practice Direction No. 4.4 2008.
 - c. The time for filing a Defence by the Second Defendant and Third Defendant is hereby extended to 56 days in accordance with Part 7.5 of the CPR 2000 and Practice Direction No. 4 of 2000.
3. An Order setting aside service of the Claim Form and Statement of Claim.
4. An Order striking out the Claim Form and Statement of Claim."

The grounds of this Application are

- 1) On 6th June, 2011, this Honourable Court was urged by the Claimant, Anguilla Business Services Ltd. to make, and in consequence thereof made, an *ex parte* Order for Interim Relief and for permission to serve Claim Form out of jurisdiction.
- 2) The application was filed on 3rd June, 2011, and expressly stated that it was asking the Court to hear it as an *ex parte* application.
- 3) When the application was urged before this Honourable Court, no claim had been made.
- 4) By virtue of Rule 17.2 (5) of the CPR 2000:
"If the Court grants an interim remedy before a claim has been issued, it must require an undertaking from the Claimant to issue and serve a Claim Form by a specified date."

5) The *ex parte* Order contains the following, which are set out:

"And upon the Claimant/Applicant's undertaking to:

1. *Serve copies of the following documents filed or to be filed in the captioned claim upon all Defendants on or before 31st June 2011:*
 - a. The interim Order made *ex parte*;
 - b. The *ex parte* application;
 - c. The Affidavit in support of the *ex parte* Application;
 - d. Notice of the date, time and place on which the Court will further consider this *ex parte* application; and
 - e. The Claim Form including Statement of Claim
- (6) In breach of CPR 2000, the Claimant has failed to give any undertaking to issue a Claim Form by a specified date.
- (7) Although the *ex parte* Order purports to give a specified date whereby a Claim Form will be served, the date is illusory, there being no such date in fact as 31st June 2011.
- (8) The Court was persuaded to make an *ex parte* Order before a claim was issued for 13 Orders and the Claimant Anguilla Business Services Ltd. in breach of the Rules, gave no undertaking to issue a Claim Form by a specified date, but gave an undertaking to serve a Claim Form on all Defendants on or before 31st June 2011.
- (9) Anguilla Business Services Ltd. having drawn up the *ex parte* Order giving an illusory date instead of a specified date went about taking steps to serve the said documents, and, in particular, the Claim Form, with its undertaking in this form.
- (10) The *ex parte* Order fixed the 1st day of July 2011, as the date for further consideration, in accordance with Rules 17.4 (5) (a).
- (11) Rule 17.4 (6) required the Claimant Anguilla Business Services Ltd. to serve the Applicants personally, not less than 7 days before the date fixed for further consideration of the application, with
 - a. The interim Order made *ex parte*,
 - b. The *ex parte* Application;
 - c. The Affidavits in support of the *ex parte* Application; and
 - d. Notice of the date, time and place on which the Court will further consider this *ex parte* Application.
- (12) Not less than 7 days before the 1st day of July, 2011, means not later than the 21st day of June, 2011. (See CPR 2000 Rules 3.2 (2) and (4).
- (13) It appears from ground (12) above that the specified date required for the service of the Claim Form on all Defendants was 21st June, 2011 and not 31st June, 2011, but the Claimant Anguilla Business Services Ltd. although it is seeking to enforce the Order for interim relief it obtained in reliance on its undertaking to serve a Claim Form by a special date, has not issued a claim Form until the 30th day of June, 2011.
- (14) In the circumstances, it is submitted that the Claimant is in contempt of the Court for failure to fulfil its undertaking to this Honourable Court, and this Honourable Court should decline to exercise its jurisdiction in this claim unless and until the Claimant has purged its contempt.

The Claimant/Respondent's Application

- [4] As indicated before, the Claimant is seeking an Order that the Respondents' joint application dated 15th July 2011 be struck out, being void *ab initio*. The application further seeks to have judgment entered for the Claimant/Applicant on the terms of the "Draft Default Judgment" pursuant to its "Request Default Judgment" dated and filed 19th August, 2011.

The grounds of the application are stated to be that the Respondents' application is vexatious and constitutes an abuse of process. A further ground is that the said application is filed in wanton disregard for Parts 3 and 11 of CPR 2000.

Submissions

- [5] The submissions filed on behalf of the Claimant fall under the following heads: Rule 9.7 (1), Rule 11.7 (1) (a), 11.11 (1) (a), 11.11 (b) and 3.6 (3) (e) of CPR 2000. The following are the submissions with respect to Rules 9.7 (1) of CPR 2000:

- "6. At the date the Respondents' Application was filed (before the October 2011 Amendments the CPR 2000) Rule 9.7 (1) (b) provided that a Defendant who argues that a Court should not exercise its jurisdiction may apply to this Honourable Court for a declaration to that effect.
7. The Respondents' application referred to Rule 9.7 (1) (b) as a basis for the said application, inter alia.
8. A Rule 9.7 (1) application (if properly made) extends the time for filing a Defence until the Court makes an order as to the period for filing such defence.
9. It is submitted that the Respondents' Application is vexatious and was not properly constituted to trigger such draconian relief.
10. The Respondents' application has no legal or factual basis on which the Court could be urged to not exercise its jurisdiction.
11. The Respondents' sole contention taken from paragraph 14 of the Respondents application is that "the Claimant is in contempt of Court for failure to fulfil its undertaking to this Honourable Court, and this Honourable Court should decline to exercise in this claim unless and until the Claimant has purged its contempt.
13. The purported ground 14 of the Respondents' application is misconceived and is the sole basis upon which the Respondents moved the Court. Such a remedy raises no issue of jurisdiction for the purposes of Rule 9.7 (1) and only relates to the issue of whether the introductory orders granted by this Honourable Court could or should have been discharged.
15. The Respondents, being filed simultaneously with the Respondents' Acknowledgment of Service raises the issue as to whether it is being used solely as a vehicle to delay the Respondents' obligations to file a Defence within the time frame prescribed by the CPR 2000.

16. Such misuse of a Rule 9.7 (1) application is an abuse of process of this Honourable Court and should attract condign consequences of being struck out as being void, *ab initio*.

Analysis and Conclusion

Rules 9.7 (1) – (4) of CPR 2000

[6] These Rules are in the following terms:

- “(1) A Defendant who –
a) disputes the Court’s jurisdiction to try the claim; and
b) argues that the Court should not exercise its jurisdiction
may apply to the Court for a declaration to that effect.
(2) A Defendant who wishes to make an application under paragraph (1) must first file an Acknowledgment of Service.
(3) The application under this rule must be made within the period for filing a defence.
(4) The application under this rule must be supported by evidence on Affidavit.”

[7] In clear terms Rules 9.7 (1) to (4) require the following: an application must be filed where a Defendant argues that the Court should not exercise jurisdiction; such a Defendant must file an Acknowledgment of Service. An application under Rule 9.7 (1) must be within the time for the filing of a defence, and such an application must be supported by Affidavit evidence.

[8] The fact of the filing of an application for the purposes of rule 9.7 (1) by some of Defendants is in doubt, but the matter does end there as there are specific rules that govern the filing of an Acknowledgment of Service.

[9] In the case of the First Defendant, service was effected at the registered office at the Sands Complex so that Acknowledgment of Service must be filed within 14 days after the date of service. In this regard in the Acknowledgment of Service it is stated that service was effected on 30th June, 2011 so that 14 clear days would render the document filed on 15th July, 2011 and as such lawful in terms of Rules 9.3 (1) and 9.7 (3) of CPR 2000.

[10] In so far as the Second Defendant is concerned, an Acknowledgment of Service was filed on 10th October 2011 and it indicates that the Claim Form was received on 23rd August 2011, being a date after the filing of the application under Rule 9.7 (1). This means that

there was no legal basis for the Second Defendant to be a party to the application filed on 15th July, 2011.

The Third Defendant is entirely out of the picture as there are no proceedings to indicate that he was served¹ with the Claim Form so as to trigger the filing of an Acknowledgment of Service.

In sum therefore, the only person to satisfy Rule 9.7 (2) is the First Applicant/Defendant. However, the further requirement of Rule 9.7 (4) is that the application must be supported by Affidavit evidence of which there is none before the Court.

In the circumstances the application filed on 19th October, 2011 by the Claimant/Respondent succeeds as the Court agrees with the submission tendered in support of this application. Therefore, the application filed by the Applicant/Defendant on 15th July, 2011 is struck out on account of non-compliance with Rules 9.7 (1) to (4) of CPR 2000.

Abuse of Process

- [11] It is the further determination that filing of the application by the Applicants/Defendant in the face of non-compliance in the Rules 9.7 (1) to (4) of CPR 2000 constitutes an abuse of process being “an attempt to thwart the process of the Court” – See **Connelly v DPP [1964] AC 1254, 1293** per Lord Reid.

Rule 9.7 (7)

- [12] Rule 9.7 (7) of CPR 2000 reads as follows:
- “(7) If in an application under this rule the Court does not make a declaration it
- a) may -
 - i. fix a date for a case management conference, or
 - ii. treat the hearing of the application as a case management conference; and
 - b) must make an Order as to the date for the filing of the defence.”

- [13] The hearing of the application took place on 22nd December, 2011 and in accordance with Rule 9.7 (7) of CPR 2000 that hearing is treated as a case management conference. But

¹ See Affidavit of Illynde Henry filed on 7th July, 2011. See also First Defendant’s Acknowledgment of Service filed on 15th July, 2011.

that is as far as the matter goes since there was never an application contemplated by Rule 9.7 (1) before this Court. The matter of filing does not arise for consideration.

Costs

- [14] Costs in these proceedings are assessed at \$2500.00 to be paid by the Applicants/Defendants, notwithstanding the fact that the Second and Third Applicants/Defendants were not proper parties to this application. They were parties to the abuse of process.

ORDER

- [15] **IT IS HEREBY ORDERED AND DECLARED** as follows:

1. The application filed by the Applicants/Defendants on 15th July 2011 is struck out because
 - a. the Second and Third Applicants/Defendants are not proper parties to the application since no Acknowledgment of Service was filed for the purposes of Rule 9.7 (2) of CPR 2000;
 - b. there is no Affidavit evidence filed for the purposes of Rule 9.7 (4) of CPR 2000 in support of the First Applicant/Respondent's case, being the only proper party to the application.
2. Having regard to the pleadings and having regard to the non-compliance with Rules 9.7 (1) to (4) of CPR 2000, judgment is hereby entered against the Second Defendant.
3. The purported filing of an application on 15th July, 2011 by the Applicants/Defendants constitutes an abuse of process.
4. Costs are assessed in the amount of \$2500.00 in favour of the Claimant/Respondent.

Errol L. Thomas
High Court Judge (Ag.)